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A TREATISE

ON

FEDERAL PRACTICE

CIVIL AND CRIMINAL

INCLUDING

PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES, FORECLOSURE OF RAILWAY MORTGAGES, SUITS UPON CLAIMS AGAINST THE UNITED STATES, PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION AND THE FEDERAL TRADE COMMISSION,

EQUITY PLEADING AND PRACTICE, RECEIVERS AND INJUNCTIONS

IN THE STATE COURTS

BY

ROGER FOSTER

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AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE FEDERAL INCOME TAX OF 1894, THE FEDERAL INCOME TAX OF 1913 AND 1914, LIBERTY OF CONTRACT, ATTACHMENT, REMOVAL OF CAUSES, TRIAL BY NEWSPAPER, &C., FORMERLY LECTURER ON FEDERAL JURISPRUDENCE AT THE LAW SCHOOL OF YALE UNIVERSITY.

SIXTH EDITION

REVISED AND ENLARGED

IN FOUR VOLUMES

VOL. II

CHICAGO

CALLAGHAN & COMPANY

1920

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TABLE OF CONTENTS

VOLUME II.

CHAPTER X.

CROSS-BILLS, SET-OFFS AND COUNTER-CLAIMS.

Page

§ 197. Definition and origin of cross-bills 1125
§ 198. Counter-claims 1130
§ 198a. Counter-claims in patent and trade-mark cases 1141
§ 198b. Set-offs 1143
§ 198c. Distinction between counter-claims and defense 1143
§ 199. New parties to cross-bills and counter-claims 1145
§ 200. Time of filing set-offs, counter-claims and cross-bills 1149
§ 201. Proceedings upon cross-bills 1150

CHAPTER XI.

REPLIES.

§ 202. Definition and history of replies 1154
§ 203. When a reply should be filed 1155
§ 204. Effect of reply 1158
§ 205. Frame of a reply 1159

CHAPTER XII.

AMENDMENTS OF WRITS, PROCESS AND PLEADINGS, AT LAW AND IN EQUITY.

§ 206. Amendments in general 1160
§ 207. Amendments of writs and process 1162
§ 208. Amendment of pleadings at common-law 1163
§ 209. When bills in equity can be amended 1163
§ 210. Form of amendment of a bill 1166
§ 210a. Effect of amendment. In general 1167
§ 210b. Time from which amendment takes effect 1168
§ 211. What amendments may be made to bills in equity and declarations at common law 1171
§ 212. Amendment by pleading matters subsequent to the filing of the bill 1176

7097764

7097763

Page
§ 213. Proceedings upon an amended bill 1178
§ 214. Amendment of answers and pleas 1179
§ 215. Practice in obtaining leave to amend 1182
§ 215a. Amendments upon appeal or error 1184
§ 215b. Review of rulings on amendments 1184

CHAPTER XIII.

ABATEMENT, REVIVOR AND SUPPLEMENT AT LAW AND IN EQUITY.

§ 216. Abatement 1187
§ 217. Effect of abatement 1194
§ 218. When a suit may be revived 1196
§ 218a. Effect of revivor 1197
§ 219. Who may revive a suit 1198
§ 220. Manner of revivor at common law 1199
§ 221. Manner of revivor in equity. In general 1202
§ 222. Definition of bill of revivor and parties to the same 1204
§ 223. Frame of bill of revivor 1205
§ 224. Proceedings upon bills of revivor 1206
§ 225. Bills in the nature of bills of revivor. In general 1209
§ 226. Frame of bills in the nature of bills of revivor and proceedings upon them 1211
§ 227. Manner of revivor upon appeal or error 1211
§ 228. Bills of revivor and supplement 1214
§ 229. Supplemental bills in the nature of bills of revivor 1215
§ 230. What renders a suit defective 1215
§ 231. Supplemental bills 1218
§ 232. Parties and frame of a supplemental bill 1226
§ 233. Proceedings upon supplemental bills 1228
§ 234. Bills in the nature of supplemental bills. In general 1231
§ 235. Frame of a bill in the nature of a supplemental bill 1233
§ 236. Proceedings upon bills in the nature of supplemental bills 1234

CHAPTER XIV.

IMPERTINENCE AND SCANDAL.

§ 237. Impertinence 1236
§ 238. Scandal 1240
§ 239. Striking out scandal and impertinence 1242

CHAPTER XV.

MOTIONS TO MAKE PLEADINGS MORE DEFINITE AND CERTAIN AND BILLS OF PARTICULARS.

§ 240. Distinction between motions to make pleadings more definite and certain and bills of particulars 1245

Page

§ 241. Motions to make pleadings more definite and certain..... 1247
§ 242. Bills of particulars..... 1248
§ 243. Practice upon motion for bill of particulars..... 1250
§ 244. Remedy for failure to give a bill of particulars..... 1251
§ 245. Form of bill of particulars..... 1252
§ 246. Amendment of bill of particulars..... 1253

CHAPTER XVI.

MOTIONS AND PETITIONS.

§ 247. Definition and classification of interlocutory applications..... 1255
§ 248. Definition and classification of motions..... 1255
§ 249. Motions of course..... 1255
§ 250. Special motions without notice..... 1256
§ 251. Notice of motion..... 1257
§ 252. Argument of motions..... 1262
§ 253. Petitions in general..... 1265
§ 254. Form of petitions and practice upon them..... 1267
§ 255. Orders 1269
§ 256. Judges who may grant orders..... 1277
§ 257. The clerk's office..... 1278

CHAPTER XVII.

INTERVENTIONS.

§ 258. Interventions. In general..... 1283
§ 258a. Intervention in class suits..... 1285
§ 258b. Intervention by bondholders..... 1287
§ 258c. Intervention by stockholders..... 1291
§ 258d. Interventions by general creditors..... 1294
§ 258e. Interventions of persons entitled to share in a fund held by the court 1296
§ 258f. Intervention by persons interested in property the title to which is in dispute..... 1296
§ 258g. Intervention by persons interested in, or with a lien upon property which is the subject of litigation..... 1297
§ 258h. Interventions *pro interesse suo*..... 1298
§ 258i. Intervention under the pure food and drugs act..... 1299
§ 258j. Interventions in patent litigation..... 1299
§ 258k. Intervention in suit under the interstate commerce law..... 1300
§ 258l. Interventions in suits on contractors' bonds..... 1300
§ 258m. Laches barring intervention..... 1301
§ 258n. Interventions by the United States, States, and cities..... 1302
§ 258o. Effect of State statutes upon intervention..... 1304
§ 259. Petition for intervention..... 1305
§ 259a. Notice of application for intervention..... 1309

Page
§ 259b. Opposition to intervention 1310
§ 259c. Hearing upon application for intervention 1311
§ 259d. Practice upon intervention 1313
§ 259e. Appeals from orders upon interventions and their review by writs of error 1314
§ 260. Rights of intervening complainants 1316
§ 261. Rights of intervening defendants 1318

CHAPTER XVIII.

INJUNCTIONS.

§ 262. Definition, classification, and objects of injunctions 1321
§ 263. Injunctions to enforce trusts and other purely equitable rights 1321
§ 264. Injunctions to restrain corporations from violating their charters 1323
§ 264a. Injunctions to protect corporate franchises 1326
§ 265. Injunctions to enforce the specific performance of covenants and other contracts affecting land 1331
§ 266. Injunctions to prevent a multiplicity of suits 1332
§ 267. Injunctions to prevent irreparable injury for which the remedy at law is inadequate. In general 1333
§ 268. Injunctions to stay proceedings in other courts. In general ... 1334
§ 269. Injunctions to stay proceedings in Federal courts 1336
§ 269a. Injunctions against patent litigation 1338
§ 270. Injunctions to stay proceedings in State courts 1340
§ 270a. Injunctions to protect jurisdiction of Federal courts 1346
§ 271. Injunctions against criminal proceedings 1349
§ 271a. Injunction against the enforcement of municipal ordinances .. 1351
§ 271b. Injunctions against assessment and collection of taxes and betterments 1352
§ 272. Injunctions to restrain the alienation of property 1356
§ 273. Injunctions to prevent waste 1357
§ 274. Injunctions to prevent the continuance of a nuisance 1359
§ 274a. Injunctions to enforce prohibition of use of intoxicating liquors 1361
§ 275. Injunctions to restrain trespass 1363
§ 276. Injunctions against strikers 1366
§ 276a. Restriction upon such injunctions by the Clayton Act 1373
§ 276b. Injunctions under the Anti-trust Law against strikers 1378
§ 276c. Injunctions to prevent obstructions to interstate commerce ... 1379
§ 276d. Injunctions under the Act of Aug. 10, 1917, for the conservation of supply and control of distribution of necessaries 1383
§ 277. Injunctions to restrain the infringement of patents 1385
§ 278. Injunctions to restrain the infringements of copyrights 1399
§ 279. Injunctions to restrain the unlawful use of trade-marks 1406
§ 280. Injunctions to prevent the opening of letters 1409

Page

§ 281. Injunctions to compel the performance or prevent the breach of contracts not affecting land 1409
§ 281a. Injunctions to prevent the revocation or refusal of a permit or license 1411
§ 282. Injunctions to compel the delivery of personal property tortiously withheld 1412
§ 283. Injunctions authorized by statute 1413
§ 283a. Injunctions to restrain enforcement of warrants of distress .. 1413
§ 283b. Injunctions to restrain comptroller of the currency 1414
§ 283c. Injunctions to enforce orders of the United States Shipping Board 1414
§ 283d. Injunctions to regulate coal mining or the operation of coal mines 1415
§ 283e. Injunctions to protect political rights 1416
§ 284. When injunctions will not issue 1418
§ 284a. Injunctions against slanders and libels 1421
§ 285. Distinction between the judicial writ and the writ remedial .. 1424
§ 286. Distinction between mandatory and prohibitory injunctions .. 1424
§ 287. Distinction between provisional and perpetual injunctions 1426
§ 288. Distinction between common and special injunctions 1427
§ 289. Time and place of applications for interlocutory injunctions .. 1428
§ 290. Injunctions not prayed for in the bill 1429
§ 291. Special practice of the Federal courts in the issue of injunctions 1430
§ 292. Notice of application for interlocutory injunction 1433
§ 293. Affidavits upon an application for an injunction 1436
§ 294. Rules of decision upon application for interlocutory injunctions 1438
§ 295. The writ of injunction 1442
§ 296. Dissolution and modification of interlocutory injunctions 1446
§ 297. The imposition of terms upon the issue, denial, dissolution, or continuance of an injunction and injunction bonds 1452
§ 298. Collection of injunction bonds 1457
§ 299. Perpetual injunctions 1463
§ 300. Appeals from injunction orders 1464

CHAPTER XIX.

RECEIVERS.

§ 301. Definition of receiver 1479
§ 302. When receivers will be appointed 1479
§ 302a. Appointment of receivers of property of corporations 1483
§ 302b. Extension of receiverships 1489
§ 302c. Receivers of National Banking Association 1491
§ 303. Rules regulating the appointment of receivers 1499
§ 304. Ancillary receivers 1500

Page

§ 305. Terms upon the appointment of receivers 1508
§ 305a. Preference in foreclosure suits and in the administration of receiverships 1509
§ 305b. Practice upon application for such preference 1532
§ 306. Property over which receivers may be appointed 1535
§ 307. Powers of receivers in general 1541
§ 308. Powers of receivers of railroads 1547
§ 309. Receivers' certificates 1552
§ 310. Advice to receivers 1561
§ 310a. Reorganization of corporations whose assets are held by receivers 1563
§ 311. Litigation by receivers 1569
§ 312. Duties of receivers 1579
§ 313. Liability of a receiver 1584
§ 314. Suits against receivers 1590
§ 315. Manner of applying for the appointment of a receiver 1598
§ 316. Who may apply for the appointment of a receiver 1602
§ 317. Manner of the appointment of the receiver 1602
§ 317a. Disapproval of the appointment of the receiver 1603
§ 318. Who should be appointed receiver 1603
§ 319. The receiver's security 1607
§ 320. Proof of claims against receivers 1609
§ 321. Receiver's accounts 1616
§ 321a. Selection and compensation of receiver's counsel 1618
§ 322. Compensation of receivers 1620
§ 323. Removal of receivers 1624
§ 324. Discharge of a receiver 1626
§ 325. Appeals from orders appointing receivers 1631

CHAPTER XX.

THE WRIT OF NE EXEAT REPUBLICA.

§ 326. Definition of the writ of *ne exeat republica*, and when it will issue 1633
§ 327. Against whom the writ will issue 1634
§ 328. Practice in obtaining the writ of *ne exeat* 1636

CHAPTER XXI.

EVIDENCE AND DISCOVERY AT LAW AND IN EQUITY.

§ 329. Evidence. In general 1640
§ 329a. Judicial notice 1640
§ 330. Admissions 1647
§ 331. Constructive admissions 1649
§ 332. Documentary evidence. In general 1650
§ 332a. Proof of handwriting 1655

Page
§ 332b. Proof of messages by telephone ... 1656
§ 332c. Proof of telegrams ... 1656
§ 333. Evidence of books and papers in the Executive Departments. In general ... 1657
§ 333a. Evidence of books and papers in the Treasury Department ... 1659
§ 333b. Evidence of books and papers in the Post Office Department ... 1664
§ 333c. Evidence of books and papers in the Department of the Interior. In general ... 1666
§ 333d. Evidence of books and papers in the Land Office and as to land grants and tax sales ... 1667
§ 333e. Evidence of matters in the Patent Office ... 1673
§ 333f. Copyright records ... 1676
§ 333g. Evidence of books and papers in the Pension Bureau and presumptions in pension cases ... 1677
§ 333h. Evidence of proceedings before the Interstate Commerce Commission ... 1678
§ 333i. Evidence of official correspondence ... 1682
§ 333j. Evidence of proceedings of Congress ... 1683
§ 333k. Evidence of Federal statutes ... 1683
§ 333l. Evidence of books and papers in consular offices and consular certificates ... 1685
§ 333m. Evidence of State and Territorial statutes and public records 1688
§ 333n. Evidence of the records of the State and Territorial Courts ... 1689
§ 333o. Evidence of the records of the Federal courts ... 1691
§ 333p. Presumptions in suits under the anti-trust laws ... 1694
§ 333q. Presumptions under the prohibition law ... 1695
§ 333r. Presumptions as to citizenship, expatriation, and unlawful entry into the United States ... 1696
§ 333s. Presumptions upon the assessment and collection of duties upon imports ... 1701
§ 333t. Presumptions upon the assessment and collection of internal revenue ... 1702
§ 333u. Presumptions upon distress sales ... 1704
§ 333v. Miscellaneous statutes as to burden of proof and *prima facie* evidence ... 1705
§ 334. Definition and use of an affidavit ... 1709
§ 335. Manner of verifying an affidavit ... 1709
§ 336. Title of an affidavit ... 1710
§ 337. Form of an affidavit ... 1711
§ 338. Execution of an affidavit ... 1713
§ 339. Competency of witnesses in civil cases ... 1714
§ 339a. Self incrimination ... 1723
§ 339b. Statutory immunity and its effect ... 1729
§ 340. Subpœna *ad testificandum* ... 1733
§ 341. *Subpœna duces tecum* ... 1736
§ 342. Service of a subpœna *ad testificandum* ... 1740
§ 343. Compelling a witness to testify ... 1743

Page
§ 344. Testimony taken in equity which may be used in other courts 1746
§ 345. Bills to perpetuate testimony 1746
§ 346. Bills to take testimony *de bene esse* 1750
§ 347. Bills of discovery 1750
§ 348. Discovery in equity 1754
§ 349. Inspection in equity 1766
§ 350. Inspection at common law 1768
§ 350a. Testimony taken in another suit 1770
§ 351. Testimony taken before a cause is at issue 1771
§ 352. Testimony taken within the jurisdiction of the court after a cause is at issue 1772
§ 353. Testimony taken after a cause is at issue and beyond the jurisdiction of the court 1779
§ 354. Depositions *de bene esse* under the acts of Congress 1780
§ 354a. Notice of taking deposition 1786
§ 354b. Proceedings upon the deposition 1788
§ 355. Form of deposition under acts of Congress 1791
§ 356. Commissions issued under a *dedimus potestatem* 1795
§ 357. Proceedings under a *dedimus potestatum* 1799
§ 358. Letters rogatory 1803
§ 359. Testimony taken in the manner prescribed by the State law 1807

CHAPTER XXII.

DISMISSAL OF BILLS BEFORE A HEARING.

§ 360. Dismissal of bills before a hearing. In general 1810
§ 361. Dismissal of bills by the plaintiff 1810
§ 362. Dismissal of bills for want of prosecution or for failure to perfect or revive the suit 1815
§ 363. Dismissal for want of jurisdiction 1817
§ 364. Motions to dismiss because the complaint shows no cause of action 1824
§ 365. Demurrers under the former practice 1827
§ 366. Admissions by a motion to dismiss 1827
§ 366a. Effect of conclusions of law upon motions to dismiss 1829
§ 366b. Effect upon a motion to dismiss of facts of which the court takes judicial notice 1831
§ 367. Classification of demurrers 1832
§ 368. Election and transfer to the law side of the court 1836

CHAPTER XXIII.

THE HEARING.

§ 369. Bringing a suit to a hearing 1841
§ 370. Judges who try cases at law and in equity 1843
§ 371. Challenge of a judge for interest 1846

Page
§ 372. Challenge of a judge for prejudice..... 1847
§ 373. Arrangement of calendar..... 1851
§ 374. Manner of hearing a cause..... 1852
§ 375. Rules of decision upon a hearing..... 1853
§ 376. Objections which cannot be made at the hearing..... 1858
§ 377. Action of the court upon a hearing..... 1859

CHAPTER XXIV.

ISSUES AT LAW.

§ 378. Power of courts to direct issues at law..... 1863
§ 379. Matters concerning which an issue is directed..... 1865
§ 380. Time when an issue is directed..... 1865
§ 381. Manner of trying an issue..... 1866
§ 382. Effect of the finding of a jury upon an issue..... 1868
§ 383. Proceedings after the trial of an issue..... 1870

CHAPTER XXV.

PROCEEDINGS IN A MASTER'S OFFICE.

§ 384. References to masters. In general..... 1871
§ 385. Who may be appointed master..... 1873
§ 386. Bringing on a reference..... 1875
§ 387. Parties entitled to attend a reference before a master..... 1876
§ 388. Proceedings before a master. In general..... 1878
§ 388a. Instructions to masters..... 1880
§ 389. Proceedings upon accountings..... 1880
§ 389a. Accountings of profits in patent cases..... 1885
§ 389b. Rules for computation of profits, and burdens of proof upon patent accountings..... 1889
§ 389c. Deductions from profits in patent cases..... 1897
§ 389d. Interest upon profits..... 1900
§ 389e. Assessment of damages for infringement of patents..... 1900
§ 389f. Appointment of liability between infringers..... 1910
§ 389g. Accounting for profits in copyright cases..... 1911
§ 389h. Assessment of damages in copyright cases..... 1913
§ 389i. Accounting of profits and assessment of damages in suits to restrain infringements of trade-marks..... 1919
§ 390. A state of facts and claim..... 1921
§ 391. Evidence before a master..... 1923
§ 392. Master's report..... 1925
§ 393. Exceptions to masters' reports..... 1926
§ 394. Judicial sales by masters and other officers..... 1931
§ 394a. Proceedings after a sale and before confirmation..... 1945
§ 394b. Practice upon the confirmation of a sale..... 1946
§ 394c. Effect of confirmation of a sale..... 1949

Page
§ 394d. Setting aside sale after confirmation..... 1950
§ 394e. Setting aside sales because of fraud in reorganization..... 1953
§ 394f. Collection of purchase money at a judicial sale..... 1957
§ 394g. Claims and liens against purchaser and property sold at a judicial sale 1958
§ 394h. Remedies of the purchaser upon a judicial sale..... 1962
§ 394i. Effect upon judicial sale of reversal of decree..... 1964
§ 395. Compensation of masters..... 1964

CHAPTER XXVI.

DECREES.

§ 396. Definition and classification of decrees..... 1968
§ 397. Final and interlocutory decrees..... 1968
§ 398. Decrees *in personam*..... 1971
§ 399. Decrees *in rem*..... 1975
§ 400. Absolute and conditional decrees..... 1974
§ 401. Decrees *nisi* 1977
§ 402. Decrees in the nature of decrees *nisi*..... 1981
§ 403. Time of entry of decree..... 1982
§ 404. Frame of decree..... 1982
§ 405. Motions at the foot of a decree..... 1989
§ 406. Enrollment of decree..... 1990

CHAPTER XXVII.

COSTS.

§ 407. Costs in general 1992
§ 408. Costs at common law..... 1992
§ 408a. Costs in criminal proceedings..... 1997
§ 409. Costs in equity..... 1998
§ 410. Costs in patent, copyright and trademark cases..... 2003
§ 411. Costs in admiralty..... 2006
§ 412. Costs upon error and appeal..... 2010
§ 413. Petitions for leave to sue *in forma pauperis*..... 2013
§ 414. Classification of costs..... 2018
§ 415. Costs as between party and party..... 2018
§ 416. Attorney's fees. In general..... 2018
§ 416a. Attorneys' fees under Anti-Trust and Interstate Commerce laws 2020
§ 416b. Attorneys' fees under copyright law..... 2021
§ 416c. Attorneys' fees for collecting war risk insurance..... 2022
§ 416d. Attorneys' docket fees..... 2023
§ 416e. Attorneys' fees upon depositions..... 2026
§ 417. Fees of clerk of Supreme Court..... 2028
§ 417a. Fees of clerks of Circuit Courts of Appeals..... 2031

Page
§ 417b. Fees of clerk of Court of Customs Appeals..... 2034
§ 417c. Fees of clerks of District Courts..... 2034
§ 418. Marshal's fees 2041
§ 418a. Fees of United States commissioners..... 2049
§ 418b. Fees of masters, referees, commissioners, examiners, notaries, auditors and consuls 2052
§ 418c. Stenographers' fees 2053
§ 419. Witness fees 2055
§ 419a. Disbursements for copies of papers..... 2060
§ 419b. Bills for printing and lithographing..... 2061
§ 419c. Premiums paid surety companies..... 2063
§ 420. Miscellaneous disbursements 2064
§ 421. Costs out of the fund..... 2066
§ 422. Costs as between solicitor and client..... 2071
§ 422a. Attorneys' liens 2074
§ 423. Taxation of costs..... 2076
§ 424. Appeal from taxation of costs..... 2078
§ 425. Security for costs..... 2079

CHAPTER XXVIII.

ENFORCEMENT OF DECREES AND ORDERS, INCLUDING EXECUTIONS, AND WRITS OF POSSESSION AND CONTEMPTS.

§ 426. Enforcement of decrees and orders. In general..... 2084
§ 427. Executions 2084
§ 428. Contempts 2096
§ 428a. Contempt by publication..... 2105
§ 428b. Perjury as a contempt..... 2111
§ 428c. Contempts in disobedience to orders by persons not parties.. 2114
§ 428d. Notice of a decree before punishment for its violation..... 2116
§ 429. Courts in which contempt proceedings should be instituted.. 2117
§ 429a. Time when contempt proceedings should be instituted..... 2118
§ 430. Distinction between criminal and civil contempts..... 2119
§ 430a. Practice in criminal contempt proceedings..... 2123
§ 430b. Contempt proceedings under the Clayton Act to punish acts which constitute criminal offenses..... 2137
§ 430c. Contempt proceedings under Prohibition Law..... 2140
§ 431. Civil contempt proceedings..... 2141
§ 432. Writ of attachment against the person..... 2148
§ 433. Execution of writ of attachment..... 2149
§ 434. Review of commitments for contempt. In general..... 2152
§ 435. Review by *habeas corpus* of commitment for contempt..... 2152
§ 436. Review by writ of error of commitment for contempt..... 2154
§ 437. Review by appeal of commitment for contempt..... 2157
§ 438. Review by revisory petitions of commitments for contempt in bankruptcy proceedings 2158

Page
§ 439. Sequestration 2159
§ 440. Writ of assistance and writ of possession..... 2160
§ 441. Action by the court itself..... 2161
§ 442. Bills to carry decrees into execution..... 2163

CHAPTER XXIX.

CORRECTION OF DECREES OTHERWISE THAN BY APPEAL.

§ 443. Correction of decrees. In general..... 2166
§ 444. Amendment of decree without a rehearing..... 2167
§ 445. Petition for a rehearing..... 2171
§ 446. Supplemental bills in the nature of bills of review..... 2177
§ 447. Bills of review 2179
§ 447a. Bills of review for errors of law..... 2179
§ 448. Provisions peculiar to bills of review for matters of fact newly discovered 2184
§ 449. Provisions common to all bills of review..... 2188
§ 450. Bills in the nature of bills of review..... 2194
§ 451. Bills to impeach decrees on account of fraud, accident or mistake 2195
§ 452. Bills to suspend or avoid the operation of decrees or judgments 2198

VOLUMES III AND IV.

CHAPTER XXX.

PRACTICE AT COMMON LAW IN CIVIL ACTIONS.

CHAPTER XXXI.

PRACTICE IN CRIMINAL CASES.

CHAPTER XXXII.

REMOVAL OF CAUSES.

CHAPTER XXXIII.

ADMIRALTY AND SEIZURES.

CHAPTER XXXIV.

BANKRUPTCY.

CHAPTER XXXV.

COURT OF CLAIMS.

CHAPTER XXXVI.

WRITS OF ERROR AND APPEALS.

APPENDIX

I.

FORMS IN CIVIL CASES AT COMMON LAW AND IN EQUITY.

II.

FORMS IN CRIMINAL PROCEDURE.

III.

MARSHALS' AND CLERKS' FORMS.

IV.

ADMIRALTY FORMS.

V.

EQUITY RULES.

VI.

ADMIRALTY RULES.

VII.

SUPREME COURT RULES.

VIII.

RULES OF THE CIRCUIT COURTS OF APPEALS. ADMIRALTY RULES OF THE SECOND AND NINTH CIRCUIT.

IX.

RULES OF COURT OF CLAIMS.

X.

BANKRUPTCY LAW.

XI.

GENERAL ORDERS IN BANKRUPTCY.

XII.

FORMS IN BANKRUPTCY.

XIII.

TABLE OF CASES.

Citations:

U. S. Constitution
U. S. Revised Statutes
Statutes at Large
Judicial Code
Equity Rules
Supreme Court Rules
Admiralty Rules
Admiralty Rules, Second Circuit Court of Appeals
Rules of Circuit Court of Appeals
Rules of Court of Claims
Rules of Appeals from Court of Claims
General Order in Bankruptcy.

INDEX.

FEDERAL PRACTICE

VOLUME II.

CHAPTER X.

CROSS-BILLS, SET-OFFS AND COUNTER-CLAIMS.

§ 197. Definition and origin of cross-bills. A cross-bill is a bill filed by a defendant in a suit in equity against one or more of the other parties, in order to obtain either discovery of facts in aid of his defense, or complete relief to all parties as to the matters charged in the original bill.[1] It is auxiliary to the original suit and dependent thereon.[2] It was borrowed through the canon, from the *reconventio* of the civil law,[3] and from it is derived the counter-claim of code-pleading.[4]

It was originally used chiefly for the purposes of set-off and discovery, which modern statutory enactments make it possible to obtain in a simpler way; but, except in a few cases, without one no relief could be obtained by a defendant against the complainant in the same suit,[5] beyond what resulted necessarily from

§ 197. 1 Nelson, J., in Ayres v. Carver, 17 How. 591, 595, 15 L. ed. 179, 180; Springfield M. Co. v. Barnard, C. C. A., 81 Fed. 261.

2 U. S. v. Reese, 166 Fed. 347; Lovell v. Latham & Co., 186 Fed. 602, s. c., 211 Fed. 374.

3 Story's Eq. Pl., § 402; Langdell's Eq. Pl. §§ 152, 154.

4 See Brande v. Gilchrist, 18 Fed. 465.

5 Carnochan v. Christie, 11 Wheat. 446, 6 L. ed. 516; Ford v. Douglas, 5 How. 143, 12 L. ed. 89; Chapin v. Walker, 6 Fed. 794; Brande v. Gilchrist, 18 Fed. 465; Denver & R. G. Ry Co. v. Denver, S. P. & P. R. Co., 17 Fed. 867; Lewis v. Glass, 92 Tenn. 147; s. c., 20 S. W. 571; International Tooth Crown Co. v. Carmichael, 44 Fed. 350; Stanwood v. Des Moines Sav. Bank, C. C. A., 178 Fed. 670; Asbestos Shingle, S. & S. Co. v. H. W. Johns-Manville Co., 189 Fed. 611, 613; Taylor v. Herndon, C. C. A., 194 Fed. 946; Mitchell v. International Tailoring Co., 169 Fed.. 145.

Where the plaintiff's right depended upon an instrument or conveyance which is not void, but merely voidable on account of fraud, or otherwise, the defendant could in most cases only set up the facts showing its invalidity by a cross-bill. Ford v. Douglas, 5 How. 143,

the denial of the prayer of the original bill.[6] The ordinary cases in which a defendant could obtain relief without a cross-bill were: suits for an account,[7] for the specific performance of contracts,[8] to compel the issue of patents in cases of interfer-

12 L. ed. 89; Langdell's Eq. Pl., § 131; Jacobs v. Richard, 18 Beav. 300; Beddoes v. Pugh, 26 Beav. 407, 416, 417; Holderness v. Rankin, 2 De Gex, F. & J. 258; Eddleston v Collins, 3 De Gex, M. & G. 1, 16; Chapin v. Walker, 2 McCrary, 175; Manley v. Mickle, 55 N. J. Eq. 563; s. c., 37 Atl. 738. But see Dayton v. Melick, 27 N. J. Eq. (12 C. E. Green), 362; Pitts v Powledge, 56 Ala. 147; Kennedy v. Green, 3 My. & K. 699, 718; Eyry v. Hughes, 2 Ch. D. 148; Osborne v. Barge, 30 Fed. 805; Green v. Turner, 80 Fed. 41.

So where the defendant contended that a contract upon which the plaintiff relied did not express the true agreement between the parties; he was required, except when the bill prayed specific performance, to file a cross-bill for the reformation of the contract. Commonwealth T. T. & Tr. Co. v. Cummings, 83 Fed. 767; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, s. c., 34 Atl. 1099. In a suit to set aside a contract, the defendant could not have the contract enforced unless he filed a cross-bill, Meissner v. Buck, 28 Fed. 161; Carnochan v. Christie, 11 Wheat. 446, 447, 6 L. ed. 516; when in a proper case he could also obtain a decree declaring the contract to be void. La Dow v. E. Bement & Sons, 66 Fed. 198; Duggar v. Dempsey, 43 Pac. 357; s. c., 13 Wash. 396; Bernhard v. Bruner, 65 Ill. App. 641; North British L. & N. Ins. Co. v. Lathrop, C. C. A., 70 Fed. 429.

It has been held that a discharge in bankruptcy pending a suit (Banque Franco-Egyptienne v. Brown, 24 Fed. 106, 107), the right to equitable set-off (Meek v. McCormick (Tenn. Ch.), 42 S. W. 458. See Carlwright v. Clark, 4 Mete. (Mass.) 104; Derby v. Gage, 38 Ill. 27), the right of sureties to subrogation (Stokes v. Little, 65 Ill. App. 255), and an agreement to settle the litigation, made pending the suit (Snyder v. De Forest Wireless Telegraph Co., 154 Fed. 142), can only be pleaded by a defendant in a cross-bill. In such cases, the cross-bill is in the nature of a supplemental bill. *Infra*, § 231.

A decree dismissing a bill to enjoin an action of ejectment cannot determine the title to the land in the absence of a cross-bill. Wood v. Collins, 60 Fed. 139. But it has been held that a defendant who is not in possession of land, when a bill is filed against him to remove a cloud to the title to the same, may, if he can show a better title than that of the complainant, obtain possession of the land by cross-bill. Greenwalt v. Duncan, 16 Fed. 35.

6 Langdell's Eq. Pl., § 123. See Hilton v. Barrow, 1 Vesey Jr. 284.

7 Clarke v. Tipping, 4 Beav. 588; Toulmin v. Reid, 14 Peav. 499; Jervis v. Berridge, L. R. 8 Ch. 357; Campbell v. Campbell, 4 Halst. Eq. (N. J.) 740; Little v. Merrill, 62 Me. 328. Brown v. Crawford, 252 Fed. 248; Anderson v. Hultberg, C. C. A., 247 Fed. 273.

8 Fife v. Clayton, 13 Ves. 546; Stapylton v. Scott, 13 Ves. 425; Bradford v. Union Bank of Tenn., 13 How. 57, 14 L. ed. 49; Northern R. Co. v. O. & L. C. R. Co., 18 Fed.

ence,[9] contribution between co-defendants,[10] and in a few instances for incidental and collateral questions between defendants,[11] or when it was possible to give the plaintiff the relief to which he was entitled without first deciding a question between them.[12] No cross-bill was necessary for such relief as might be allowed a defendant by means of a conditional decree imposing terms upon the complainant in accordance with the maxim that "he who seeks equity must do equity."[13]

The subject-matter of the cross-bill must be germane to that of the original bill.[14] It has been said that: "A cross-bill cannot be made an original bill in the same cause unless the subject matter is germane to the original bill."[15] A cross-bill cannot interpose new controversies between the defendants to the original bill, a decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill.[16] The fact that in

815. But see s. c., 20 Fed. 347. See Newton v. Gage, 155 Fed. 598; Dettering v. Nordstrom (C. C. A.), 148 Fed. 81. In a suit for specific performance where the defendant filed a cross-bill for a rescission the court allowed a rescission as of the date of the decree leaving to either party the right to sue at law for damages because of a breach of the contract. Southern Lumber Corp. v. Doyle, 204 Fed. 829.

9 Lockwood v. Cleveland, 6 Fed. 721; Foster v. Lindsay, 3 Dill. 127; Electrical Accum. Co. v. Brush El. Co., 44 Fed. 602. But may be filed if the defendant so chooses. American C. B. Co. v. Ligowski C. P. Co., 31 Fed. 466; Electrical Accum. Co. v. Brush El. Co., 44 Fed. 602, 607. *Contra*, Lockwood v. Cleveland, 6 Fed. 721, 727.

10 La Touche v. Lord Dunsany, 1 Sch. & Lef. 137, 166, 167; s. c., as Chamley v. Lord Dunsany, 2 Sch. & Lef. 690, 718; Langdell's Eq. Pl., § 125.

11 Federal M. & S. Co. v. Bunker Hill & Sullivan M. & C. Co., 187 Fed. 474; Hood v. Clapham, 19 Beav. 90. See Elliott v. Pell, 1 Paige (N. Y.) 263.

12 Langdell's Eq. Pl., § 125.

13 Farmers' L. & Tr. Co. v. Denver, L. & G. R. Co. (C. C. A.), 126 Fed. 46; *supra*, § 153; *infra*, § 400.

14 Bowker v. U. S., 186 U. S. 135, 46 L. ed. 1090; Great Northern Ry. Co. v. Western Union Tel. Co., C. C. A., 174 Fed. 321; Lovell v. Latham & Co., 186 Fed. 602; U. S. Light & Heating Co. v. J. B. M. El. Co., C. C. A., 194 Fed. 866; Ledbetter v. Mandell, 141 App. Div. (N. Y.) 556, 558, affirmed 205 N. Y. 537; Great Northern Ry. Co. v. Western Union Tel. Co., 174 Fed. 321; Miller v. Uhlman, 198 Fed. 233; Langdell's Eq. Pl., § 124; Daniell's Ch. Pr. (5th Am. ed.) 1550; Field v. Schieffelin, 7 J. Ch. (N. Y.) 250, 11 Am. Dec. 441.

15 A. M. Car & Foundry Co. v. Merchant's Disp. Transp. Co., 216 Fed. 904, 911.

16 Landon v. Public Utilities Commission, 234 Fed. 152, 168.

Where a bill was filed by one

the determination of the controversy it may become necessary to consider questions similar to those involved in an independent

tenant in common of a mortgage against the two others, who had bought in separate parcels the mortgaged property, the complainant seeking to recover from them his share of the purchase-money; it was held that a cross-bill could not be filed by one defendant against the other to recover a balance due him "resulting from the price severally paid and to be paid by them, as compared with the respective amounts" of their interests in the mortgage. Weaver v. Alter, 3 Woods, 152. Where a receiver of a bank filed a bill to set aside a transfer of shares of its stock by one defendant to another, and to hold the transferor liable to the creditors of the bank; it was held that the transferee could not file a cross-bill to set aside the transaction as between the transferor and himself so that he might be repaid the purchase price and be relieved from liability to the creditors of the bankrupt. Stuart v. Hayden, C. C. A., 72 Fed. 402. Where a bankrupt's trustee sued to set aside a preferential transfer, making as defendants unknown persons who had or claimed to have a right or interest in the subject matter of the suit; the court dismissed a cross-bill filed by intervenors who sought to impress a trust in their favor upon property in the hands of the trustee. Lovell v. Latham & Co., 211 Fed. 374. In a suit by a depositor against a bank to recover the amount of checks paid on forged indorsements, it was held that defendant could not file a cross-bill against a second bank seeking to recover over in case it was held liable to plaintiff. Pollard v. Wellford, 99 Tenn. 113, 42 S. W. 23.

Where a bill was filed against the stockholders of an insolvent corporation to collect out of their unpaid subscriptions the amount of a judgment against it, a cross-bill filed by one who had paid a larger proportion of his subscription than the rest, praying for an accounting, and that the others be compelled to pay the judgment; was held bad upon demurrer. Putnam v. New Albany, 4 Biss. 363, 373. Where a bill was filed by a remainderman under a will, contending that certain provisions of the will establishing estates prior to his own were invalid, and praying that the trustees appointed by the will convey the property devised either to him, or to the heirs-at-law, or to the State; a bill filed by the heirs-at-law, not impugning the estate of the equitable tenant for life, but praying that the estates in remainder, some of which were to persons yet unborn, should be declared invalid, was held improper as a cross-bill. Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515. See Neal v. Foster, 34 Fed. 496, 498; Osborne v. Barge, 30 Fed. 805.

In a suit by an administrator to recover assets it was held that a cross-bill was demurrable which sought an accounting of the administration of the estate of the intestate's father; although that would have resulted in increasing the estate held by the plaintiff and all the necessary parties were before the court. Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; s. c., as Perea v. Harrison, 7 N. H. 666, 41 Pac. 529. Where to a bill for the

controversy between the defendants, does not justify a cross-

cancellation of certain certificates of stock because unlawfully issued, the defendants alleged by a cross-bill that defendant corporation had decided to cease the manufacture of goods for a time, and that complainants had directed the concern to continue operations, and asked to have complainants restrained from further interference; it was held that the cross-bill should be stricken out as foreign to the subject-matter of the original bill. Allen v. Fury, 53 N. J. Eq. 35, 30 Atl. 551. On a suit to restrain the enforcement of a judgment, and to establish as a set-off a legal claim, a cross-bill seeking a settlement of a partnership alleged to have formerly existed between the parties was stricken out as foreign to the subject-matter of the original bill. O'Neill v. Perryman, 102 Ala. 522, 14 So. Rep. 898. Where a bill was filed to restrain a sale under an execution, the *defendant was allowed to file a cross-bill* praying a decree, declaring that he had a lien upon the property on which he had levied, appointing a receiver, and directing the sale of such property. Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900. See Remer v. McKay, 38 Fed. 164. Where the mortgagee filed a bill to collect rents from a lessee and a sublessee of the mortgaged railroad, and for a declaration that the lease was binding upon the sublessee, a cross-bill by the lessee against the mortgagor, who was a defendant to the original, seeking a cancellation of the lease, was held properly filed. Jesup v. Illinois Cent. R. Co., 43 Fed. 483. It has been held: that a cross-bill may be filed in a suit to foreclose a mechanic's lien, for the cancellation of the record of the lien with damages for a breach of the mechanic's contract (Springfield M. C. v. Barnard S. Mfg. Co., 81 Fed. 261); in a suit to foreclose a vendor's lien, for the foreclosure of a subsequent vendor's lien after the cross-complainant has secured the payment of the amount due the original plaintiff (Cox v. Price, 2 Va. Dec. 170, 22 S. E. 512); in a suit for the cancellation of a lease for the return of property delivered thereunder (Pullman's P. C. Co. v. Central Tr. Co., 171 U. S. 138, 43 L. ed. 108); in a suit by a street railway company to enjoin a city from forfeiting a franchise, by a mortgagee for the appointment of a receiver to borrow the funds needed for payment to prevent the forfeiture. Union Street Ry. Co. v. City of Saginaw, 115 Mich. 300, 73 N. W. 243. Where an insurance company had procured an injunction against a suit upon a policy which contained a limitation clause, the court sustained a cross-bill for a recovery of the amount of the policy on the ground that a State court of common law might hold that the injunction did not extend the period for bringing suit. North B. & M. Ins. Co. v. Lathrop, C. C. A., 63 Fed. 508. In a suit to foreclose a mortgage, given to secure a note for the price of property sold; it was held, that an answer setting up fraud in the inducement of the sale as a defense to the note, and a cross-bill for a rescission of the contract, because of the same fraud, were not inconsistent. Richardson v. Lowe, C. C. A., 149 Fed. 625.

bill.[17] In a suit by the receiver of a natural gas company against State officers and distributing gas companies to enjoin the enforcement of an order of a State Commission fixing the charges for gas at a rate alleged to be unreasonably low, it was held: that a cross-bill by one of the distributing gas companies praying to set aside an order fixing the price for distributing the gas could not be maintained.[18]

§ 198. Counter-claims. In the New York Code of Procedure,[1] David Dudley Field substituted a counter-claim for a cross-bill. His reform was adopted in the English Judicature Act.[2] The new Equity Rules have followed these precedents and provide: that the answer "may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."[3] If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof."[4]

17 Landon v. Public Utilities Comm'n, 234 Fed. 152, 168.

18 Ibid.

§ 198. 1 N. Y. Laws of 1848, ch. 379, § 128.

2 36 Vic. c. 66, § 24, Order XXI.

3 Eq. Rule, 30.

4 Eq. Rule 31. Under the former practice in a case where the original bill prayed a confirmation of a title under a deed absolute in form, a cross-bill by one of the defendants, claiming that the deed be declared a trust deed for her sole benefit, was held to be germane to the subject-matter of the suit, and sufficient to support a decree binding the other defendants as well as the plaintiff. Kingsbury v. Buckner, 134 U. S. 650, 677, 33 L. ed. 1047, 1057. See Griffin v. Griffin, 112 Mich. 87, 70 N. W. 423; Feige v. Babcock, 111 Mich. 538, 70 N. W. 7. A defendant to a foreclosure suit may file a cross-bill, to enforce an agreement by a codefendant to convey him part of the mortgaged premises. Peacock, Hunt & West Co. v. Thaggard, 128 Fed. 1005. Upon a bill to set aside deeds, the grantors and grantees of which were defendants, the court allowed a cross-bill by the grantees against their codefendant, the grantor, for the recovery of the purchase money paid by them for the land, and for the cancellation of notes given for deferred payments, in case the deeds should be set aside. Craig v. Door, C. C. A., 145 Fed. 307. In suits to establish and protect water rights against separate appropriators of water from the same stream, cross-bills were allowed between the several defendants to protect their respective rights against each other.

These rules impose no penalty for a failure to state a counter-claim arising out of the transaction which is the subject-matter of the suit, but by implication they forbid its assertion in an independent suit, and a judgment against the defendant would undoubtedly be a bar to any subsequent attempt to assert one.[5]

It has been held: that the set-off or counter-claim must be one which might be the subject of an independent suit in equity in the same district;[6] and that, consequently, in a suit for the infringement of a patent the defendant cannot by cross-bill obtain relief for another infringement, of which, because of the residence of the defendant, the court could not have taken original jurisdiction.[7] But there is a contrary decision by a Circuit Court of Appeals upon the same point.[8] And where the com-

Ames Realty Co. v. Big Indian Min. Co., 146 Fed. 166; Miller & Lux v. Rickey Land & Cattle Co., 146 Fed. 574. But it was held that cross-bills by the defendants against the complainant, asserting their rights and seeking for affirmative relief were *demurrable*. Miller & Lux v. Rickey Land & Cattle Co., 146 Fed. 574; Van Vibbler v. Hilton, 84 Cal. 585, 24 Pac. 308. In a suit to foreclose a mortgage, it was held that a defendant holding another mortgage on the same and other property might, by cross-bill, obtain affirmative relief against other defendants, judgment creditors of the mortgagor, and thus establish the validity of his mortgage. First Nat. Bank v. Salem Capital Flour Mills Co., 31 Fed. 580. But a cross-bill was *not* allowed upon a creditor's bill, when the defendant sought thus to have adjusted the indebtedness between themselves. Vanner-son v. Leverett, 31 Fed. 376. Where the mortgagee filed a bill to collect rents from a lessee and a sublessee of the mortgaged railroad, and for a declaration that the lease was binding upon the sublessee, a cross-bill by the lessee against the mortgagor, who was a defendant to the original, seeking a cancellation of the lease, was held properly filed. Jesup v. Illinois Cent. R. Co., 43 Fed. 483. It was said that where an original bill sought to enforce an equitable title against several defendants, it was *improper* for a defendant to file a cross-bill seeking the enforcement of a title paramount against his codefendants. Ayres v. Carver, 17 How. 594, 15 L. ed. 179; Portland Wood Pipe Co. v. Slick Bros. Const. Co., 222 Fed. 528; Calfisch v. Humble, C. C. A., 251 Fed. 1.

5 Odger's Pleading, 4th ed. pp. 228–230, *supra*, § 186.

6 Coleman v. Am. Warp Drawing Mach. Co., 235 Fed. 531.

7 Ibid. McGill v. Sorenson, 209 Fed. 876.

8 U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co., C. C. A., 234 Fed. 868; Buffalo Specialty Co. v. Vancleef et al., 217 Fed. 91, per Sanborn, J.: "Many questions are being raised in the district courts as to the proper construction of Rule

plainant sued to cancel notes in a district of which neither party was a resident, the defendant was allowed by cross-bill to collect the notes.[9]

30, and there has been conflict of opinion which will probably continue. As I look at the matter, the rule is quite clear and easy to interpret. It is quite similar to section 3 of order 19 of the English orders (Statutory Rules and Orders of 1912, p. 1781; Annual Practice of 1908, p. 234). The two rules follow:

9 Howard v. Leete, C. C. A., 257 Fed. 918.

"English rule:

" 'A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the registrar or the judge may, on the application of the plaintiff before trial, if in the opinion of the registrar or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.' " After quoting Rule 30.

"It will be seen that Rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject-matter of the bill, but allows without requiring him to set up any equitable counterclaim or set-off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed. Birmingham Estates Co. v. Smith, 13 Ch. D. 506, 509. Nor is a counterclaim to be excluded because plaintiff is a foreigner who could not be sued in England. By invoking the jurisdiction, he consents to be sued there by counteraction, unless plaintiff be a sovereign, not suable without its consent. Griendtovan v. Hamlyn & Co., 8 L. T. R. 231; Strousberg v. Costa Rica Republic, 29 W. R. 125, Ch. App.; Imperial Japanese Govt. v. P. & O. Co., (1895) A. C. 644, P. C. Nor is the amount recoverable by counterclaim limited by the jurisdiction of the court (Amon v. Babbett, 22 Q. B. D. 543, Ch. App.), unless objection is made by giving written notice, as required by the Judiciary Act of 1873. By adopting the English rule, its construction in England is adopt-

It has been held: that the words, "which might be the subject of an independent suit in equity against" the plaintiff and the

ed, at least to the extent of excluding construction at variance with plain and explicit language. Under such circumstances, the clear meaning of the words should not be rejected on account of supposed inconvenience in applying the rule.

"It is said in argument that it could not have been the intention of the rule to compel a nonresident plaintiff to submit to cross-suits in districts foreign to his residence, and thus run counter to express statutes, like section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), or the Act of March 3, 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 588), relating to place of suit. Section 51 provides that civil suits, other than those of diverse citizenship, shall only be brought in the district where defendant inhabits, the others only in the district of the residence of either party. The act of 1897 applies only to patent cases, and provides that the court shall have jurisdiction only in the district where defendant inhabits, or where he has committed infringement and has an established place of business. But these acts do not relate to the general jurisdiction of the district court, only to the power of the particular court to proceed. They give defendant a privilege which he may waive. If the counterclaim defendant (original plaintiff) raises the question of jurisdiction at the outset, and succeeds, defendant may have a speedy decision of this question by the Supreme Court. Whatever the decision may be affects the scope of Rule 30, not its construction. * * * The cases supporting a limited application of the rule proceed upon the theory that it was not intended to change the substantive law providing what could be treated as a set-off or counterclaim prior to the rule (Judge Thomas, 214 Fed. 841), and that the words 'shall have the same effect as a cross-suit' mean to limit the counterclaim to what might have been brought in by cross-bill. These words are adopted from the English rule, except that 'cross-suit' is there 'cross-action.' Why not give them the settled construction of the English courts? As Judge Chatfield says in the Marconi Case" (206 Fed. 295, 298, quoted *infra*.):

" 'Here we have a deliberate use of new terms covering any 'independent suit in equity' to have the result of a 'cross-suit,' and yet to be pleaded 'without cross-bill.'

"The contrary view is strongly argued by Judge Dodge in the Terry Case," 204 Fed. 103, "Judge Geiger in the Adamson Case," 208 Fed. 566, "and Judge Thomas in the Sydney Case," 214 Fed. 841. "But the new equity rules were conceived in a most liberal spirit, and I think the one in question should be given its manifest meaning, so as to allow all mutual claims in equity to be set off or opposed, as is done under the English practice. I have examined many English decisions under order 19, and am convinced that the rule has there worked justly. It has been given a broad and liberal construction, but has not been extended (as its terms prohibit) to cases so incongruous as to be incapable of

provision that the set-off or counter-claim "so set up shall have the same effect as a cross-suit," relate, not to cross-claims in general, but to counter-claims in equity only; and do not permit a cross-claim or set-off, that could be enforced only at common law.[10]

Where the plaintiff's cause of action arose under a law of the United States and there was no diversity of citizenship, it was held that a counter-claim not founded upon a Federal statute could not be maintained.[11]

The authorities are not harmonious upon the question whether a cross-bill which is not germane to the subject-matter of the original bill can now be sustained. There is respectable authority for the position that such a cross-bill can now be filed;[12] but

trial with the original suit. Bartholomew v. Rawlings, No. N. 56; Huggons v. Tweed, 10 Ch. D. § 35, Ch. App.; Compton v. Preston, 21 Ch. D. 138. Such an exception may also properly be applied under Rule 30, since the rule relates only to equitable causes of action. If it would be inequitable to subject the plaintiff to the defense of an incongruous cross-action surely the court would decline jurisdiction. I am convinced, therefore, that the dismissal of the bill had no effect on the counterclaim for unfair competition."

10 Terry Steam Turbine Co. v. B. F. Sturtevant Co., 204 Fed. 103, 106 (Citing Jackson v. Simons, C. C. A., 98 Fed. 768); Williams Patent Crusher & Fertilizer Co. v. Kinsey Mfg. Co., 205 Fed. 375; Motion Picture Patent Co. v. Eclair Film Co., 208 Fed. 416; Vacuum Cleaner Co. v. Am. Rotary Valve Co., 208 Fed. 419; El. Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377; Ohio Brass Co. v. Hartman El. Mfg. Co., 243 Fed. 629. Bankston v. Commercial Tr. & Sav. Bank, C. C. A., 250 Fed. 985; Covington County, Ala. v. Stevens, C. C. A., 256 Fed. 328. But see Act of March 3, 1915, 38 St. at L. 756, Comp. St. § 1251a, quoted, *infra*, § 206, *contra*, Salts Textile Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156; McGill v. Sorenson, 209 Fed. 876.

11 U. S. Exp. Bolt Co. v. H. G. Kroncke H. Co., C. C. A., 234 Fed. 868, 875, reversing 216 Fed. 186.

12 Marconi Wireless Tel. Co. v. Nat. El. Signal Co. (D. C. E. D. N. Y.), 206 Fed. 295; Salt's Text. Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156; Vacuum Cleaner Co., v. A. M. Rotary Valve Co. (D. C. S. D. N. Y.), 208 Fed. 419; El. Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377; Buffalo Specialty Co. v. Vancleef, (N. D. Illinois,) 217 Fed. 91; Paramount Hosiery Form Drying Co. v. Walter Snyder Co., (E. D. Pa.) 244 Fed. 192.

Marconi Wireless Tel. Co. v. Nat. El. Signal Co., 206 Fed. 295, 298, 300, per Chatfield, J.: "It will be noted that a counterclaim 'arising out of the transaction which is the subject-matter of the suit' must be included in an answer. Consideration of the rule and of the subject-

matter of the present action indicates that in a suit for infringement of patent the transaction which is the subject-matter of the suit does not mean, on the one hand, the patent rights alone, nor, on the other hand, the particular act of infringement alleged. Either of these might be the transaction in question, but the word 'transaction' is broader in scope, yet narrower when applied to the particular set of circumstances from which the relations and rights of the parties have resulted. The same patent might have to do with entirely separate transactions, or the same infringement might result in establishing various rights, contract or otherwise. But the test of determining the transaction from which the suit arose would require a determination of the precise right (and its breach) about which the parties were litigating, and the attendant circumstances which were involved therein.

"Rule 30 plainly requires that as between the parties to an equity action involving the steps to such a transaction, and the determination of rights between the parties growing out of the transaction, all claims shall be litigated in one suit, and that thus the matter shall be rendered *res adjudicata* and future litigation avoided. For this purpose the rule says that such counterclaims must be made a part of the answer in the first suit which calls into question this transaction. On the other hand, the ordinary relations of persons in business and society, whether with respect to a contract or tort, or, for illustration, a patent, may give a defendant in his opinion a cause of action against the same party who is bringing a bill in equity against this defendant upon some transaction with which the defendant's claim has no point of contact beyond the identity of the parties to the suit.

"The words of Rule 30 provide that every and any such cause of action may be set off or counterclaimed by the defendant; that is, used by him, if successful, as a subtraction or diminution against the plaintiff's claim if the plaintiff be successful therein, and also available to the defendant for his own relief in case the plaintiff be unsuccessful. The inclusion of such a setoff or counterclaim without the use of a cross-bill is said to have the same effect as a cross-suit, and is made discretionary, or even optional, under the rule. The purpose of uniting independent suits is plainly to facilitate adjustments and to diminish litigation. But the doctrine of *res adjudicata* should not be invoked against a man, nor should he be charged with laches, for failing to insist upon prosecuting an independent action against some one who might happen to be suing him, if nothing were to be gained, and not even the convenience of witnesses were furthered by so doing.

"The distinction, therefore, between the two parts of the second paragraph of Rule 30 is not to be observed by defeating an alleged counterclaim or construing it so strictly as to make it fall in the other class from that in which it is to be disregarded. * * *

"The plaintiff points out that between large manufacturers hundreds of infringement actions might be

pending upon different patents in widely divergent fields and impossible of classification so as to base thereon any suggestion that the causes of action arose from the same transaction, or even that they had any similarity to one another, beyond being patent cases and being litigation between the same parties. But, under the language of the section, any of these subjects of litigation, if the suit could be brought in equity and could have the same effect as a cross-suit, may be united in one set of pleadings and disposed of at one trial, resulting in but one judgment, in favor of the party who might recover enough to exceed that of his opponent and involving in this trial a number of decrees or injunctions, in the case of patents, against either or both parties, as the right to the injunction might be shown.

"At this point we should consider the language of Rule 26 (198 Fed. XXV, 115 C. C. A. XXV), which provides that the plaintiff may join in one bill as many causes of action cognizable in equity as he may have against the defendant. This language is also broad enough to unite a bill to set aside a transfer of real estate as fraudulent, with an action for injunction to prevent the breach of some theatrical contract, and also with an action upon a patent right for damages and an injunction as well. If under Rule 26 three such causes of action or 300 if they existed could legally and properly be united, it is difficult to see why, under the provisions of Rule 30, any of these 3 or 300 actions could not be united in a bill. Any such cross-suits or counterclaims could be disposed of in the same litigation, inasmuch as the parties were the same, and as to a certain extent the witnesses might have their own convenience furthered, even if the convenience of the court be exceedingly strained.

"We must therefore go a step further before determining what limitation there is upon either Rule 26 or Rule 30. It is provided in Rule 26 that:

'If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.'

"Under Rule 30 no such provision for the convenience of the court is inserted. But it may be assumed that entirely distinct or separable controversies, even if contained in one set of pleadings, could be separated upon the trial, and would result in a succession of trials, and, if necessary, in a succession of judgments or decrees, which could be set off or counterclaimed against one another in the issuance of execution or the satisfaction of the judgment.

"There is nothing inherently impossible, therefore, and nothing forbidden by the language of the rule; but, on the contrary, the rule would seem to require and direct the union of various litigations existing in equity up to the time of pleading, or, by amendment, up to the time of trial, between the parties to the litigation, and we have to consder what limitations must be observed in this particular application. * * *

"The new Rule 30 not only thus does away with a cross-bill, but says that 'without cross-bill' any claim which could be the subject of an independent equity suit shall be set

out in the answer with the same effect as a 'cross-suit,' so as to allow a 'final judgment' on the 'original' and 'cross-claims.' Here we have a deliberate use of new terms covering any 'independent suit in equity,' to have the result of a 'cross-suit,' and yet to be pleaded 'without cross-bill' (which is seemingly recognized as the old way of pleading). In the case of the Terry Steam Turbine Co., *supra*, the court seems to hold that the permissive way of pleading is no broader than the mandatory. If so, it is impossible to give any purposeful meaning to the greater part of the paragraph. However, to go to the other extreme, and hold that all causes of action in equity between the parties and within the court's jurisdiction can be brought in and tried, is evidently not practicable, although the rule seems to be broad enough for this construction. Some restriction should be adopted (under Rule 79, 198 Fed. XLI, 115 C. C. A. XLI) for general limitation, and in each case the court must ultimately determine what issues can be properly disposed of in 'a final judgment' in the suit, and order severance accordingly.

"In the present case, while difficulty is suggested by the nature of the subject-matter and the number of claims, it does not seem that for a trial without a jury greater difficulty would be found than in disposing of four suits in what might be termed a series, and there seems to be no reason, beyond the court's natural desire to simplify its work, for striking out the counterclaim in the present action. If it should appear that some connection of events brings this counterclaim or the cause of action upon the defendant's patents into the category of matters arising 'from the same transaction' as the plaintiff's own cause of action, then assuredly the court should not force the parties into the possible position of having their rights in the future shut off by the mandatory language of the first part of the section." See Buffalo Specialty Co. v. Vancleef, 217 Fed. 91, 93, 94, Sanborn, J., quoted *supra*. Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156, 157, 158, per Martin, J.: "As I understand, the object and purpose of these new rules in equity, including Rule 30, is to lessen costs for litigants in the court of equity, bring about more speedy and effective relief to the parties therein, do away with technical questions that may be a hindrance to speedy justice, and settle all matters in controversy between the parties that may fairly arise from the allegations of the complaint. To meet these demands, Rule 30 should be construed liberally, not narrowly. The language of the rule is:

" 'The answer must state (may not state) any counter-claim arising out of the transaction which is the subject-matter of the suit and may, without cross-bill, set out any set-off or counter-claim against the plaintiff,' etc.

"This is to afford an opportunity for the defendant, by answer only, to assert any wrong which he claims to have suffered arising from the matters alleged in the bill." Paramount Hosiery Form Drying Co. v. Walter Snyder Co. (D. C. E. D. Pa.), 244 Fed. 192.

there are a number of cases to the contrary.[13] The question has

[13] Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C. D. Mass.), 204 Fed. 103; Adamson v. Shaler (D. C. E. D. Wisc.), 208 Fed. 566; Klauder-Weldon Dyeing Mach. Co. v. Giles (D. C. D. Mass.), 212 Fed. 452; Sydney v. Mugford Printing & Eng. Co. (D. Conn.), 214 Fed. 841; Goodno v. Hotchkiss (D. Conn.), 230 Fed. 514; Christensen v. Westinghouse Traction Brake Co. (D. C. W. D. Pa.), 235 Fed. 898, 900, 901, per Thompson, J.: "The reasoning of Judge Dodge and those with him, who have adopted the more restricted application of the rule, appears to me as the more logical. It seems to be reasonably clear that the purposes of the rule is to require the setting up in the answer of all matters which could formerly be brought in by cross-bill only. As there is a clearly recognized distinction between a set-off and a counter-claim in equity; it must be assumed that, when the rule used both words, they were used, not interchangeably or as synonymous, but with their true distinction in view. A counter-claim is one which the defendant might assert against the plaintiff in the same suit, the cross-bill being brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. And if this is not its purpose, it is not a cross-bill. The term 'counter-claim' or 'cross-bill' in equity having a definite meaning, it can hardly be supposed that the court in drafting the rule used it in two different senses: The first in its ordinary and accepted signification, that is, a claim 'arising out of the transaction which is the subject-matter of the suit'; the second, without any such limitation, thus practically effecting a very radical change in the law as to what could be pleaded by way of counter-claim. It is to be assumed that, if such radical change were intended, it would have been expressly and plainly declared. I do not think the wording of the rule justifies this conclusion. Giving proper effect to the words 'without cross-bill' and the words 'shall have the same effect as a cross-bill,' it seems reasonably clear that the answer was intended to perform the function of a cross-bill, making the cross-bill no longer necessary; the matter thus pleaded in the answer having the same effect as the cross-suit. This could not be true if the defendant is permitted in effect to file an original bill by way of counter-claim having no connection with the subject of the original bill.

"There is also force in the position of Judge Geiger that, if the rule were intended to so enlarge the scope of equity procedure as to permit the defendant to incorporate in his answer causes of action not related nor germane to the subject of the bill, then Rule 31 (198 Fed. XVII, C. C. A., XVII) should have the necessary provisions to enable the plaintiff to obtain such affirmative relief, as, were the defendant proceeding by the original bill, the complainant could obtain, formerly by cross-bill now by counter-claim. There is plainly no provision in Rule 31 for such set-off or counter-claim on the part of the plaintiff, unless

most frequently arisen in suits for the infringement of patents which are discussed in the following section. In a suit to rescind a contract and to cancel notes, the defendant may set up a counter-claim for the collection of the notes.[14] It has been held that where plaintiff sued at law for breach of contract, it was admissible for defendant by cross-petition to seek reformation of the contract.[15] That in a suit by prior mortgagees to foreclose, a subsequent mortgagee can not complain, by way of set-off or counter-claim, for a diversion of the funds acquired through the prior mortgages, though the mortgagors are insolvent.[16]

In determining when a counter-claim arises out of the transaction which is the subject-matter of the suit, cases under the former practice in equity and those under the code practice may be considered. Where pending a suit by an insurance company to cancel a policy for misrepresentation the insured died and by supplemental bill the beneficiary was restrained from suing at law upon the policy, it was held that he could only assert his claim by a cross-bill.[17] It has been held under the New York Code of Civil Procedure that the following causes of action arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or were connected with the subject of the action: In an action brought to recover the purchase price of stock, a claim that the contract of sale was procured by fraudulent representations, with a prayer that it should be rescinded.[18] In an action by an heir to set aside so much of a will as created a trust, a counter-claim by the defendant trustee for the rents of the land collected by the plaintiff since the testator's death.[19] In a foreclosure suit,

it is intended to be embraced in the word 'reply.' Certainly this at least is very doubtful. I am therefore of the opinion that the words 'and may, without cross-bill, set-off or counter-claim against the plaintiff, which might be the subject of an independent suit in equity against him,' apply only to such counter-claims as arise out of the transaction which is the subject-matter of the suit.''

14 Knupp v. Bell, C. C. A., 243 Fed. 157; Howard v. Leete, C. C. A., 257 Fed. 918. See Central Trust Co. v. Wheeling & L. E. R. Co., 211 Fed. 515.

15 Upson Nut Co. v. American Shipbuilding Co., 251 Fed. 707.

16 Mississippi Valley Trust Co. v. Washington N. R. Co., 212 Fed. 776.

17 Royal Union Mut. Life Ins. Co. v. Wynn, 177 Fed. 289.

18 Delano v. Rice, 23 App. Div. (N. Y.) 327.

19 O'Brien v. Garniss, 25 Hun. (N. Y.) 446.

a counter-claim for usury and to set aside the cloud by the mortgage on the title to the premises.[20] In an action to enforce the statutory lien created on an award in condemnation proceedings, a counter-claim for a breach of a contract for the sale of the premises condemned, which was made during the condemnation proceedings.[21] In an action to enjoin a foreclosure action, a counter-claim for rent due from the equitable owner of the mortgage.[22] It has been held, in England, that in an action by the vendor for specific performance, the defendant may, by a counter-claim, pray for the review of a previous decision as to the title.[23]

The following cases, amongst others, under the New York Code have held that counter-claims could not be pleaded. In an action brought to restrain a party from interference with the plaintiff's trade, a counter-claim for damages arising out of the breach of a contract between some of the plaintiffs and the assignor of the defendant.[24] In an action to set aside an assignment and to procure a reassignment of bonds and mortgages, a counter-claim that the agent, acting under a power of attorney from the plaintiff, together with two others, acting under a previous power of attorney, had subsequently assigned to the defendant three other bonds and mortgages which plaintiff refused to deliver.[25] In an action to recover money collected under color of a contract by fraud, a counter-claim for a balance due for work under the contract.[26] In an action to recover a debt for which a lien had been filed, a counter-claim for the expense of removing the lien and of preparation of the defense of an action anticipates to foreclose the same.[27]

20 Myers v. Wheeler, 24 App. Div. (N. Y.) 327, 48 N. Y. Supp. 611; Queen City Bank v. Brown, 75 Hun, (N. Y.) 259, 58 St. Rep. 286, 28 N. Y. Supp. 1016.

21 Cottle v. N. Y., W. S. & B. Ry. Co., 27 App. Div. (N. Y.) 604, 50 N. Y. Supp. 1008.

22 Austin v. Rapelye, 45 St. Rep. 480.

23 Scott v. Alvarez (1895), 1 Ch. 596.

24 Sugden v. Magnolia Metal Co., 58 App. Div. (N. Y.) 236.

25 Bradhurst v. Townsend, 11 Hun (N. Y.) 104.

26 People v. Dennison, 84 N. Y. 272, affirming 81 N. C. (N. Y.) 129, affirming 59 How. Pr. (N. Y.) 157.

27 Biershenk v. Stokes, 18 N. Y. Supp. 854, reversing 43 St. Rep. (N. Y.) 788.

The rules furthermore permit any set-off or counter-claim which might be the subject of an independent suit in equity against the plaintiff.[28] This abrogates the former doctrine, that a cross-bill must be germane to the subject-matter of the original bill.[29]

§ 198a. Counter-claims in patent and trade-mark cases. Before the equity rules of 1912, in a suit to compel the issue of a patent,[1] or for relief on account of interfering patents,[2] a cross-bill because of the infringement of the defendant's patent in question could not be maintained. Where, on a bill by several persons to restrain the infringement of a patent and for an account, the defense being invalidity of the patent and a license, the court sustained the patent and decreed damages; a bill was not sustained as a cross-bill which set up a judgment in another suit against one of the complainants, and prayed that they all set forth and discover what share of the damages was claimed by each, so that the defendant who filed the cross-bill might set off his judgment against the share claimed by his judgment creditor.[3] Where the plaintiff, claiming the exclusive right under a contract to use the name of defendant in the sale of patent medicines, filed a bill against the latter to enjoin a violation thereof, and the latter filed an alleged cross-bill to enjoin complainant from making use of the name not authorized by the contract it was held that this latter bill was not a true cross-bill, but an original bill.[4]

Since the adoption of the rules of 1912, the following decisions have been made. In a suit to recover royalties under a contract for an exclusive license, defendant may be permitted to set up a counter-claim disputing the validity of the

28 Eq. Rule 30.

29 It has been held: that a cross-bill may be filed in a suit to foreclose a mechanic's lien for the cancellation of the record of the lien, with damages for a breach of the mechanic's contract (Springfield M. 261); in a suit to foreclose a vendor's lien, for the foreclosure of a subsequent vendor's lien after the cross-complainant has secured the payment of the amount due the original plaintiff (Cox v. Price, 2 Va. Dec. 170, 22 S. E. 512). See *supra*, note 4 and § 197, note 16.

§ 198a. 1 Kilbourn v. Hirner, 163 Fed. 539, *supra*, § 147.

2 Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co., 46 Fed. 851, supra, § 147.

3 Rubber Co. v. Goodyear, 9 Wall. 807.

4 Chattanooga Medicine Co. v. Thedford, 58 Fed. 347.

patent owned by the licensor, not for the purpose of avoiding payment of royalties, but in order to obtain a decree terminating the contract, when the license provides that the royalties shall terminate upon a decree which declares the patent void.[5] In a suit for the infringement of a patent a counter-claim may seek relief for the infringement of another patent, the invention covered by which is used in connection with the invention protected by the patent of the complainant, or is connected with the same subject-matter.[6] It has been held: that in a suit to enjoin the infringement of a trade-mark and for unfair competition a counter-claim will lie which seeks an injunction for an infringement of the defendant's patent by the sale of complainant's articles upon which the trade-mark is used.[7] That in a suit to enjoin the infringement of a patent the defendant may counter-claim for unfair competition by threats and advertisements in connection with the patents in suit.[8]

A number of cases hold that in a suit for the infringement of a patent the counter-claim cannot pray relief because of the infringement of another patent for an invention absolutely unconnected with that protected by the patent of plaintiff.[9] There are other cases of equal authority which sustain such counter-claims.[10]

5 Miami Cycle & Mfg. Co. v. Robinson, C. C. A., 245 Fed. 556.

6 U. S. Expansion Bolt Co. v. H. G. Kroncke H. Co., 216 Fed. 186, approved but reversed upon another point, C. C. A., 234 Fed. 868, 872. *Contra,* Christensen v. Westinghouse Traction Brake Co., 235 Fed. 898.

7 Champion Spark Plug Co. v. Champion Ignition Co., 247 Fed. 200.

8 Buffalo Specialty Co. v. Van Cleef, 217 Fed. 910; Salts Text. Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156. *Cf.* Vacuum Cleaner Co. v. Am. Rotary Valve Co., 208 Fed. 419. *Contra,* Williams Patent Crusher & Fertilizer Co. v. Kinsey Mfg. Co., 205 Fed. 375; U. S. Exp. Bolt Co. v. H. G. Kroncke Hardware Co., C. C. A., 234 Fed. 868, 875, reversing 216 Fed. 186 (where there was no diversity of citizenship).

9 Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C. Mass.), 204 Fed. 103; Marconi Wireless Tel. Co. v. Nat. El. Sig. Co., 206 Fed. 295; Adamson v. Shaler, (D. C. E. D. Wisc.), 208 Fed. 566; Klauder-Weldon Dyeing Mach. Co. v. Giles (D. C. W. Mass.), 212 Fed. 452; Christensen v. Westinghouse Traction Brake Co. (D. C. W. D. Pa.), 235 Fed. 898.

10 Marconi Wireless Tel. Co. v. Nat. El. Signal Co. (D. C. E. D. N. Y.), 206 Fed. 295; Salt's Text. Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156; Vacuum Cleaner Co. v. A. M. Rotary Valve Co. (D. C. S.

§ 198b. Set-offs. The distinction between a set-off and a counter-claim may be one of importance, since in case of bankruptcy or insolvency of the complainant the defendant might be allowed the full amount of his set-offs and be obliged to share proportionately with the other creditors in the dividend upon his counter-claims.[1] "A set-off is a statutory defense to an action. A counter-claim is a cross-action."[2] A set-off is generally considered to be a matter capable of use as an off-set to a recovery by the plaintiff. A counter-claim is a matter capable of use as a basis for a judgment for relief against the plaintiff and in a proper case may be also used as a set-off.[3] The terms are not mutually exclusive.[4] Upon the foreclosure by the trustee of a mortgage to secure bonds of a corporation, it was held that in the distribution of the fund the court would not set off against the claims of such bondholders as were stockholders of the mortgagor, the amounts due for failure to pay their subscriptions in full.[5]

In England, it has been said that "set-off is the creature of statute; to be allowed a set-off you must show a statutory right."[6] There a set-off remains precisely what it used to be under the status of George II.[7] It must there be a cross-claim for a liquidated amount and it can be pleaded only to a liquidated claim.[8]

§ 198c. Distinction between counter-claim and defense. There may also be some importance in the distinction between a defense and a counter-claim, since a reply is required to the latter, but not without special order to the former.[1] The former cases, holding when a cross-bill should be filed, and when not, may con-

D. N. Y.), 208 Fed. 419; El. Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377; Buffalo Specialty Co. v. Vaneleef, (N. D. Illinois), 217 Fed. 91; Paramount Hosiery Form Drying Co. v. Walter Snyder Co. (E. D. Pa.)

§ 198b. 1 Odgers Principles of Pleading, 4th ed., p. 228.

2 Lord Esher, M. R., in Sykes v. Sacerdoti, 15 Q. B. D. 423.

3 Marconi Wireless Tel. Co. v. Nat. El. Sig. Co., 206 Fed. 295, 299, per Chatfield, J.

4 Ibid.

5 Fidelity Trust Co. v. Washington-Oregon Corp., 217 Fed. 588. See *infra*, §§ 645, 648.

6 Liskeard, etc., Ry. Co. v. Liskeard & Caradon Ry. Co., 18 Times Rep. 1; Ann. Pr. 1913, p. 360.

7 2 Geo. II, Ch. 22; 8 Geo. II, Ch. 24.

8 Rees v. Watts, 11 Ex. 410; Ann. Pr. 1913, p. 360.

§ 198c. 1 Eq. Rule 31.

sequently be useful in this respect. If the facts which a defendant wishes to set up destroy the plaintiff's apparent cause of action, they constitute a defense and should be so pleaded; but if they only furnish a reason why the court should make a bill depriving the plaintiff of his cause of action, they must be set forth as a counter-claim.[2] It was formerly held that a discharge in bankruptcy pending a suit,[3] and the right of sureties to subrogation,[4] and an agreement to settle the litigation made pending the suit,[5] could only be pleaded by a defendant in a cross-bill. In such cases, the cross-bill was in the nature of a supplemental bill.[6]

In England, a counter-claim must always seek relief against the plaintiff, either alone or along with some third person;[7] but to a joint claim by two plaintiffs, a counter-claim against them jointly, or a separate counter-claim against each of them has been allowed;[8] or the defendant may counter-claim against one plaintiff and deny all liability to the other, and then recover a judgment against one of them.[9] It has been held in England that the plaintiff may plead a counter-claim against a counter-claim interposed by the defendant;[10] provided, at least, that he does not pray for an affirmative judgment upon the same.[11] It has been held that matter described in the answer as an "answer by way of counter-claim," may be treated as a counter-claim;[12] but that where the matter was described as a defense and nothing was shown to indicate that the pleader intended to

2 See Langdell's Eq. Pl., § 155.

Therefore, when a bill is filed by a mortgagor against a mortgagee for redemption, if the defendant can only show that the plaintiff is not entitled to redeem, he might obtain the benefit of a foreclosure without filing a cross-bill for the purpose; for the dismissal of a bill to redeem upon its merits is itself a foreclosure. Langdell's Eq. Pl., § 123. See Hilton v. Barrow, 1 Ves. Jr. 284.

3 Banque Franco-Egyptienne v. Brown, 24 Fed. 106, 107.

4 Stokes v. Little, 65 Ill. App. 255.

5 Snyder v. De Forest Wireless Telegraph Co., 154 Fed. 142.

6 *Infra*, §§ 231, 234.

7 Furness v. Booth, 4 Ch. D. 586; Harris v. Gamble, 6 Ch. D. 748; Ann. Pr. 1913, p. 363.

8 M., S. & L. Ry. Co. v. Brooks, 2 Ex. D. 243.

9 Hall v. Fairweather, 18 Times Rep. 58; Ann. Pr. 1913, p. 363.

10 Toke v. Andrews, 8 Q. B. D. 428.

11 Renton Gibbs & Co., L'd v. Neville & Co. (1900), 2 Q. B. 181.

12 Johnson v. Sherwood, 34 Ind. App. 490, 73 N. E. 180.

set up a counter-claim as such, he was precluded from insisting that he set one up.[13] Where the matter was not described as a counter-claim, but the prayer asked that the paper be made a cross-petition against the plaintiff, who replied to the same, it was treated as a counter-claim.[14]

§ 199. New parties to cross-bills and counter-claims. It was said by a judge of great authority that new parties could not be introduced into a case by a cross-bill.[1]

It was held, that this could not be done when the result would be to arrange parties of the same citizenship upon different sides of a controversy, that arose before the suit was brought and over which a Federal court could not have original jurisdiction.[2] A junior mortgagee was not allowed to file a cross-bill in a foreclosure suit, so as to procure the foreclosure of his own mortgage, when, on account of his citizenship, the court would have had no jurisdiction of an original bill for that purpose.[3] It has been said: that a cross-bill cannot be filed to set aside a compromise of the original suit, under which deeds have been made to a person not an original party thereto.[4] In a suit by the United States on behalf of Indians to cancel conveyances of lands, defendants were not permitted to file a cross-bill praying that individuals claiming an interest in the lands adverse to defendant be joined as parties and required to litigate their claims.[5] In a suit to prevent unfair competition by false advertisements concerning patent rights a stranger was not allowed to intervene and bring in another party in order that they might by counter-claim for the infringement by the complainant of the same

13 Lafond v. Lassere, 26 Misc. (N. Y.) 77, 56 N. Y. Supp. 459; State v. Coughran, 19 South Dak. 271, 103 N. W. 31. *Contra*, Central Imp. Co. v. Cambria Steel Co., C. C. A., 210 Fed. 706, 721; Mills v. Rosenbaum, 103 Ind. 152, 2 N. E. 313. But see Mason v. Mason, 46 Misc. (N. Y.) 361, 94 N. Y. Supp. 868, 34 Civ. Pro. R. 193.

14 Hutchings v. Dean, 11 Ky. Law Rep. 310.

§ 199. 1 Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 145, 15 L. ed. 158, 162. See Randolph v. Robinson, 2 N. J. L. 171; Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350.

2 Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350. Similar is Wright v. Frank, 61 Miss. 32.

3 Newton v. Gage, 155 Fed. 598. But see Lilienthal v. McCormick, C. C. A., 117 Fed. 89, 96.

4 Bunel v. O'Day, 125 Fed. 303, 319.

5 U. S. v. Woods, C. C. A., 223 Fed. 316.

patent.[6] In a suit in equity by the purchaser of coal rights in lands for a specific enforcement of the contract, the terms of which were in dispute between the parties, the defendant cannot by cross-bill bring in as parties defendant the agents who made the contract, on his behalf and with his approval, to have their right to commissions determined; a controversy which has no relevancy to the principal suit, and in which complainant has no interest.[7]

It has been said that when the interests of the defendant require the presence of new parties, he should take the objection of non-joinder and compel the plaintiff to amend.[8] It was said later that the objection of their misjoinder could be raised only by the new parties thus sought to be brought in.[9]

The rule seems now to be well established that, although new parties cannot be introduced by a cross-bill which seeks discovery only or which is purely defensive, they may when it seeks affirmative relief against the complainants and their presence is necessary to the determination of the controversy as thus enlarged.[10] But this is very rarely permitted. A citizen of the District of Columbia, who had bought an interest in the property affected pending the litigation, was allowed to file a cross-bill to protect his interest in the property.[11] Upon a bill in equity filed by the lessors of an oil lease against the lessee, for a discovery, an accounting of royalties, and specific performance of the contract to deliver oil as royalty; the defendant was allowed to file a cross-bill, bringing in as defendants other claimants of ownership to parts of the land, and praying that their rights be de-

6 Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 347.

7 Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350.

8 Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350.

9 Brandon Mfg. Co. v. Prime, 14 Blatchf. 371. *Contra,* Gregory v. Pike, C. C. A., 67 Fed. 837, holding that the complainant may object to a cross-bill filed by a stranger claiming an interest in the subject of the litigation. See Thurston v. Big Stone Gap Imp. Co., 86 Fed. 484.

10 Brandon Mfg. Co. v. Prime, 14 Blatchf. 371; Kanawha Lodge v. Swann, 37 W. Va. 176; s. c., 16 S. E. 462; Allen v. Tritch, 5 Colo. 222, 228; Hurd v. Case, 32 Ill. 45, 83 Am. Dec. 249; Jones v. Smith, 14 Ill. 229; Blodgett v. Hobart, 18 Vt. 414; Hildebrand v. Beasley, 41 S. (Tenn.) 121, 123; Sharp v. Pike's Adm'r, 5 B. Mon. (Ky.) 155; Coster's Ex'rs v. Bank of Ga., 24 Ala. 39.

11 Ulman v. Iaeger's Adm'r, 155 Fed. 1011.

termined by the court.[12] In a suit to restrain the infringement of a patent, a cross-bill was sustained; which brought in as defendant to it a new party, the assignor of the patent to the original complainant; claimed that such assignor had previously assigned the equitable title thereto to the orator of the cross-bill, and that the legal assignee had bought with notice thereof; and prayed a conveyance of the patent and an injunction against further annoyance.[13]

Parties brought in as defendants to a cross-bill may, in turn, exhibit cross-bills when the same are necessary or proper to terminate the litigation.[14] A stranger to a suit cannot file a cross-bill without permission from the court.[15] A cross-bill filed by a stranger without such permission may be stricken from the file.[16] Permission will not be granted if his claim is not germane to that set forth in the original bill.[17] Thus, when a trustee in bankruptcy sued to set aside a preferential transfer and to recover the proceeds of the same, a party claiming the lien upon the fund was not permitted to intervene and to enforce the same by cross-bill.[18] It has been said that under the practice of the Federal courts one claiming an interest in the subject of litigation cannot properly be made a party defendant against the objection of complainant, and hence a cross-bill filed by a person thus coming into the cause should be dismissed.[19] In a suit to foreclose a chattel mortgage, a party claiming a prior chattel mortgage, made by one of the original defendants upon part of the property, may be allowed to intervene and file a cross-bill to estab-

12 Robinson v. Brast, C. C. A., 149 Fed. 149.

13 Brandon Mfg. Co. v. Prime, 14 Blatchf. 371.

14 Blair v. Illinois S. Co., 42 N. E. 895; s. c., 159 Ill. 350, 31 L.R.A. 269.

15 Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 17 L. ed. 725; Forbes v. Memphis, E. P. & P. R. Co., 2 Woods, 323; Gregory v. Pike, 67 Fed. 837; *infra*, § 258.

16 Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 294, 303, 17 L. ed. 725, 729; Putnam v. New Albany, 4 Biss. 365, 367; Keithley v. Am. Car & Foundry Co., 216 Fed. 904; Am. Car & Foundry Co. v. Merchants' Despatch Transp. Co., 216 Fed. 904.

17 Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 347; Lovell v. Latham & Co., 186 Fed. 602; s. c., 211 Fed. 374.

18 Lovell v. Latham & Co., 186 Fed. 602.

19 Gregory v. Pike, C. C. A., 67 Fed. 837. See Thruston v. Big Stone C. I. Co., 86 Fed. 484.

lish his rights.[20] It has been held that upon a stockholders' bill to set aside a transfer of property because of the fraud and gross negligence of its president, such president, although not an original party, may be allowed to intervene and file a cross-bill to controvert the charges against him in the bill.[21] Upon a stockholder's bill for an injunction, against the election of directors at the annual meeting of the stockholders of a corporation, other stockholders not original defendants, were allowed to file a cross-bill praying for a modification of a preliminary injunction, granted in accordance with the prayer of the original bill, so as to permit the election of the directors under the supervision of a master in chancery, at a time to be fixed by the court.[22] Whether under the new Equity Rules a new party can be brought in by a counter-claim has not yet been decided.

In England, the defendant may plead a counter-claim against a third person jointly with the plaintiff; provided that the relief thus sought relates to, or is connected with, the subject-matter of the plaintiff's claim;[23] even though such third person could not be a party to the plaintiff's original claim;[24] but the plaintiff must be a party to such counter-claim;[25] and a third person may be joined with the plaintiff as defendant to the counter-claim, although he would be liable only in one of two inconsistent alternatives;[26] but such third person cannot counter-claim in the action against either plaintiff or defendant.[27] A joint claim against two partners may there be set up as a counter-claim against a separate claim by one of them.[28] In New York it has been held that where the liability was joint and several, a counter-claim or set-off might be interposed;[29] but otherwise a joint demand could not be set up as a counter-claim when

20 Osborne & Co. v. Barge, 30 Fed. 805.

21 Brinckerhoff v. Holland Tr. Co., 159 Fed. 191.

22 Bartlett v. Gates, 118 Fed. 66.

23 Baker v. Gent, 9 Times Rep. 159; *Re* A Debtor (1907), 23 Times Rep. 169; S. F. Edge, L'd v. Weigel, (1907), 97 L. T. 447.

24 Turner v. Hednesford Gas Co., 3 Ex. D. 145.

25 Furness v. Booth, 4 Ch. D. 586; Harris v. Gamble, 6 C. D. 748.

26 Child v. Stenning, 5 Ch. D. 695.

27 Street v. Gover, 2 Q. B. D. 498; Alcoy, etc., Co. v. Greenhill (1896), 1 Ch. 19. "Annual Practice," 1912, I, 361.

28 Eyre v. Moreing, W. N. 1844, 58. See Hodson v. Mochi, 8 Ch. D. 569.

29 American Guild v. Damon, 186 N. Y. 360.

one only of the obligors [30] or obligees [31] was a party to the suit.

§ 200. Time of filing set-offs, counter-claims and cross-bills. The Equity Rules provide for the assertion of set-offs and counter-claims in the answer of the defendant,[1] which must be filed within twenty days after service of the subpœna, unless the time is enlarged.[2] They authorize the subsequent filing of supplemental pleadings by permission of the court.[3] Set-offs and counter-claims can undoubtedly then be filed, provided they arose subsequent to the original answer or the complainant was ignorant of them when such answer was made.[4] Under the former practice, a cross-bill might be filed at any time before the final decree.[5] A cross-bill should not be filed before the answer to the original bill. It should regularly be filed with, or immediately after, the defendant's answer;[6] but may be allowed any time before the final decree.[7] Under the chancery practice a cross-bill was not permitted to go to a hearing upon the depositions already published.[8] In a case where the defendant, after answer, learned of facts tending to show that the plaintiff had before suit parted with all interest in the subject-matter to a citizen of the same

30 Baldwin v. Briggs, 53 How. 80; Spofford v. Rowan, 6 N. Y. St. Rep. 250; P. & S. Mfg. Co. v. Noel, 60 N. Y. Superior Ct. 207, affirmed 138 N. Y. 606.

31 Windecker v. Mutual Life Ins. Co., 12 App. Div. (N. Y.) 73, 77 N. Y. St. Rep. 358, 43 N. Y. Supp. 358; Nat. St. Bank v. Boylan, 2 Abb. N. C. (N. Y.) 216; Bockover v. Harris, 43 N. Y. Superior Ct. 548.

§ 200. 1 Eq. Rule 30.

2 Eq. Rules 12, 16.

3 Eq. Rule 34; *infra*, § 231.

4 Ibid.

5 Morgan's La. & T. R. & S. Co. v. Texas C. R. Co., 137 U. S. 171, 34 L. ed. 625, a cross-bill for a foreclosure upon a default subsequent to the appointment of a receiver in a bill *quia timet*.

Allen v. Allen, Hempst. 58. A cross-bill filed before the complainant therein has filed his answer to the original bill might be stricken from the files on motion. Ballard v. Kennedy, 16 So. 327; s. c., 34 Fla. 483.

6 Daniell's Ch. Pr. (2d Am. ed.) 1745; White v. Buloid, 2 Paige (N. Y.), 164; Allen v. Allen, Hempst. 58.

7 Morgan's C. & T. R. S. S. Co. v. Texas C. R. Co., 137 U. S. 171, 34 L. ed. 625. The old practice under which a cross-bill must ordinarily be filed before publication has been abrogated. Neal v. Foster, 34 Fed. 496; Rogers v. Reissner, 31 Fed. 592; Pullman's P. C. Co. v. Central Tr. Co., 46 Fed. 261; Huber v. Diebold, 25 N. J. Eq. 170.

8 Bassett v. Nosworthy, 102 Rep. Temp. Finch, 103; Field v. Schieffelin, 7 J. Ch. N. Y. 25; approved in Mathieson v. Craven, 247 Fed. 223, 228, per Bradford, J.

State as the defendant, the proceedings were stayed until the complainant answered a cross-bill, charging such a transfer.[9]

§ 201. Proceedings upon cross-bills. It was the better practice for a defendant to apply for leave before filing a cross-bill.[1] Permission might be denied for laches.[2] Ordinarily, a refusal to grant leave would not be reviewed upon an appeal;[3] but it was held that a cross-bill by a party to the suit might be filed with the answer without permission of the court.[4] A cross-bill in a suit by a State may be served upon the Attorney-General when he filed the original bill.[5] It has been held at circuit that a subpœna to answer a cross-bill may, by express leave of the court, be served by substitution upon the attorney for the complainant to the original bill when his client is beyond the jurisdiction of the court.[6] In one case the court said: "The reason of this rule would seem to limit it in equity cases to cross-bills, either wholly or partly defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject-matter of the original bill, are made the basis for the affirmative relief."[7] Leave to make substituted service was re-

9 Young v. Pott, 4 Wash. 521. But see Westinghouse El. & N. Co. v. Mustard, 87 Fed. 336. It has been said that an objection of a defect of parties must precede the filing of a cross-bill. Plum v. Smith (N. J. Ch.), 39 Atl. 1070.

§ 201. 1 Indiana & St. L. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895; Brown v. L. C. & M. W. R. Co., 2 Wall. 283, 17 L. ed. 725; International T. C. Co. v. Carmichael, 44 Fed. 350; Mercantile Tr. Co. v. Missouri, K. & T. Ry. Co., 41 Fed. 8; Brush El. Co. v. Brush-Swan El. Co., 43 Fed. 701; Brown v. Bell, 4 Hay. (Tenn.), 287; Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579. *Contra,* Neal v. Foster, 34 Fed. 496, 498; Beauchamp v. Putnam, 34 Ill. 378, 381.

2 Under-Feed Stoker Co. of America v. Am. Stoker Co., 169 Fed. 891.

3 Indiana & St. L. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895. *Contra,* Beauchamp v. Putnam, 34 Ill. 378, 381.

4 Christmas Gold Mining Co. v. Milliken, 200 Fed. 316, and cases cited.

5 Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. 552.

6 Lowenstein v. Glidewell, 5 Dill. 325; Kingsbury v. Buckner, 134 U. S. 650, 676, 33 L. ed. 1047, 1057; Peay v. Schenck & Bliss, Woolw. 175; Johnson R. R. S. Co. v. Union S. & S. Co., 43 Fed. 331. But see Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811, 19 L. ed. 587, 589, 590; § 165 and citations.

7 Caldwell, J., in Lowenstein v. Glidewell, 5 Dill. 325, 328. See Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811, 19 L. ed. 587, 589, 590; and supra, § 165.

fused in a case where the plaintiffs offered to stipulate that the matter sought to be pleaded by cross-bill might be set up by answer;[8] but permitted where the cross-bill set up new matter not set out in the original bill, germane to the case made by the original bill, and sought to make such new matter the basis of independent affirmative relief.[9] Service by publication of a subpœna upon a cross-bill was held to be improper.[10]

It has been held that a cross-bill may be dismissed upon motion before an answer or a hearing when it sets up matter improper for such a pleading, even though it was filed by leave of the court.[11] A demurrer might however, be filed to a cross-bill for want of equity, for multifariousness, for presenting matter improper for a cross-bill, or for objections which would be grounds of demurrer to an original bill.[12] Where a cross-bill in equity asked relief foreign to the litigation, in behalf of parties who had a right of action at law, it was held that it should be dismissed "without prejudice," and not "for want of equity."[13] Since demurrers have been abolished an objection to a cross-bill or counter-claim should be made by a motion to strike out the same.[14] When the equities set forth in the cross-bill were doubtful a motion to strike out was denied,[15] and a demurrer subsequently sustained.[16] It was held that an order for an injunction granted at defendant's motion to preserve the status quo was not an adjudication of the right of set-off.[17] Upon demurrer, part of a cross-bill was sustained as substantially a plea to the jurisdiction.[18]

The testimony taken under the cross-bill may be read for or

8 Heath v. Erie Ry. Co., 9 Blatchf. 316.

9 Gasquet v. Fidelity T. & S. Y. A., C. C. A., 57 Fed. 80 reversing Fidelity T. & S. Y. Co. v. Mobile St. Ry. Co., 53 Fed. 850. See Lowenstein v. Glidewell, 50 Dillon, 325; Ledbetter v. Mandell, 141 App. Div. 556; affirmed 205 N. Y. 537.

10 Webster Loom Co. v. Short, 10 Off. Gaz. 1019.

11 Dickerman v. Northern Trust Co., 80 Fed. 450.

12 Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; American & G. M. & I. Corp. v. Marquam, 62 Fed. 960.

13 Barrett v. Short, 41 Ill. App. 25.

14 Motion Picture Patent Co. v. Eclair Film Co., 208 Fed. 416; Ohio Brass Co. v. Hartman El. Mfg. Co., 243 Fed. 629.

15 Knauth, Nachod & Kuhne v. Lovell, C. C. A., 200 Fed. 403.

16 Lovell v. Latham & Co., 211 Fed. 374.

17 J. L. Owens v. Officer, C. C. A., 244 Fed. 47.

18 Marvin v. Ellis, 9 Fed. 367.

against the original bill; and the testimony taken under the original bill can be read for or against the cross-bill. In either case a formal order granting leave to do this, "saving all just exceptions," should first be obtained *ex parte*.[19] Both bills were usually heard together in the court of first instance[20] and upon appeal.[21] Where an answer to the cross-bill alleged an affirmative defense thereto, a motion by complainant for judgment upon the pleadings was denied.[22] When a decree had been made dismissing a cross-bill before a decree upon the original bill, it was held that an appeal therefrom taken before a decree upon the original bill must be dismissed.[23] A decree upon the original bill would supersede a previous decree upon a cross-bill if the two were inconsistent.[24]

Where the cross-bill sought affirmative relief, the voluntary dismissal of the original bill would not dismiss the cross-bill.[25] It was otherwise where the cross-bill merely sought discovery.[26] It was said that a dismissal of the original bill by the court after a hearing operated as a dismissal of a cross-bill between the defendants, even though the cross-bill showed a good case for relief; "but as a cross-bill, it must follow the fate of the original bill."[27] But the later authorities held that where the cross-bill

19 Daniell's Ch. Pr. (5th Am. ed.) 1552, 1553; Lubiere v. Genou, 2 Ves. Sen. 579.

20 Ayres v. Carver, 17 How. 591, 15 L. ed. 179; Moore v. Huntington, 17 Wall. 417, 422, 21 L. ed. 642, 643; *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355; Daniell's Ch. Pr. (2d Am. ed.) 1751. See Blythe v. Hinckley, 84 Fed. 228.

21 Ayres v. Carver, 17 How. 591, 15 L. ed. 179; *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355.

22 Barnett v. Kuneckle, C. C. A., 256 Fed. 644.

23 Ayres v. Carver, 17 How. 591, 15 L. ed. 179.

24 *Ex parte* Railroad Co., 95 U. S. 221, 225, 24 L. ed. 355, 356; Blythe v. Hinckley, 84 Fed. 228.

25 Lowenstein v. Glidewell, 5 Dill. 325; Chicago & A. R. Co. v. Union R. M. Co., 109 U. S. 702, 27 L. ed. 1081.

26 Donohoe v. Marposa, L. & M. Co., 1 Pac. Coast L. J. 211, 219.

27 Mr. Justice Field in Dows v. Chicago, 11 Wall. 108, 112, 20 L. ed. 65, 67; U. S. v. California & Oregon Land Co., 192 U. S. 355, 360, 48 L. ed. 476, 479. See also Cross v. De Valle, 1 Wall. 5, 14, 17 L. ed. 515, 518. But see Wabash, St. L. & P. Ry. Co. v. Central T. Co., 22 Fed. 138, 142; Donohoe v. Mariposa L. & M. Co., 1 Pac. Coast L. J. 211; Jesup v. Illinois Cent. R. Co., 43 Fed. 483, 495. It was held that where the original bill was dismissed "without prejudice," the cross-bill must also be dismissed "without prejudice." Blewitt v. Blewitt (Miss.), 12 So. 249. Where one who filed a cross-bill was held

was not purely defensive, but sought original relief and contained in itself sufficient allegations for an original bill, it might not be affected by such a dismissal,[28] and that where there was no jurisdiction in equity of the matter set up by the original bill, the filing of a cross-bill alleging matters of equitable cognizance gave the court jurisdiction of the original bill as well,[29] at least where the cross-bill might have been sustained as an original bill.[30] When an abatement took place after a cross-bill had been filed, it seems that there should have been a bill of revivor filed in both the original and the cross cause.[31]

Where a cross-bill assumed the character of an original bill it was dismissed for jurisdiction if the parties to the controversy thereby presented were citizens of the same State and no Federal question was involved.[32] Otherwise, proceedings upon cross-bills were substantially the same as those upon original bills.[33]

to have no standing in court it was held that other parties who attempted to come in under the cross-bill must abide by the result declared against him who filed it. Stainback v. Junk Bros. L. & Mfg. Co., 98 Tenn. 306, 39 S. W. 530. See also Richman v. Donnell, 53 N. J. Eq. 32.

28 San Diego Flume Co. v. Souther, 90 Fed. 164, 167; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025; Holgate v. Eaton, 116 U. S. 33, 29 L. ed. 538; Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 27 L. ed. 1081; Jackson v. Simmons, C. C. A., 98 Fed. 768; Coogan v. McCarron, 50 N. J. Eq. 611, 25 Atl. 330; Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 48 L. ed. 911; Blythe v. Hinckley, 84 Fed. 228, 236, 237; Badger Gold Min. & Mill Co. v. Stockton Gold & Copper Min. Co., 139 Fed. 838. In Columbus v. Mercantile Tr. Co., 218 U. S. 645, 663, 54 L. ed. 1193, 1199, the complainant sued to enjoin an act alleged to be in violation of a contract and defendant filed a cross-bill seeking a declaration that the contract had been forfeited for nonperformance; it was held that a decree dismissing the original bill upon the merits must contain a clause granting the prayer of the cross-bill. But see U. S. v. California & Oregon Land Co., 192 U. S. 355, 360, 48 L. ed. 476, 479.

29 Sanders v. Riverside, C. C. A., 118 Fed. 720.

30 Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 145, 48 L. ed. 911, 912.

31 Story's Eq. Pl., § 363.

32 Patton v. Marshall, 173 Fed. 350.

33 See, however, Lantz v. Gordon, 28 Fed. 264; Puetz v. Bransford, 31 Fed. 458. For a case where an answer to a cross-bill was held responsive, see Prentiss Tool & Supply Co. v. Godchaux, 66 Fed. 234. See on the general subject Noel v. King, 2 Madd. 392; Hannah v. Hodgson, 30 Beav. 12; Gray v. Haig, 13 Beav. 65.

CHAPTER XI.

REPLIES.

§ 202. Definition and history of replies. A reply is a pleading by which the plaintiff puts in issue the matters pleaded in a defendant's answer. They were formerly called replications.[1] Replications were formerly of two kinds, general and special.[2] A general replication consists of a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged therein to bar the plaintiff's suit, together with an assertion of the truth and sufficiency of the bill.[3] A special replication sets up new matter in avoidance of a substantive defense contained in the answer or plea.[4] To this the defendant was obliged to file a rejoinder, giving the discovery required in it.[5] This might then be succeeded by a sur-rejoinder and a rebutter.[6] Special replications and their consequences were, on account of the inconvenience therefrom resulting, almost obsolete by the time of Lord Eldon.[7] A special replication to the answer was forbidden by the Equity Rules of 1842, which provided that "no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."[8]

The body of a general replication was substantially in the following form: "This repliant, saving and reserving to him-

§ 202. [1] Mason v. Hartford, P. & F. R. Co., 10 Fed. 334.

[2] Mitford's Pl., ch. 3.

[3] Story's Eq. Pl., § 878.

[4] Story's Eq. Pl., § 878.

[5] Mitford's Pl., ch. 3; Story's Eq. Pl., § 878.

[6] Mitford's Pl., ch. 3; Story's Eq. Pl., § 878.

[7] Mitford's Pl., ch. 3; Story's Eq. Pl., § 878.

[8] Rule 45 of 1842. See Mason v. Hartford, P. & F. R. Co., 10 Fed. 334; Nattier v. Hinde, 7 Pet. 252, 273, 8 L. ed. 675, 683; Duponti v. Mussy, 4 Wash. 128; Wren v. Spencer O. Mfg. Co., 18 Off. Gaz. 857.

self all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto, saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied unto by his repliant; without that, that any other matter or thing in the said answer contained, material as effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed."[9] The signature of counsel was unnecessary.[10] Replications have now been abolished; and the new Equity Rules, following the New York Code of Procedure and the English orders in chancery, now provide as follows.

§ 203. When a reply should be filed. "Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill."[1] Where there are several defendants a replication should be filed within the prescribed time after one of them has filed an answer with a counter-claim, although the others may not have done so,[2] and a separate replication after the other answers have come in if they set up counter-claims. It has been held that the pendency of a motion affecting the an-

9 Story's Eq. Pl., § 878, note 4.

10 Story's Eq. Pl., § 881; Daniell's Ch. Pr. (4th Am. ed.) 830.

§ 203. 1 See Smith's Ch. Pr. (2d Eng. ed.), vol. i, p. 336.

2 Allis v. Stowell, 5 Fed. 203.

swer will excuse the plaintiff from replying until the motion has been decided.[3] The court exercises great liberality in allowing a reply filed too late to stand.[4] The taking of testimony by the defendant, or any other proceeding taken by him in the cause, might be held a waiver of his right to have a counter-claim taken as confessed for want of a reply.[5] An objection upon this ground cannot be raised for the first time upon appeal.[6] Formerly after a cause had been heard upon bill and answer, the court would rarely allow a replication to be filed;[7] but it was said: that permission to file the replication should be granted when the suit was set down for such hearing in good faith, for the purpose of testing the sufficiency of a defense in the answer.[8] When a complainant is in default for not filing a replication in due time, it is improper to grant him any relief not justified by admissions in the answer.[9] The court may grant leave to withdraw a reply, and amend, or have the cause set down for a hearing upon bill and answer.[10]

Where a defense pleaded in an answer is, upon its face, conclusive and raises but a single point, a reply should usually be ordered. Where the answer contains no counter-claim, a reply should be stricken out.[11] In New York, replies have been ordered to defenses setting up the statute of limitations,[12] but not a foreign statute of limitations;[13] the statute of frauds;[14]

3 Peirce v. West's Ex'rs, Pet. C. C. 351; Sayles v. Erie Ry. Co., 2 N. J. L. J. 212; Fischer v. Hayes, 6 Fed. 76; s. c., 19 Blatchf. 26; Jones v. Brittan, 1 Woods, 667; Potts v. Alexander, 118 Fed. 885, 886; approving text, U. S. v. Barber Lumber Co., 169 Fed. 184.

4 Fischer v. Hayes, 6 Fed. 76; s. c., 19 Blatchf. 26.

5 Jones v. Brittan, 1 Woods, 667; Fischer v. Hayes, 6 Fed. 76; s. c., 19 Blatchf. 26; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. ed. 733.

6 Clements v. Moore, 6 Wall. 299, 18 L. ed. 786; Fretz v. Stover, 22 Wall, 198, 22 L. ed. 769.

7 Bullinger v. Mackey, 14 Blatchf. 355; Peirce v. West's Ex'rs, Pet. C. C. 351.

8 Besson & Co. v. Goodman, 147 Fed. 887.

9 Harrington v. Union Oil Co., 144 Fed. 236.

10 Rogers v. Goore, 17 Ves. 130; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425; Daniell's Ch. Pr. (2d Am. ed.) 479; Ibid. (3d Am. ed.) 830.

11 Goodno v. Hotchkiss, 234 Fed. 514.

12 Hubbell v. Fowler, 1 Abb. N. S. 1.

13 Olsen v. Singer Mfg. Co., 138 App. Div. 467; 122 N. Y. Supp. 822; Cavanagh v. Oceanic S. S. Co., 30 St. Rep. 532; 9 N. Y. Supp. 198. But see Perls v. Metropolitan Life

a discharge in bankruptcy;[15] marriage;[16] divorce;[17] special partnership;[18] ratification;[19] settlement of previous litigation;[20] a judgment in another suit;[21] a previous assignment of the claim in suit;[22] non-payment of insurance premiums and false statements in an application for a policy;[23] foreclosure.[24]

In New York, a reply will not be directed to the matter alleged in an answer which does not constitute a defense,[25] nor to defenses which have been negatived in the plaintiff's pleading,[26] nor where the matter had been thrashed out upon a previous application for a receiver,[27] nor to evidentiary facts in an answer,[28] nor to a defense which is supported by lengthy statements of facts or documents;[29] nor where the complaint alleged

Ins. Co., 15 Daly, 517; 29 St. Rep. 409, 8 N. Y. Supp. 532; New York, L. E. & W. R. R. Co. v. Robinson, 25 Abb. N. C. 116; 12 N. Y. Supp. 208.

14 Guinzburg v. Joseph, 141 App. Div. 472; 126 N. Y. Supp. 324.

15 Poillon v. Lawrence, 43 N. Y. Superior Ct. 385. See Poillon v. Lawrence, 77 N. Y. 207.

16 Link v. Sprague, cited by counsel in Brinkerhoff v. Brinkerhoff, 8 Abb. N. C. 207.

17 Brinkerhoff v. Brinkerhoff, 8 Abb. N. C. 207.

18 Williams v. Kilpatrick, 21 Abb. N. C. 61; Hartford Nat. Bank v. Beinecke, 15 App. Div. 474; 44 N. Y. Supp. 486; 26 N. Y. Civ. Pro. R. 226.

19 Steinway v. Steinway, 26 N. Y. Supp. 657, 52 St. Rep. 660; Richards v. Greason, 128 App. Div. 320, 112 N. Y. Supp. 675.

20 Seaton v. Garrison, 116 App. Div. 301. See Twamley v. McKennell, 137 App. Div. 574, 122 N. Y. Supp. 237.

21 Timble v. Russell, 41 Misc. 577; 85 N. Y. Supp. 109. Held otherwise when the judgment was in another State; Columbus, H. V. & T. R. R. Co. v. Ellis, 25 Abb. N. C. 150; 11 N. Y. Supp. 768, 19 Civ. Pro. R. 66.

22 Toplitz v. Levering, 71 App. Div. 37; 75 N. Y. Supp. 678.

23 Schwan v. Mutual Trust F. L. Ass'n, 9 Civ. Pro. R. 82.

24 Timble v. Russell, 41 Misc. (N. Y.) 577, 85 N. Y. Supp. 109.

25 Voisin v. Mitchell, 96 N. Y. Supp. 386; N. Y., L. E. & W. R. R. Co. v. Robinson, 25 Abb. N. C. (N. Y.) 116, 12 N. Y. Supp. 208; Columbus, H. V. & T. R. R. Co. v. Ellis, 25 Abb. N. C. (N. Y.) 150, 11 N. Y. Supp. 768; Johnson v. Andrews, 34 Misc. (N. Y.) 89, 68 N. Y. Supp. 764; City Equity Co. v. Bodine, 141 App. Div. (N. Y.) 907, 126 N. Y. Supp. 439.

26 Avery v. N. Y. C. & H. R. R. R. Co., 6 N. Y. Supp. 547, 24 St. Rep. 918 affirmed 117 N. Y. 660; Shaff v. United Surety Co., 142 App. Div. 465, 127 N. Y. Supp. 8.

27 Hallenborg v. Greene, 87 App. Div. 259; 84 N. Y. Supp. 319.

28 Steinway v. Steinway, 26 N. Y. Supp. 657; 52 St. Rep. 660.

29 Zeiner v. Mutual Reserve Fund Life Ass'n, 51 App. Div. 607, 64 N. Y. Supp. 63; Columbus, H. V. &

compliance by plaintiff with all the conditions of the contract upon which he sued, and the answer interposed a general denial and specified conditions which it alleged plaintiff had not performed.[30] It was held that the right to compel a reply was waived by a delay until the action was referred and noticed for hearing,[31] but not by service of a cross-notice of trial.[32]

The Equity Rules are silent as to whether, when the plaintiff wishes to meet a defense by confession and avoidance, he can be permitted to reply against the opposition of the defendant. In England, the rules expressly give the plaintiff the right to reply to any defense in an answer by leave of the Circuit Court.[33] Under the New York Code of Civil Procedure, a defense in an answer may be met by confession and avoidance without any reply.[34]

§ 204. Effect of reply. According to the former practice, the complainant by filing a general replication admitted the sufficiency as regards discovery,[1] and as regards the form of pleading,[2] but not the sufficiency as a defense,[3] of the plea or answer to which it was filed, and denied every allegation in the plea or answer which was not directly responsive to the bill.[4]

Where the plaintiff's pleadings stated, that he had been appointed substituted trustee in a proceeding for the dissolution of a corporation, and that a prior decree had vested in his predecessor all the corporation's property and things of action, to

T. R. R. Co. v. Ellis, 25 Abb. N. C. 150; 11 N. Y. Supp. 768; 19 Civ. Proc. R. 66.

30 Burr v. Union Surety & Guaranty Co., 86 App. Div. (N. Y.) 545, 83 N. Y. Supp. 756.

31 Sterling v. Mut. Life Ins. Co., 6 State Rep. (N. Y.) 96.

32 Cavanagh v. Oceanic S. S. Co., 30 State Rep. (N. Y.) 532, 9 N. Y. Supp. 198.

33 Order XIII. Ann. Cas. 1913, p. 395.

34 Met. L. I. Co. v. Meeker, 85 N. Y. 614.

§ 204. 1 Story's Eq. Pl., § 877; Hughes v. Blake, 6 Wheat. 453, 5 L. ed. 303.

2 McKim v. White Hall Co., 2 Md. Ch. 510.

3 Equity Rule 33; Everts v. Agnes, 4 Wis. 343; Rule 33; Matthews v. Lalance & G. Mfg. Co., 2 Fed. 232. But see Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & C. H. T. Co., 5 Bann. & A. 584.

4 Humes v. Scruggs, 94 U. S. 22, 24 L. ed. 51. It was held that the general replication put in issue the validity of a deed set up in the answer although not questioned by the bill. Boyd v. Hawkins, 2 Dev. (N. C.) Eq. 195. But see McClane's Adm'x v. Shepherd's Ex'x, 21 N. J. Eq. 76; Cowart v. Perrine, 21 N. J. Eq. 101.

which he had succeeded, and that he had received authority to collect all its debts and claims; it was held that no force could be given to his denial in a replication that the corporation and its officers after the entry of the first decree were without control of its affairs or management.[5]

§ 205. Frame of a reply. The full title of the cause, as it stands at the time the reply is filed, must be set forth in the heading of the reply, but only the names of such of the defendants as have appeared should be inserted or inferred to in its body. If a defendant's name has been misspelled by the plaintiff, and such defendant has corrected the same by his answer, but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title of the reply. In the body of the reply, however, the correct name only should be inserted. When any defendant has died since the bill was filed, the words "since deceased" should follow his name in the title, but his name should be omitted in the body of the replication. If the plaintiff joins issue with all the defendants their names need not be repeated in the body; it is sufficient in such case to designate them as "all the defendants;" but if he does not join issue with all, the names of the defendants must be set out in the body.[1] A reply should be signed individually by one or more of the solicitors for the complainant.[2] Unless the complainant appears in person in the case, it would probably be sufficient for the defendant to sign the same individually.[3] It is the safer practice to have his individual signature acknowledged. It has been held, in England, that a reply must not set up new claims.[4]

5 Strout v. United Shoe Machinery Co., 208 Fed. 646.

§ 205. 1 Daniell's Ch. Pr. (4th Am. ed.) 830, 831.

2 Eq. Rule 24.

3 U. S. R. S., § 747.

4 Williamson v. L. & W. Ry. Co., 12 Ch. D. 787.

CHAPTER XII.

AMENDMENTS OF WRITS, PROCESS AND PLEADINGS, AT LAW AND IN EQUITY

§ 206. Amendments. In general. The Revised Statutes provide: "No summons, writ, declaration, return process, judgment, or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such condition as it shall, in its discretion, and by its rules, prescribe."[1]

"In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to technical rules of practice. Undoubtedly great caution should be exercised where the application comes after the litigation has continued

§ 206. [1] U. S. R. S., § 954. See Parks v. Turner, 12 How. 39, 46, 13 L. ed. 883, 887; Roach v. Hulings, 16 Pet. 319, 10 L. ed. 979; Tilton v. Cofield, 93 U. S. 163, 167, 23 L. ed. 858, 859; Jacob v. U. S., Brock. 520, 525; Rosenbach v. Dreyfuss, 1 Fed. 391; U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Warren v. Moody, 9 Fed. 673; Thomas v. U. S., 15 Ct. Cl. 242; Russell v. U. S., 15 Ct. Cl. 168; Gulf, C. & S. F. Ry. Co. v. James, 48 Fed. 148, 150; Am. Alkali Co. v. Campbell, 113 Fed. 398; Great

for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side."[2]

The act of March 3, 1915, provides concerning all the courts of the United States: "In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."[3]

"Where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."[4] It has been held that this does not authorize an appellate court to maintain the jurisdiction by the dismissal of an unnecessary party.[5]

After naturalization the court has no power to amend its record by altering the name by which the new citizen was therein described,[6] nor by changing the sovereignty which he abjured.[7]

Northern Ry. Co. v. Herron, C. C. A., 136 Fed. 49; U. S. R. S., §§ 636, 948, 914, Comp. St., §§ 5595, 5596.

2 Harlan, J., in Hardin v. Boyd, 113 U. S. 756, 761, 28 L. ed. 1141, 1142. See Nellis v. Pennock Mfg. Co., 38 Fed. 379.

3 38 St. at L. 956, Comp. St. § 1251a. See National Surety v. U. S., C. C. A., 228 Fed. 577.

4 38 St. at L. 956, Comp. St. § 1251c.

5 Thomas v. Anderson, C. C. A., 8th Ct. 223 Fed. 41, 43.

6 *Re* Holland, 237 Fed. 735.

7 U. S. v. Vogel, C. C. A., 262 Fed. 262, overruling several cases therein cited; *supra*, § 151b.

8 Andas v. Highland Land & Bldg. Co., C. C. A., 205 Fed. 862.

It has been held that the prayer for relief in a petition is no part of the notice required to make due process of law and that an amendment of the prayer after defendant has made default in appearance does not invalidate the judgment thereupon.[8] States,[9] charities,[10] infants,[11] idiots, and lunatics are allowed to amend in cases where courts might hesitate to grant the privilege to others. Amendments are rarely allowed to the plaintiffs in penal actions and actions to enforce forfeitures.[12]

§ 207. Amendments of writs and process. A writ may be amended by adding thereto: a date;[1] or, in a removal case, where the State statute so permits, a seal;[2] or, if it is under seal, by adding the proper teste[3] or signature[4] to the same; or the return day, when served after the original return day had passed;[5] or by directing it to a defendant in his official instead of his individual capacity;[6] or when indorsed by an attorney not admitted to practice in the Federal court, but qualified for such admission, by substituting another attorney,[7] or by admitting the original attorney to practice as of a date prior to the issue of the writ;[8] but when issued in the Federal court without a seal or signature, the defect cannot be cured by amendment.[9] Petitions and bonds on removal are process within the statute and may be amended in a proper case.[10] It has been held that an omission in the papers upon which an attachment has been granted may be supplied by amendment in a case where the State practice does not permit such a cure.[11]

9 Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

10 President of St. Mary M. College v. Sibthorp, 1 Russ. 154.

11 Serle v. St. Eloy, 2 P. Wms. 386; Pritchard v. Quinchant, Amb. 147; Story's Eq. Pl., §§ 59, 892.

12 U. S. v. Batchelder, 9 Int. Rev. Rec. 98, Fed. Cas. No. 14,451.

§ 207. 1 Gilbert v. South Carolina I. & W. I. Exposition Co., 113 Fed. 523.

2 Wolf v. Cook, 40 Fed. 432.

3 U. S. v. Turner, 50 Fed. 734.

4 Bryan v. Ker, 222 U. S. 107, 56 L. ed. 114.

5 Speare v. Stone, C. C. A., 193 Fed. 375.

6 Hastings v. Herold, 184 Fed. 759.

7 Jewett v. Garrett, 47 Fed. 625.

8 Ibid.

9 Dwight v. Merritt, 4 Fed, 614; Peaslee v. Haberstro, 15 Blatchf. 472. *Contra*, Chamberlain v. Mensing, 47 Fed. 435.

10 Kinney v. Columbia Sav. & L. Ass'n, 191 U. S. 78, 48 L. ed. 103. See *infra*, §§ 546, 547.

11 Bowden v. Burnham, 59 Fed. 752, 754; Erstein v. Rothschild, 22 Fed. 61, 64; Booth v. Denike, 65 Fed. 43; *infra*, Section on Attachment.

§ 208. Amendment of pleadings at common law. It has been held that the time and manner of the amendment of pleadings at common law is determined by the practice of the State where the court is held;[1] but, in matters of form, they may be amended in cases where the State statute gives no such permission.[2] The court has power upon the trial to increase the amount of damages demanded in the complaint.[3] Where the State practice is silent, amendments at common law will usually be allowed in cases in which they would be allowed in equity and they have the same effect.

§ 209. When bills in equity can be amended. The equity rules regulate the amendments of bills as follows: "The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.[1] After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge." "The answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it."[2] "The court may, at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[3]

§ 208. [1] Rosenbach v. Dreyfuss, 1 Fed. 391. See U. S. R. S., § 914. *Contra* as to amendments upon the trial, Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983. See U. S. R. S., § 954; Erstein v. Rothschild, 22 Fed. 61.

[2] U. S. R. S., § 954; Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983.

[3] Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983.

§ 209. [1] Eq. Rule 28. See Gubbins v. Laughtenschlager, 75 Fed. 615; Beavers v. C. A. Richardson & Co., 118 Fed. 320; National Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816.

[2] Eq. Rule 30.

[3] Eq. Rule 19.

A bill may be amended although the new matter was known to the complainant when the bill was filed.[4]

Under the former practice, where objections to the jurisdiction had been sustained without any general appearance, or any pleading by the defendant, the bill might always be amended.[5] For the purposes of the rule as to amendments, an answer which had been held or admitted to be insufficient, was considered as no answer.[6] In New York, it was held that, after an insufficient answer, the complainant could not amend by leaving out the defendant's name, thus discontinuing the suit without costs.[7] An amendment of a bill without payment of costs or service of a copy on the defendant might be withdrawn and did not then extend the defendant's time to plead.[8]

Under the old chancery practice, it was not usual to give leave to amend when a general demurrer was sustained, but in the discretion of the court that might be done.[9] Under the rules of 1842, if upon a hearing any demurrer or plea was allowed, the court might, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it deemed reasonable.[10] If the defect in the bill was clearly one that went to the whole equity of the plaintiff's case, leave to amend would not be granted.[11] Leave to amend might also be refused when the case for the defendant was a hard one and he was free from wrongdoing while the plaintiff had had an opportunity to plead the new matter when his bill was first drawn.[12] When a demurrer had been sustained, an amendment which did not cure the defect would not be allowed.[13]

After a case has been set down for a hearing upon the facts,

4 Whitaker v. Whitaker Iron Co., 238 Fed. 980.

5 Insurance Co. of N. A. v. Svendsen, 74 Fed. 346.

6 Daniell's Ch. Pr. (2d Am. ed.) 473. See Chase v. Dunham, 1 Paige (N. Y.), 572.

7 Chase v. Dunham, 1 Paige (N. Y.), 572.

8 Sheffield F. Co. v. Witherow, 149 U. S. 574, 576, 37 L. ed. 853, 855.

9 Wellesley v. Wellesley, 4 Myl. & Cr. 554, 558.

10 Eq. Rule 35, of 1842.

11 Langdell's Eq. Pl., § 96; Tyler v. Bell, 2 Myl. & Cr. 89; Lowe v. Farrie, 2 Madd. 101; Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961.

12 Dowell v. Applegate, 8 Fed. 698; s. c., 7 Saw. 232.

13 McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961, 965.

and especially after such a hearing, an amendment which substantially changes the case made by the bill will rarely be granted,[14] but the courts of first instance and of review [15] usually grant applications for leave to amend so as to correct clerical errors [16] and to make the pleadings conform to evidence that has been taken without objection,[17] and they often permit the necessary jurisdiction averments then to be added.[18] No variance between the pleadings and the proofs is material unless of a character to mislead the opposite party.[19]

An amendment may be allowed by the court at any time even when a motion to dismiss a bill is pending [20] or even after a final decree [21] or a judgment at law and after a decision upon a writ of error when a new trial has been ordered; [22] or upon an appeal when leave is granted to both sides to adduce further evidence.[23] In the latter case ordinarily leave from the appellate

14 The Tremolo Patent, 23 Wall. 518, 527, 23 L. ed. 97, 98; Gubbins v. Laughtenschlager, 75 Fed. 615; Bass, R. & G. v. Feigenspau, 82 Fed. 260; Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Atchison, T. & S. F. Ry. Co. v. Gilliland, C. C. A., 193 Fed. 608; Healey Ice Machine Co. v. Green, 184 Fed. 515.

15 Crescent Milling Co. v. H. N. Strait Mfg. Co., C. C. A., 227 Fed. 804.

16 Mellwood Distilling Co. v. Harper, 167 Fed. 389, an error in the name of the complainant.

17 Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Pa. Steel Co. v. N. Y. City Ry. Co., 190 Fed. 602; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Lusk v. Bush, C. C. A., 199 Fed. 369; Flint & P. M. R. Co. v. McPherson, C. C. A., 105 Fed. 210, 44 C. C. A., 449; Freund v. S. H. Greene & Sons Corporation, 139 Fed. 703; Pa. R. Co. v. Cole, 214 Fed. 948, 950; Harris v. Egger, C. C. A., 226 Fed. 389; Davis v. Gates, 235 Fed. 192; Law v. Illinois Cent. R. Co., C. C. A., 208 Fed. 869, 870.

18 Baglin v. Title Guaranty & Surety Co., 166 Fed. 356; McEldowney v. Card, 193 Fed. 475; Atchison, T. & S. F. Ry. Co. v. Gilliland, C. C. A., 193 Fed. 608; Crosby v. Cuba R. Co., 158 Fed. 144.

19 Penn. Co. v. Whitney, C. C. A., 169 Fed. 572, 578, citing Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. ed. 230; Baltimore & P. R. R. Co. v. Cumberland, 176 U. S. 232, 238, 20 Sup. Ct. 380, 44 L. ed. 447; Schiffen v. Anderson, C. C. A., 146 Fed. 457, 459.

20 Crown Feature Film Co. v. Bettis Amusement Co., 206 Fed. 362.

21 The Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; McEldowney v. Card, 193 Fed. 475; Maddox v. Thorn, 60 Fed. 217. See Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272; Fitchburg R. Co. v. Nichols, C. C. A., 85 Fed. 869.

22 Farmer v. Atlantic Coast Line R. Co., 205 Fed. 319.

23 Rio Grande Dam & Irr. Co. v.

court to apply for the amendment must be obtained; but where a decree upon the pleading has been reversed and the cause remanded for further proceedings, the complainant may be allowed by the court of first instance to amend his bill without express leave of the court of review.[24] The power of the court of first instance to allow an amendment pending an appeal,[25] or writ of error,[26] is extremely doubtful.

§ 210. Form of amendment of a bill. "Wherever leave to amend the bill is granted, it is more proper to file an amended bill than to interline the original bill, particularly if some of the defendants had before answered that bill."[1] "The rule is that the amended bill should state no more of the original bill than may be necessary to introduce, and to make intelligible, the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out and separating the old from the new matter, at the peril of having their answer excepted to if any mistake should happen, and all the matter of the amended bill should not be answered."[2] Accordingly, an amended bill which was obnoxious to this rule was held impertinent.[3] It is the better practice for the solicitor to sign the amendment.[4]

U. S., 215 U. S. 266, 268, 54 L. ed. 190, 192; Newcomb v. Burbank, C. C. A., 181 Fed. 334.

24 Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 268, 54 L. ed. 190, 192, where the mandate authorized the court below "to grant leave to both sides to adduce further evidence;" Am. Bell Tel. Co. v. U. S., 68 Fed. 542, 570.

25 *Re* Sanford Fork & Tool Co., 160 U. S. 247, 40 L. ed. 414; Berliner Gramophone Co. v. Seaman, C. C. A., 113 Fed. 750.

26 St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689, 693.

§ 210. 1 Peirce v. West's Ex'rs, 3 Wash. 354, 355.

2 Ibid. In Alabama, where the amendment was inconsistent with the allegations in the original bill, which it did not correct or withdraw, the bill as amended was dismissed upon demurrer. Friedman v. Fennell, 94 Ala. 570, 10 S. R. 649. For a case where a paper described as an "amended petition" was treated as an amendment to the petition and as setting forth not a substitute to the original cause of action, but an additional or alternative claim, see Melton v. Pensacola Bank & Trust Co., C. C. A., 190 Fed. 126, 136.

3 Peirce v. West's Ex'rs, 3 Wash. 354, 355.

4 Daniell's Ch. Pr. (5th Am. ed.) 313.

Where the construction of an amendment is doubtful it will be held to be made to conform to the order under which it was made and not leave the amended pleading in effect unchanged.[5]

Allegations in a *remittitur* filed after judgment cannot be considered as amendments to a pleading.[6] A stipulation may be treated as an amendment.[7]

The action of the court in submitting a case to a jury on a certain theory inconsistent with the plaintiff's pleading when no exception on that ground was made, may be treated as an amendment to his pleading, although no formal amendment is shown in the record.[8]

§ 210a. Effect of amendment in general. An amendment speaks as of the date of the original bill;[1] and an amendment alleging the requisite difference of citizenship in the present tense will be presumed to refer to the date of the original bill and will sustain the jurisdiction.[2] Where the original bill stated that the infringements charged were since a specified date, it was held that the general allegations in an amendment as to infringement at divers times since the issue of the patents did not authorize proof thereof prior to the time alleged in the original pleading.[3] Where an amended bill recited the substance of the original and made the same a part thereof, it was held that a corporation made a party to the original was a party to the amended bill.[3a]

The amendment of a bill was usually considered as an admission of the sufficiency of the answer as regards discovery;[4] but an amendment which merely brought in a new defendant did not have this effect;[5] and the court might, to prevent delay, enter-

5 Bogert v. Southern Pac. Co., 215 Fed. 218.

6 Am. Surety Co. v. Sanberg, 225 Fed. 150. See Central Life Securities Co. v. Smith, C. C. A., 236 Fed. 170.

7 Denny v. Pironi, 141 U. S. 121, 35 L. ed. 657.

8 Schiffer v. Anderson, C. C. A., 146 Fed. 457, 459; Erie R. Co. v. Kennedy, C. C. A., 191 Fed. 332.

§ 210a. 1 Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199.

2 Birdsall v. Perego, 5 Blatchf. 251; Baltimore & O. R. Co. v. McLaughlin, C. C. A., 73 Fed. 519; Campbell v. Johnson, C. C. A., 167 Fed. 102. *Contra*, Sanbo v. Union Pac. Coal Co., 146 Fed. 80.

3 Geneva Mfg. Co. v. Nat. Furniture Co., 188 Fed. 663.

3a Empire C. & Tr. Co. v. Empire C. & M. Co., 150 U. S. 159, 37 L. ed. 1037.

4 Smith's Ch. Pr. (2d Eng. ed.) 307.

5 Taylor v. Wreneh, 3 Ves. 715.

tain a motion to amend a bill in equity at the time that exceptions to the answer are filed, and then require the defendant to answer the amendments and the exceptions together.[6] A suggestion by a defendant, that an amendment, as to which evidence had been offered, should be allowed *nunc pro tunc*, does not estop him from filing an answer pleading the statute of limitations to the same.[7]

An amendment of a bill, at least before answer, will not, it seems, dissolve an injunction previously granted.[8] It is, however, the usual and the safer practice to have a clause inserted in the order stating that the amendment may be made without prejudice to the injunction.[9] Unless otherwise provided in the order, it seems that an amendment of a bill will discharge all contempt proceedings previously instituted.[10] But it was held that an amendment of a bill may be allowed upon the hearing of an application for a preliminary injunction, whereupon it takes effect at once, and the hearing may proceed without an adjournment until after the issue of the new subpœna which the amendment necessitates.[11] It has been said: that, when the defense of laches, appearing on the pleadings, is raised upon the trial, the complainants may be permitted to amend and the court will then rule upon the defense in accordance with the pleadings as amended.[12]

§ 210b. Time from which amendment takes effect. An amendment to a petition which sets up no new cause of action and makes no new demand, but simply varies or expands the allegations in support of the cause of action, previously pleaded, relates back to the beginning of the action; and when the suit was begun within the statutory period of limitation, it is not barred by the expiration of such time previous to the amend-

6 Kittredge v. Claremont Bank, 3 Story, 590.

7 U. S. v. Dalcour, 203 U. S. 408, 51 L. ed. 248.

8 Read v. Consequa 4 Wash. 174, 180; Smith's Ch. Pr. (2d Eng. ed.), 306; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

9 Read v. Consequa, 4 Wash. 174; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

10 Smith's Ch. Pr. (2d Eng. ed.) 305; Gray v. Campbell 1 R. & M. 323; Symonds v. Duchess of Cumberland, 2 Cox, 411.

11 American S. W. Co. v. Wire D. & D. W. Unions, 90 Fed. 598.

12 Alexander v. Fidelity Trust Co., 214 Fed. 495.

ment;[1] but an amendment which introduces a new or different cause of action and makes a new or different demand, is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is made.[2] The former rule applies although the two causes of action arise out of the same transaction, when, by the practice of the State, a plaintiff is only required, in his pleading, to state the facts which constitute his cause of action.[3] It has been said that an amendment changes the cause of action only where the pleader deserts in point of fact the ground which he had first taken, or puts the same facts on a new ground in point of law.[4]

An amendment relates back to the commencement of the action as regards the Statute of Limitations when it makes: a change in the date of a contract upon which the suit is brought,[5] or a slight modification in the compensation thereunder,[6] or an enlarged statement of the terms of the contract which is not inconsistent with the original allegations.[7] In two actions upon awards made by the Interstate Commerce Commission a transfer of the awards from one suit to another was held not to make two new causes of action.[8] So, when the complaint stated facts, from which the law raised the legal presumption of a promise to pay the balance of an account stated and demanded judgment for that amount, it and this amendment, added an averment of a promise to pay the balance.[9]

So when the original declaration referred to a State law and the amendment to the Federal Employers' Liability Act, the allegations of fact, except as to the capacity in which the plaintiff sued, being in both pleadings the same.[10]

§ 210b. [1] Illinois Surety Co. v. Peeler, 240 U. S. 214; Seaboard Airline Ry. v. Renn, 241 U. S. 290, 293; Patillo v. Allen-West Commission Co., 131 Fed. 680; Bison State Bank v. Billington, C. C. A., 228 Fed. 116.

[2] U. S. v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251.

[3] Patillo v. Allen-West C. Co., 131 Fed. 680; Seaboard Airline Ry. v. Renn, 241 U. S. 290, 293.

[4] Galesbury & K. El. Ry. Co. v. Hart, 221 Fed. 7.

[5] Standard Bitulithic Co. v. Curran, C. C. A., 256 Fed. 68.

[6] Galesbury & K. El. Ry. Co. v. Hart, C. C. A., 221 Fed. 7.

[7] MacGlashan v. Langston, 244 Fed. 831. But see Maryland Casualty Co. v. Price, C. C. A., 231 Fed. 397.

[8] Penn. R. Co. v. Minds, C. C. A., 244 Fed. 53.

[9] Patillo v. Allen-West C. Co., 131 Fed. 680.

[10] Mo. K. & T. Ry. Co. v. Wulf, 260 U. S. 570; Seaboard Airline Ry.

No new cause of action was stated in an action for wrongful death, by an amendment enlarging the statement of the damages.[11] Nor by an additional allegation of a new act or omission constituting negligence.[12] There seems to be no reason why this rule should not be applied to any action for damages where negligence is charged.[13] Nor to an action for wrongful death where the original complaint was founded upon the statute of a different state from that which was inserted by the amendment.[14] But it has been held: that a new cause of action is presented by changing the ground of recovery from a right at common law to one under a Kansas statute,[15] or from a right under a treaty to a right under a statute, which did away with the defense that the negligence of which complaint was made was that of a fellow-servant;[16] and that if the statutory period expired before such an amendment, the claim was barred.[17] Where a bill to rescind a sale for fraud and to recover incidental damages was transferred from the equity to the law side of the court because the plaintiff had made it impossible to restore the status quo, it was held that an amended petition claiming damages for the fraud did not change the cause of action.[18] Where the plaintiff sued to collect a claim for material, an amendment setting up a further claim for material furnished by another and assigned to him was held to state a new cause of action and not to relate back to the commencement of the suit,

v. Koennecke, 239 U. S. 352; Seaboard Airline Ry. v. Renn, 241 U. S. 290; Smith v. Atlantic Coast Line R. Co., C. C. A., 210 Fed. 761; O'Dell v. Southern Ry. Co., 248 Fed. 343, 345. See Lucchetti v. Phila. & R. Ry. Co., 233 Fed. 137.

11 Truckee River Gen. El. Co. v. Benner, C. C. A., 211 Fed. 79, p. 726A.

12 Illinois Cent. R. Co. v. Norris, C. C. A., 245 Fed. 926; M'Clintic-Marshal Const. Co. v. Forgy, C. C. A., 246 Fed. 193, 199; Arbunich v. United Railroads of San Francisco (Cal. D. C. App., Oct. 1915), 152 Pac. 51.

13 Owl Creek Coal Co. v. Goleb, C. C. A., 210 Fed. 209; Coeur d'Alene Lumber Co. v. Thompson, C. C. A., 215 Fed. 8; Western Coal & Min. Co. v. McCallum, C. C. A., 237 Fed. 1003.

14 Williams v. William B. Scaife & Sons Co., 227 Fed. 922.

15 Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983; U. S. v. Dalcour, 203 U. S. 408, 51 L. ed. 248.

16 Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 298, 39 L. ed. 983. 991; U. S. v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251.

17 Ibid.

18 Friederichsen v. Renard, 247 U. S. 207, reversing 231 Fed. 882.

although the amount prayed for in the original petition was sufficient to cover both claims.[19] The same ruling was made when plaintiff sued in replevin to recover prints which infringed his copyright and subsequently amended to aver an additional claim to recover the statutory penalty for each copy seized.[20]

In an action to recover unpaid duties founded upon defendant's fraud in suppressing documents which would have shown undervaluation the court disallowed an amendment, after the statute of limitations had run, resting the action upon the defendant's knowledge of the undervaluation.[21] And in an action to recover penalties for importation of contract laborers, disallowed an amendment charging new and different statements of the offense.[22]

Where argument of a demurrer was postponed without the defendant's objection until after the period of limitation had expired, leave to amend was granted the plaintiff without regard to the fact that new causes of action were thereby inserted.[23]

§ 211. What amendments may be made to bills in equity and declarations at common law. By the former practice an amendment in a bill in equity was required and usually allowed whenever the plaintiff wished to avoid and not merely deny a defense in the answer which had not been anticipated in the original bill.[1] An amendment should rarely if ever be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs.[2] It is unsettled whether a bill for discovery can be

19 Salyers v. U. S., C. C. A., 257 Fed. 255.

20 Hills & Co. v. Hoover, C. C. A., 211 Fed. 241.

21 U. S. v. Salen, 244 Fed. 196.

22 U. S. v. Dwight Mfg. Co., 210 Fed. 79.

23 U. S. v. Dwight Mfg. Co., 210 Fed. 85.

§ 211. 1 Wilson v. Stolley, 4 McLean, 275; Lant v. Manley, C. C. A., 75 Fed. 627, 634; Piatt v. Vattier, 9 Peters, 405, 9 L. ed. 173. See *supra*, §§ 136, 195. This rule did not require that the amendment set forth evidence, such as a judgment or decree, to establish any fact put in issue by the pleading, Southern Pac. R. Co. v. U. S., 168 U. S. 1, 42 L. ed. 355.

2 Harlan, J., in Hardin v. Boyd 113 U. S. 756, 761, 28 L. ed. 1141, 1142. Thus, where a bill for the enforcement of a judgment lien upon certain property was filed against certain specified defendants, an amendment was refused after a hearing, when it was sought to seek discovery and relief against all purchasers of both the property referred to in the original bill and other property of the judgment

debtor. Sneed v. McCoull, 12 How. 407, 422, 13 L. ed. 1043, 1049. A bill to restrain the infringement of a patent cannot be amended so as to allege that the title to the patent is in a different person from the one who in the original bill is alleged to hold it. Goodyear v. Bourn, 3 Blatchf. 266. See Rylands v. La Touche, 2 Bligh, 586. But see Owatonna Mfg. Co. v. F. B. Fargo & Co., 94 Fed. 519; *infra*, § 231. Such a bill may, however, be amended so as to set up a reissue of the original patent, which occurred before the original bill was filed, but was not mentioned herein. The Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; Reay v. Raynor, 19 Fed. 308; Reay v. Berlin & J. E. Co., 30 Fed. 448. But see Jones v. Barker, 11 Fed. 597. And so as to include claims for damages and profits due previous owners of the patent, who have assigned them to the complainant. N. Y. Grape S. Co. v. Buffalo Grape S. Co., 20 Fed. 505. The allegation that certain machines alleged to be used in violation of a patent were infringements when made may also be added by amendment. Reay v. Raynor, 19 Fed. 308. It was held that a bill for a new trial of an action for the price of stock alleged to have been sold the defendant could *not* be changed by amendment so as to charge that the defendant held the stock in trust for the complainant. Oglesby v. Attrill, 14 Fed. 214. A bill filed by several creditors praying the sale of their debtor's land in one State, and the satisfaction of their claims out of the proceeds of such sale, cannot be changed by amendment so as to pray relief to one against another of the plaintiffs, in respect to the receipt by the latter of the proceeds of the sale of other land of the same debtor situated in another State and sold under a decree in another suit in another court. Smith v. Woolfolk, 115 U. S. 143, 148, 29 L. ed. 357, 359. A bill by the Land Company of New Mexico to enforce an executory contract by the defendant Smoot for the sale of an interest in land of which the defendant Elkins had the legal title, and which it was alleged that Smoot was about to assign to the defendant Butler with Elkins's connivance, was held not amendable "by omitting all the parties but Elkins, and proceeding against him upon the theory that complainant had acquired Smoot's interest by an absolute and unconditional transfer." Land Co. v. Elkins, 120 Fed. 545. It was held that a creditor's bill, filed to obtain the appointment of a receiver of the property of a city, and the application by him of its assets to the satisfaction of its debts, could not be amended so as to seek relief against a receiver and back-tax collector, appointed by a subsequent statute of the State to collect the city's assets. Meriwether v. Garrett, 102 U. S. 472, 502, 26 L. ed. 197, 200. But see Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864. A bill to set aside a sheriff's sale *may* be amended so as to add a tender of the purchase price and a prayer for a redemption of property. Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839. A bill to set aside a contract for the sale of land as obtained by fraud may be amended by the addition of an alternative

amended so as also to pray relief.[3] It was held that a bill filed against persons in their individual capacity cannot be amended so as to sue them as officers of a corporation,[4] but that when two corporations of the same name were organized in different States, a mistake in the designation of the place of incorporation of the complainant [5] or defendant [6] might be corrected by amendment,

prayer for the specific performance of the contract. Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, distinguishing Shields v. Barrow, 17 How. 130, 15 L. ed. 158. A bill to enjoin a railroad company from transporting coal owned by a corporation, in which it is a stockholder, may be amended so as to set forth that the latter corporation is not a bona fide mining company, but merely an adjunct or instrumentality of the defendant, which is in effect the legal owner of the coal which it transports, and that by the use of its power as a stockholder the railroad company has practically obliterated all distinction between the two corporations. U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 55 L. ed. 458. A bill to remove a cloud upon the title to land may be amended so as to seek the enforcement of trusts relating to the same property. Partee v. Thomas, 11 Fed. 709. See also Neale v. Neales, 9 Wall. 1, 19 L. ed. 590; Battle v. Mutual Life Ins. Co., 10 Blatchf. 417; Burgess v. Graffam, 10 Fed. 216. But see Savage v. Worsham, 104 Fed. 80. It has been said that where the bill originally sets out one agreement which it seeks to enforce, and the answer admits the execution of another agreement of a similar character, but with provisions different from those alleged in the bill, the plaintiff may amend abandoning the agreement first pleaded by him, and obtain the enforcement of that admitted by the defendant; but that he cannot, while still praying the enforcement of the agreement as set out by him, amend so as to seek, in case he fail in proving that, an enforcement of the one admitted in the answer. Lindsay v. Lynch, 2 Sch. & Lef. 1, 9.

[3] See Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125; Butterworth v. Bailey, 15 Ves. 358; Hildyard v. Cressy, 3 Atk. 303; Crow v. Tyrell, 2 Madd. 397; Jackson v. Strong, 1 McClel. 245; Lousada v. Templer, 2 Russ. 565; Daniell's Ch. Pr. (2d. Am. ed.) 263–465.

[4] Tyler v. Galloway, 13 Fed. 477. But see Womersley v. Merritt, L. R. 4 Eq. 695; Richmond v. Irons, 121 U. S. 27; 30 L. ed. 864; Pendery v. Carleton, 87 Fed. 41.

[5] Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

[6] Bainum v. Am. Bridge Co. of N. Y., 141 Fed. 179, where one company was designated in its corporate name as "of New York" and the other as "of New Jersey;" Hernan v. Am. Bridge Co., C. C. A., 167 Fed. 930; Clemmens v. Washington Park Steamboat Co., 171 Fed. 168. In Am. Surety Co. v. Maryland Casualty Co. (Kansas), 155 Pac. 59, the New Century Zinc & Min. Co. of Delaware was sued as the New Century Mining Company described as a Kansas corporation. No objection was

and that so may be a mistake in the name of a corporation defendant which has appeared and defended.[7] A cross-bill has been amended so as to radically change the ground of the relief sought, when the proofs which make the amendment necessary have been furnished by the complainant in support of the latter's original bill.[8] When the suit was begun in a Federal court, that court may allow an amendment setting forth the facts essential to the Federal jurisdiction, such as the requisite difference of citizenship,[9] or the sufficient value of the matter in dispute.[10] The court of review may allow an amendment setting forth the facts which show the requisite diversity of citizenship.[11] The practice in removed cases is considered in a subsequent section.[12] Great liberality is allowed as to amendments which strike out parties,[13] or bring in new parties,[14] except as to bills for discovery, to which in England no new parties could be added.[15] An amendment may be made so as to dismiss the complaint as regards proper but not indispensable parties whose presence would oust the court of jurisdiction [16] but an indispensable party whose citizenship would defeat the jurisdiction cannot be brought in by amendment,[17] and after a removal, an amendment to substitute a defendant for the purpose of defeat-

raised until after trial and judgment. It was held that the judgment was as valid as if it had been obtained against the company in its right name.

7 Clemmens v. Washington Park Steamboat Co., 171 Fed. 168.

8 Chicago M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 289, 33 L. ed. 900, 904.

9 38 St. at L. 956, Comp. St., § 1251c, quoted *supra*, § 206. Continental Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380; Halsted v. Buster, 119 U. S. 341, 30 L. ed. 462; Denny v. Pironi, 141 U. S. 121, 124, 35 L. ed. 657, 658; Springstead v. Crawfordsville Bank, 231 U. S. 541; Watson v. Bonfils, C. C. A., 116 Fed. 157; Maddox v. Thorn, 60 Fed. 217. See Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272. *Contra*, Dickinson v. Consol. Tr. Co., 114 Fed. 232, 242.

10 Thompson v. Automatic Fire Protection Co., 151 Fed. 945.

11 38 St. at L. 956, Comp. St., § 1251c, quoted *supra*, § 206.

12 *Infra*, Chapter XXXII, § 555.

13 Connolly v. Taylor, 2 Pet. 556, 7 L. ed. 518; Dwight v. Humphreys, 3 McLean, 104.

14 Fisher v. Rutherford, Baldwin, 188; Patterson v. Stapler, 7 Fed. 210.

15 Marquis Cholmondeley v. Lord Clinton, 2 Meri. 71.

16 Thomas v. Anderson, C. C. A., 223 Fed. 41. See § 43 *supra*.

17 Delaware, L. & W. R. Co. v. Mayer, etc., of Jersey City, 168 Fed. 128.

ing the jurisdiction has been denied.[18] A bill filed by a married woman can almost always be amended by the addition of the name of a next friend when necessary.[19] A bill filed on behalf of one's self and others may be amended by striking out the invitation to others to join, provided none of them have come in;[20] and a bill in one's own name may be amended by the addition of words sufficient to make it a bill in behalf of a class.[21] Amendments have been allowed so as to change a bill or declaration filed by the plaintiff individually into one filed by him as agent,[22] or as executor,[23] or as administrator [24] or a bill filed by him as administrator, into one filed by him as ancillary administrator,[25] or in his individual capacity,[26] or into a bill filed by the widow or next of kin of the intestate,[27] and a bill filed against an executor into one charging him as administrator of the same person,[28] and a suit against an individual into one against him as executor [29] although the statute of limitations had expired.[30] It has been said that

18 Taylor v. Weir, 162 Fed. 585, where there were circumstances from which an estoppel might arise.

19 Douglas v. Butler, 6 Fed. 228.

20 Yates v. Arden, 5 Cranch, C. C. 526; Anthony v. Campbell, C. C. A., 112 Fed. 212.

21 Richmond v. Irons, 121 U. S. 27, 30, L. ed. 864; Good v. Blewitt, 13 Ves. 397, 401; Atty. Gen. v. Newcombe, 14 Ves. 1, 6; Resse R. S. Min. Co. v. Atwell, L. R. 7 Eq. 347.

22 Fleitman v. McKinnon, C. C. A., 238 Fed. 98.

23 Leahy v. Haworth, C. C. A., 4 L.R.A. (N.S.) 657, 141 Fed. 850.

24 Missouri, K. & T. Ry. Co. v. Wulf, C. C. A., 192 Fed. 919; Reardon v. Balaklala Consol. Copper Co., 193 Fed. 189. An amendment was allowed upon the trial to permit an administratrix to amend by averring that her appointment was by a local court of a different county from that first alleged in her declaration. Chicago Great Western R. Co. v. McCormick, C. C. A., 200 Fed. 375.

25 Gould v. Suburban El. Lt. Co., 243 Fed. 950.

26 St. Louis & S. F. R. Co. v. Herr, C. C. A., 193 Fed. 950; Johnson v. Phoenix Bridge Co., 197 N. Y. 316.

27 Keystone Coal & Coke Co. v. Fekete, C. C. A., 6th Ct., 232 Fed. 72. See Salyer v. Consolidation Co., C. C. A., 6th Ct., 246 Fed. 794. *Contra*, Alexander v. Wilkes-Barre Ry. Co. (D. C. M. D., Pa.), 235 Fed. 461; Johnson v. Phoenix Bridge Co., 197 N. Y. 316; Chsaitis v. Lehigh Valley Coal Co., 174 App. Div. (N. Y.) 600; Benyak v. Lehigh Coal & Nav. Co., 166 App. Div. (N. Y.), 829, held that where the name of one of the parents was omitted from the title it might be added by amendment if the limitations prescribed by the statute had expired.

28 Randolph v. Barrett, 16 Pet. 138, 10 L. ed. 914.

29 Williams v. Cobb, 219 Fed. 663.

30 Reardon v. Balaklala Consol. Copper Co., 193 Fed. 189.

when the complaint contains any allegation of a ground of recovery, although merely inferential, the court has discretionary power to permit the defect to be cured by amendment.[31] In an English case, a bill in behalf of a charity was changed by amendment into an information.[32]

Before the new equity rules, it was held that in a removed case, a complaint containing a statement of grounds for equitable relief might be amended, so as to turn it into a bill in equity; although the issues have been tried on the common law side of the court.[33] Now, if at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.[34]

§ 212. Amendment by pleading matters subsequent to the filing of the bill. The general rule is that nothing which has occurred since the filing of a bill can be added to it by amendment.[1] Such matters, when admissible, should ordinarily be introduced by a supplemental bill.[2] It was held incompetent to amend a bill, stating that certain notes and mortgages were executed under a threat by the defendant that he would kill the complainant if they were not executed and paid at their maturity, by adding the allegation, "that in pursuance of such threat the defendant did, subsequently to the commencement of this suit, take the life of the original complainant."[3] Such a murder does not add to the complainant's cause of action, although

31 Great Northern Ry. Co. v. Herron, C. C. A., 136 Fed. 49.

32 President of St. Mary M. College v. Sibthorp, 1 Russ. 154.

33 Goodyear Shoe Machinery Co. v. Danceel, C. C. A., 119 Fed. 692; Danceel v. Goodyear Shoe Machinery Co., C. C. A., 144 Fed. 679, in which the author was counsel. The point does not appear in the report, but the permission was contained in the mandate, and objections to the same argued twice in the Circuit Court of Appeals, and again upon the petition for a certiorari which was denied by the Supreme Court; 202 U. S. 619, 50 L. ed. 1174.

34 Eq. Rul. 22.

§ 212. 1 Wray v. Hutchinson, 2 M. & K. 235; Mason v. Hartford, P. & F. R. Co., 10 Fed. 334; Copen v. Flesher, 1 Bond, 440; Lyster v. Stickney, 12 Fed. 609; Mellor v. Smither, C. C. A., 114 Fed. 116.

2 Kryptok Co. v. Haussmann & Co., 216 Fed. 267.

3 Lyster v. Stickney, 12 Fed. 609, 610.

it might be put in evidence as tending to prove the original duress.[4]

A bill may perhaps be amended before answer, demurrer, or plea, by alleging new matter that has occurred since it was first filed.[5] And it has been held that where a plaintiff has, at the time of filing his original bill, an inchoate right, to perfect which a formal act alone is necessary, and such formal act is not performed till afterwards; as where an executor files a bill before probate, and subsequently proves the testament,[6] or the next of kin brings a suit to protect the personal estate of an intestate, and subsequently procures her appointment as administratrix,[7] or a foreign administrator files a bill before obtaining ancillary letters of administration, and such letters are subsequently issued to him;[8] the introduction of the fact by amendment will be permitted.[9] It has been said that amendments might be allowed to set forth damages that accrued since the filing of the bill.[10]

It has been also held in England that the "defendant, when he puts in his answer, must state the facts as they *then* are; and if circumstances are then introduced in the answer which occurred subsequent to the filing of the bill the plaintiff must be allowed to make amendments to the bill, so as to show that such

4 Lyster v. Stickney, 12 Fed. 609.

5 Story's Eq. Pl., § 885; Candler v. Pettit, 1 Paige (N. Y.), 168; Ogden v. Gibbons, Haist. N. J. Dig. 172.

6 Belloat v. Morst, 2 Hayw. (N. C.) 157; Daniell's Ch. Pr. (2d Am. ed.) 460.

7 Humphreys v. Humphreys, 3 P. Wms. 348; Bradford v. Felder, 2 M'Cord (S. C.), Ch. 170. See Person v. Fidelity & Casualty Co., C. C. A., 92 Fed. 965; reversing S. C., 84 Fed. 759; Mo. Kansas & Tex. Ry. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355.

8 Swatzel v. Arnold, Woolw. 338; Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 624; Hodges v. Kimball, C. C. A., 91 Fed. 845; Leahy v. Haworth, C. C. A., 141 Fed. 850; holding that the ancillary letters related back to the date of the filing of the bill, not only for the purpose of qualifying complainant to sue, but also so as to defeat the statute of limitations. Dodge v. Town of North Hudson, 188 Fed. 489, an action under the State statute for negligence, which caused the death of the intestate. *Contra*, Mason v. Hartford, P. & F. R. Co., 10 Fed. 334.

9 Daniell's Ch. Pr. (2d Am. ed.) 460, 461; Swatzel v. Arnold, Woolw. 383; Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 618, 624; Humphreys v. Humphreys, 3 P. Wms. 348.

10 Mitchell v. Big Six Development Co., 186 Fed. 552.

new circumstances mentioned in the answer are not of the color he represents them, and so as to obtain a complete answer as to such circumstances."[11] Except as said above and possibly in a few cases of the assignment of patents,[12] where the plaintiff has no cause of action at the time the suit is brought, he cannot continue the suit by pleading the subsequent accrual of a cause of action to him.[13] Thus, a defective creditor's bill cannot be amended by setting up a judgment obtained after it was filed.[14] Where, prior to the filing of a bill for the infringement of a patent, the defendant had committed no infringement, and had threatened none; it was held: that a subsequent change in the structure, which constituted an infringement, would not warrant the granting of a preliminary injunction in the same suit.[15]

§ 213. Proceedings upon an amended bill. When the amendment merely brings in new parties defendant, they alone need be served with a new subpœna.[1] If, however, a bill is substantially amended by the addition of new charges, according to the English practice a subpœna to answer the amendments had to be sued out and served upon all the defendants.[2] Where, before answer, the bill is amended in a material point, the time to answer is extended to the same time as if the amended were an original bill.[3] If, however, a defendant has answered the original bill, he cannot, without obtaining leave to withdraw his first answer, answer to any more than the new matter, unless the amendments virtually make a new case.[4] Where the amend-

11 Sir Thomas Plumer, V. C., in Knight v. Matthews, 1 Madd. 566.

12 See *infra*, §§ 231, 234.

13 Putney v. Whitmire, 66 Fed. 385; Westinghouse Air-Brake Co. v. Christensen Engineering Co., 121 Fed. 558; Am. Bonding & Tr. Co. v. Gibson County, C. C. A., 145 Fed. 871.

14 Putney v. Whitmire, 66 Fed. 385.

15 Westinghouse Air-Brake Co. v. Christensen Engineering Co., 121 Fed. 558.

§ 213. 1 Longworth v. Taylor, 1 McLean, 514; Angerstein v. Clarke, Ves. Jr. 250; Skeffington v. ———, 4 Ves. 66; Am. Steel & Wire Co. v. Wire Drawers & Die Makers Unions, 90 Fed. 598, 601. (Where the amendment showed that individual defendants upon whom notice had been already served were officers and members of a voluntary association which it was sought to bind by the injunction.)

2 Cooke v. Davies, T. & R. 309; Bramston v. Carter, 2 Sim. 458. See Kendall v. Beckett, 1 Russ. 152.

3 Nelson v. Eaton, 66 Fed. 376.

4 Keene v. Wheatley, 9 Am. Law Reg. 33, 60; Atkinson v. Hanway, 1 Cox Eq. 360; Ellice v. Goodson, 3 M. & C. 653; Ritchie v. Aylwin

ments seek to introduce a new matter which is properly the subject of a supplemental bill, the defendant must raise that objection by answer,[5] or motion to dismiss.[6] Otherwise, the objection will be waived.[7] The equity rules provide that, "In any case where an amendment shall be made after answer filed, the defendant shall put in a new answer or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer."[8] An answer to an amended bill is impertinent if it contains any matter which was pleaded in the answer to the bill before amendment.[9] It seems to have been the English rule that an answer to an amended bill might set up an entirely new defense inconsistent with that in his former answer.[10] The court may after amendment refuse leave to file an answer which does not plead a defense to the new matter.[11]

§ 214. Amendment of answers and pleas. The Equity Rules provide concerning the amendment of answers: "The answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it."[1] It will be observed that this does not specifically provide for the insertion of a new affirmative defense by amendment, as was permitted by the former practice.[2] The principles upon which the courts proceed in allowing such amendments is thus stated by Judge Story: "In mere matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments. But when application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity

15 Ves. 79; North Chicago St. R. Co. v. Chicago Union Traction Co., 150 Fed. 612. See Ellice v. Goodson, 3 M. & C. 653.

5 Wray v. Hutchinson, 2 M. & K. 235.

6 Brown v. Higden, 1 Atk. 291.

7 Archbishop of York v. Stapleton, 2 Atk. 136.

8 Equity Rule 32; copied in substance from Eq. Rul. 46 of 1842.

9 Gier v. Gregg, 4 McLean, 202.

10 Daniell's Ch. Pr. (2d Am. ed.) 468; citing Bolton v. Bolton, MS. See also Trust & F. Ins. Co. v. Jenkins, 8 Paige (N. Y.) 589.

11 Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 289, 33 L. ed. 900, 905.

§ 214. 1 Eq. Rule 30.

2 See Smith v. Babcock, 3 Sumner, 538.

are exceedingly slow and reluctant in acceding to it. To support such applications, they require very cogent circumstances and such as to repel the notion of any attempt of the party to evade the justice of the cause, or to set up new and ingeniously contrived defenses or subterfuges. When the object is to let in new facts and defenses wholly dependent upon parol evidence, the reluctance of the court is greatly increased, since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room for the introduction of testimony manufactured for the occasion. But when the new facts sought to be introduced are written papers or documents, which have been omitted by accident or mistake, there the same reason does not apply in its full force, for such papers and documents cannot be made to speak a different language from that which originally belonged to them. The whole matter rests in the sound discretion of the court."[3] "It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put and sworn to. Where the party relies upon new acts which have come to his knowledge since the answer was put in, or where it is manifest that he has been taken by surprise, or where the mistake or omission is manifestly a mere inadvertence and oversight, there is generally less reason to object to the amendment than there is where the whole bearing of the facts and evidence must have been well known before the answer was put in."[4]

An amendment of an answer,[5] or a cross-bill, changing the character of the defense will rarely be allowed after the court has rendered or caused to be rendered an opinion adverse to the

3 Smith v. Babcock, 3 Sumn. 583, 586.

4 Smith v. Babcock, 3 Sumn. 583, 586; N. Y. Filter Co. v. O. H. Jewett F. Co., 62 Fed. 582.

5 Calloway v. Dobson, 1 Brock. 119; Gubbins v. Laughtenschlager, 75 Fed. 615; Claflin v. Bennett, 51 Fed. 693, 701. See Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398, Hamilton v. Nevada G. & S. M. Co., 33 Fed. 562, 568.

position originally taken by the defendant.[6] The defendant will rarely be allowed to withdraw an admission which he has made.[7] Leave to amend will be denied when the complainant proves conclusively by affidavit that the new matter sought to be introduced is false.[8] Ordinarily, leave to amend an answer will be denied when the defendant knew of the facts which he wishes to introduce, at the time his original answer was drawn;[9] or might have then discovered them by the exercise of reasonable diligence.[10] An omission due to a mistake of law cannot ordinarily be cured by amendment.[11] The court may refuse to allow an amendment which would introduce an unconscientious defense, such as the statute of limitations,[12] the statute of frauds,[13] or that a contract made by a complainant corporation was not authorized by its charter;[14] or because of laches.[15] Where on the trial defendant was granted permission to file an amended answer "more in detail" than one then stated, so much as raised new issues operating as a surprise was afterwards rejected.[16]

When the proposed amendment is trivial the answer may be removed from the file, altered, resworn to, and refiled;[17] but if it is of any length, it is customary to file a supplemental answer setting it forth.[18]

Pleas at common law, verified before the wrong officer, may be

6 Ferguson Contracting Co. v. Manhattan Tr. Co., C. C. A., 118 Fed. 791.

7 Ruggles v. Eddy, 11 Blatchf. 524; First Trust & Sav. Bank v. Bitter Root Valley Irr. Co., 251 Fed. 320.

8 Hicks v. Otto, 17 Fed. 539.

9 India R. C. Co., v. Phelps, 8 Blatchf. 85; Webster L. Co. v. Higgins, 13 Blatchf. 349; Cross v. Morgan, 6 Fed. 241; Suydam v. Truesdale, 6 McLean, 459. But see Standard El. I. Co. v. Ramsey, 130 Fed. 151; City of Hutchinson v. Kansas Bitulithie Co., C. C. A., 239 Fed. 659; Walker v. Giles, 207 Fed. 825. See Grinnell Washing Mach. Co. v. Clarinda Lawn M. Co., 237 Fed. 98.

10 India R. C. Co. v. Phelps, 8 Blatchf. 85; Webster L. Co. v. Higgins, 13 Blatchf. 349.

11 Webster L. Co. v. Higgins, 13 Blatchf. 349; Cross v. Morgan, 6 Fed. 241.

12 Cock v. Evans, 9 Yerg (Tenn.) 287.

13 Cook v. Bee, 2 Tenn. Ch. 344.

14 Third Av. Sav. Bank v. Dimock, 9 C. E. Green (24 N. J. Eq.) 26.

15 Shapiro v. Engel, 257 Fed. 854.

16 First Trust & Sav. Bank v. Bitter Root Valley Irr. Co., 251 Fed. 320.

17 Bailey W. Mach. Co. v. Young, 12 Blatchf. 199.

18 Dolder v. Bank of England, 10 Ves. 284, 285; Daniell's Ch. Pr. (5th Am. ed.) 779, 780.

corrected by amendment and the proper verification added on the trial,[19] and amendments to pleadings will be allowed at common law in all cases authorized by the State statute.[20]

§ 215. Practice in obtaining leave to amend. It has been held that the practice upon an application to amend a common law follows that in the State where the action is pending.[1]

In equity the application for leave to amend must be in writing, stating the new matter which the applicant desires to introduce by amendment, and must be supported by an affidavit, stating the reason why this matter was not included in the original pleading.[2] It is the better practice for the complainants to present specific amendments to paragraphs of the original bill and not to present a substituted bill,[3] except under extraordinary circumstances. In one case, detailed proof by affidavit was required concerning matters that it was desired to add by amendment in a general allegation.[4] When a party is entitled to amend as of course, no affidavit is required.[5] Where the former pleading was verified, oath must be made to the truth of the proposed amendment.[6] Where the proposed amendment consists of matters disclosed by documentary evidence, the documents themselves must be produced if possible.[7] Notice of the application for an amendment must always be given when leave of the court is required.[8] An amendment inserting the name of a new party plaintiff should not, ordinarily, be allowed without notice to him.[9]

19 Bank of Edgfield v. Farmers' C. M. Co., 18 L.R.A. 201, 52 Fed. 98.

20 Leman v. Baltimore & O. R. Co., 128 Fed. 191.

§ 215. 1 U. S. R. S., § 914; Rosenbach v. Dreyfuss, 1 Fed. 391; Leman v. Baltimore & O. R. Co., 128 Fed. 191. But see Erstein v. Rothschild, 22 Fed. 61. *Contra*, dicta in Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983; Snead v. M'Coull, 12 How. 407, 422, 13 L. ed. 1043, 1049; Mer. Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Wells v. Wood, 10 Ves. 401, Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 374, 385; Rodgers v. Rodgers, 1 Paige (N. Y.), 424; Daniell's Ch. Pr. (5th Am. ed.) 781.

2 Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745.

3 Ibid.

4 Postal Tel. Cable Co. v. Livermore & Knight Co., 194 Fed. 180.

5 Chase Electric Const. Co. v. Columbia Const. Co., 136 Fed. 699.

6 Rodgers v. Rodgers, 1 Paige (N. Y.), 424.

7 Churton v. Frewen, L. R. 1 Eq. 238; Daniell's Ch. Pr. (5th Am. ed.) 781.

8 Riggs v. Brown, 172 Fed. 638.

9 Frank v. Union Cent. L. I. Co., 130 Fed. 224.

The court may impose costs or other terms as a condition precedent to amendment; for example, a disclosure of the names of the witnesses whom the party expects to call to prove the new matter,[10] or a direction that testimony taken under the former issue shall be allowed to stand and that short notice be taken of subsequent proceedings.[11] This is the usual practice when a motion for intervention is granted.[12]

An intervenor cannot file an amended bill bringing in new parties who, if originally joined, would have defeated the jurisdiction.[13] The time within which the amendment must be filed may be limited.[14] It has been said that when leave is asked to file a substituted bill of complaint, the court can only permit or reject it as a whole and should not be expected to refuse the same and permit it to be filed when drawn in a different form.[15] When leave to amend by adding the essential jurisdictional averments was granted after verdict for plaintiff, no trial was permitted of any other issue except that which the defendant raised upon these,[16] and the verdict upon the other issues was allowed to stand.[17] In one case, the parties were directed to take depositions concerning the jurisdictional allegations in support of the application for an amendment.[18] The order allowing the amendment should state the new matter to be inserted.[19] Where an amendment inserts a new cause of action barred by limitation[20] or states new matter not allowed by the order[21] it may be stricken from the file. An objection that an amended bill contains matter which should have been pleaded in a supplemental bill is waived if not set up by motion or answer.[22] It was held, that an order

10 Caster v. Wood, 1 Baldw. 289.

11 Farmers' Loan & Tr. Co. v. Central Park, N. & E. R. R. Co., 175 Fed. 528.

12 Mathieson v. Craven, 247 Fed. 223.

13 Clauss v. Palmer Union Oil Co., 213 Fed. 286.

14 Klein v. Title Guaranty & Surety Co., 166 Fed. 365, ten days.

15 Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745.

16 Crosby v. Cuba R. Co., 158 Fed. 144, 153; Grand Trunk Western R. Co. v. Reddick, C. C. A., 160 Fed. 898.

17 Ibid.

18 Crosby v. Cuba R. Co., 158 Fed. 144, 153.

19 Daniell's Ch. Pr. (5th Am. ed.) 410.

20 Salyers v. U. S., C. C. A., 257 Fed. 255.

21 Strange v. Collins, 2 V. & B. 163, 167.

22 Seattle & S. E. Ry. Co. v. Union Tr. Co., 79 Fed. 179.

dismissing a bill, when a plea is sustained, is a bar to a subsequent application for leave to amend.[23]

§ 215a. Amendments upon appeal or error. The court of review may allow an amendment alleging facts which show the requisite diversity of citizenship [1] or which obviate the objection that a suit in equity should have been brought at law or an action at law should have been brought in equity.[2] Otherwise not [3] except by consent.[4] Or when the parties have treated the case below as if an amendment were unnecessary or had been made.[5] It has been held that the court of review cannot permit an amendment striking out a proper but unnecessary path whose presence defeats the jurisdiction.[6]

§ 215b. Review of rulings on amendments. An appellate court may,[1] but rarely [2] will, reverse a decree for an error in refusing permission to make an amendment; never unless the proposed amendment appears upon the record.[3] A refusal to allow an amendment, after final decree, will rarely, if ever, be reviewed by an appellate court.[4] It has been said that a decree will not be reversed for an error in allowing amendments.[5]

23 Raphael v. Trask, 118 Fed. 678.

§ 215a. 1 38 St. at L. 956, Comp. St. § 1251e, quoted *supra*, § 206; Swayne & Hoyt v. Barsch, C. C. A., 226 Fed. 581.

2 38 St. at L. 956, Comp. St. § 1251a, quoted *supra*, § 206.

3 Pacific R. Co. of Mo. v. Ketchum, 95 U. S. 1, 24 L. ed. 347; Yeandle v. Pa. R. Co., C. C. A., 169 Fed. 938. But see Williams v. Molther, C. C. A., 198 Fed. 460.

4 Kennedy v. Georgia State Bank, 8 How. 586, 12 L. ed. 1209.

5 Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; Confectioner s Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Pa. Steel Co. v. N. Y. City Ry. Co., 190 Fed. 602; McEldowney v. Card, 193 Fed. 475.

6 Thomas v. Anderson, C. C. A., 223 Fed. 41.

§ 215b. 1 Ridle v. Whitehill, 135 U. S. 621, 627, 640, 34 L. ed. 282, 285, 289; Lant v. Manley, 75 Fed. 634; U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 55 L. ed. 458; Am. Plate Glass Co. v. Struthers-Wells Co., C. C. A., 201 Fed. 6.

2 Mer. Nat. Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816; Hudson v. Randolph, C. C. A., 66 Fed. 216; McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961; Brookfield v. Novelty Glass Mfg. Co., C. C. A., 170 Fed. 960; *Re* Frank, C. C. A., 239 Fed. 709; Gooch v. Presbyterian Home Hospital, C. C. A., 239 Fed. 828.

3 National Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816.

4 Brown v. Schleier, 194 U. S. 18, 48 L. ed. 857.

5 Chapman v. Barney, 129 U. S. 677, 681, 32 L. ed. 800, 801.

The court upon appeal will disregard an amended pleading filed without leave,[6] unless the other party has treated it as valid, when he cannot raise the objection for the first time upon appeal.[7] By making an amendment plaintiff waives his objection to a previous ruling that an amendment was necessary.[8] Where it does not appear that the amendment prejudiced the opposite party, for example, that the statute of limitations had run pending the suit upon appeal or error, the exception to its allowance will be disregarded.[9]

When both parties have conducted the case as if the pleadings contained certain allegations therein omitted, an amendment inserting such allegations may be allowed at almost any stage of the cause.[10] Where the record on appeal shows that an amended bill which omitted one of the original parties was filed by leave of the court, it will be presumed that leave to dismiss as to such party was granted where there is nothing in the record to show the contrary.[11] An appellate court may, however, especially where the question of jurisdiction was not raised below, when reversing a judgment direct that the plaintiff be permitted to amend.[12] It has been held that upon such a reversal the issues may be narrowed to the question of the jurisdiction of the court.[13] Where a new trial is ordered upon a writ of error [14] or in a suit in equity upon a reversal when the mandate grants leave to both sides to adduce further evidence,[15] or possibly

6 Terry v. McLure, 103 U. S. 442, 26 L. ed. 403.

7 Clements v. Moore, 6 Wall. 299, 18 L. ed. 786.

8 U. S. v. Gr. Northern Ry Co., C. C. A., 220 Fed. 630.

9 O'Brien v. Illinois Surety Co., C. C. A., 203 Fed. 436.

10 Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Pa. Steel Co. v. N. Y. City Ry. Co., 190 Fed. 602; McEldowney v. Card, 193 Fed. 475.

11 Hicklin v. Marco, C. C. A., 56 Fed. 549.

12 Puget Sound Nav. Co. v. Lavendar, C. C. A., 156 Fed. 361; Whitney-Cent. Trust & Sav. Bank v. General Fire Extinguisher Co., C. C. A., 240 Fed. 631.

13 Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 160 Fed. 898, which is contrary to the usual practice.

14 Farmer v. Atlantic Coast Line R. Co., 205 Fed. 319.

15 Rio Grande Dam & Irr. Co. v. U. S., 215 U. S. 266, 268, 54 L. ed. 190, 192. See Am. Bell Tel. Co. v. U. S. 68 Fed. 542, 570.

when reversed generally for further proceedings,[16] an amendment may be allowed in the discretion of the lower court. It is the safer practice to apply to the appellate court for leave to ask for the amendment below. It was held: that a Circuit Court of Appeals had no power, upon the motion of the appellant, to dismiss an appeal and remand the case to the court below, with directions to permit the amendment of a pleading to insert facts inadvertently omitted, when the omission was not known to the appellant until after the appeal was taken.[17] A defendant cannot require the complainant to amend his bill.[18]

16 See Am. Bell Tell. Co. v. U. S. 68 Fed. 542, 570.

17 Strand v. Griffith, C. C. A., 135 Fed. 739.

18 North Chicago St. R. Co. v. Chicago Union Traction Co., 150 Fed. 612.

CHAPTER XIII.

ABATEMENT, REVIVOR AND SUPPLEMENT AT LAW AND IN EQUITY.

§ 216. Abatement. If any event happens after the beginning of an action at common law or the filing of a bill in equity which makes it necessary to bring in a new party, either plaintiff or defendant, in order to obtain a complete or satisfactory determination of the controversy; the suit will either abate or become defective.[1]

The abatement or defect must be remedied by the filing of a bill of revivor, a bill in the nature of a bill of revivor, a supplemental bill, a bill in the nature of a supplemental bill, or a bill of revivor and supplement,[2] or by motion upon affidavit without such a pleading.[3]

An abatement takes place by the death of one of the parties, or, where a married woman is under a disability, by the marriage of a female plaintiff.[4] An action entirely abates by the death of any of the plaintiffs:[5] unless his interest therein wholly ceases by his death,[6] or survives to another party to the suit,[7] or he has been previously discharged by a decree in an interpleader[8] suit, or a suit in the nature of an interpleader; when it does not. Formerly a suit abated by the marriage of a female plaintiff;[9] but it may be doubted whether this rule would be followed where a married woman has the same power over her property as if

§ 216. 1 Mitford's Pl., ch. 1, § 3.

2 Mitford's Pl., ch. 1, § 3. See *infra*, § 220, for proceedings at common law.

3 Eq. Rule 45; Spring v. Webb, 227 Fed. 481; *Ex parte* Slater, 246 U. S. 128, 133. But see Eq. Rule 35; *infra*, § 221.

4 Mitford's Pl., ch. 1, § 3.

5 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354.

6 Daniell's Ch. Pr. (2d Am. ed.) 1698; Mitford's Pl., ch. 1, § 3.

7 Fallowes v. Williamson, 11 Ves. 309; Boddy v. Kent, 1 Mer. 364; Fisher v. Rutherford, Baldw. 188; Daniell's Ch. Pr. (2d Am. ed.) 1699.

8 Anon., 1 Vern. 351; Jennings v. Nugent, 1 Molloy, 134; Daniell's Ch. Pr. (2d Am. ed.) 1765.

9 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354.

she were single.[10] By the marriage of a female defendant, a suit never abated, though her husband had to be named in all subsequent proceedings.[11] When the husband of a female plaintiff died, by the former practice she could at her option continue the suit without filing any bill of revivor; but if she did not, it was considered abated and she was not liable for the costs.[12] Before the hearing of a suit,[13] it abates upon the death of a defendant who has appeared so far as proceedings against him or his interest are concerned, and if he were an indispensable party to a decree all proceedings must be suspended till his representatives have been brought in.[14] In a suit to cancel a patent to land upon the death of the patentee intestate his heir becomes an indispensable party defendant.[15] If, however, his interest wholly ceases by his death, or wholly survives to one of the other parties, no revivor will be necessary.[16] A suit abates by the death of a member of a firm during a suit against it.[17] It has been held that the death of a defendant before appearance does not abate the suit; for, according to the former practice, till his appearance, or a decree taken against him *pro confesso,* there was no cause against him; but a bill must be filed against his representative, which was an original bill as far as respected this defendant, but a supplemental bill with respect to the suit.[18]

The Revised Statutes provide: "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit

10 Lorillard v. Standard Oil Co., 2 Fed. 902.

11 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354. A suit does not abate by the marriage of a male defendant, although it affects real estate. Clark v. Hall, 7 Paige (N. Y.), 382. The coming of age of an infant party does not abate the suit or render it defective unless his interest is thereby charged. Campbell v. Browne, 5 Paige (N. Y.), 34.

12 Mitford's Pl., ch. 1, § 3.

13 Childs v. Ferguson, C. C. A., 181 Fed. 795.

14 Story's Eq. Pl., § 369; Wright v. Phipps, 58 Fed. 552.

15 Wright Blodgett & Co., v. U. S., C. C. A., 203 Fed. 262.

16 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1698, 1699; Story's Eq. Pl., § 357.

17 Wilson v. Seligman (U. S. C. C. S. D. N. Y. 1880), 10 Rep. 651. But see U. S. R. S., § 956, cited *infra.*

18 Shadwell, V. C., in Crowfoot v. Mander, 9 Sim. 396. See U. S. v. Fields, 4 Blatchf. 326.

to final judgment. The defendant shall answer accordingly: and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court." [19]

"If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against surviving defendant, and one or more of them dies, the writ of action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." [20] This authorizes the continuance of a suit in the name of the survivor of the firm which brought the same without joining the personal representatives of those who are dead.[21] A suit for the infringement of a trade-mark, may thus proceed since that is a tort for which the defendants are jointly and severally liable.[22] It has been held that, where one of several obligees of a negotiable bond dies pending an action to collect the same, the action may be continued in the name of the survivors, who, if they recover, are entitled to the whole sum due under the obligation, and upon its receipt will hold that part of the recovery, to which the decedent would have been entitled had he lived, in trust for the representatives of the latter; that the presence in the action of the personal representatives of such deceased co-obligee after his death is erroneous, but a harmless error; that no formal order of revivor is necessary in such a case, but that a suggestion of the

19 U. S. R. S., § 955, Comp. St. § 1592.

20 U. S. R. S., § 956, Comp. St. § 1953. This statute is substantially a copy of the act of 8 & 9 W. III., ch. 1, § 7. See Allen v. Fairbanks, 40 Fed. 188.

21 Jones v. Pettingill, 245 Fed. 269.

22 Northwestern Consol. Milling Co. v. William Callam & Son, 177 Fed. 786.

death of one of the plaintiffs, made upon the record by either the plaintiffs or defendants, is sufficient; and that the Circuit Court of Appeals, when reversing a judgment in favor of a surviving plaintiff and the representatives of the other, may direct that, upon the making of the proper suggestion and the striking out of the names of the personal representatives, a new judgment be entered in favor of the remaining plaintiffs, as they then appear of record, for the amount of the principal with interest.[23]

These statutes apply to writs of error [24] and appeals.[25] These statutes do not apply to real actions.[26] Real actions cannot be revived,[27] unless the State statute so provides.[28]

Independently of statute a suit to enjoin an official act abates when the defendant ceases to be a public officer, and cannot ordinarily be revived against his successor.[29] The only exceptions to this rule are boards and bodies of a quasi corporate character having a continuous existence.[30]

The Act of February 8th, 1899 provides: "No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs." [31]

[23] Thomas v. Green County, C. C. A., 159 Fed. 339.

[24] McKinney v. Carroll, 12 Pet. 66, 9 L. ed. 1002; Classe v. Rippon, 1 B. & Ald. 586.

[25] Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391.

[26] Macker v. Thomas, 7 Wheat. 530, 5 L. ed. 515; Green v. Watkins, 6 Wheat. 260, 5 L. ed. 256.

[27] Macker v. Thomas, 7 Wheat. 530, 29 L. ed. 391; Green v. Watkins, 6 Wheat. 260, 5 L. ed. 256.

[28] McArthur v. Williamson, 45 Fed. 154; U. S. v. Boutwell, 17 Wall. 604.

[29] Warner V. S. Co. v. Smith, 165 U. S. 28, 41 L. ed. 621; State of Florida v. Croom, 226 U. S. 309, 57 L. ed. —; Pullman Co. v. Croom, 231 U. S. 571.

[30] Marshall v. Dye, 231 U. S. 250.

[31] Act of February 8th, 1899, 30 St. at L. 822.

This statute does not apply to suits against State officers such as a suit for an injunction.[32] The joinder of other officers against whom no injunction was asked did not give the court jurisdiction of an appeal from an order denying this relief.[33] A consent to a continuance of the case against the successor of the defendant who had died was disregarded by the court.[34] Where the application was granted by a judgment or final order before the death or expiration of the official term the rule is otherwise.[35]

A suit cannot be revived by or against a foreign executor who is not authorized to sue or be sued in the forum.[36]

If the cause of action be one created by a Federal statute, its survival or abatement is not affected by State statutes or decisions.[37] The State statute, which requires a claim to be presented to an administrator before revivor does not apply to an action upon a bond given to the United States.[38]

A *qui tam* action to recover a penalty under a statute of the United States abates by the death of the defendant, and cannot be revived, although the statutes of the State where the case is pending authorize the revivor of actions to recover penalties.[39] It has been held that so does an action to recover triple damages under the Anti-Trust Act of July 2, 1890.[40] But that upon the death of an individual, or the dissolution of a corporation, plaintiff, such a suit may be revived by the personal representatives or successor as the case may be.[41] An action to recover damages for a violation of the Interstate Commerce Act[42] or by a receiver of a National Bank against directors to recover damages for their negligent management of its affairs[43] may be revived by the

32 Pullman Co. v. Croom, 231 U. S. 571; p. 739 A.; Pullman Co. v. Knott, 243 U. S. 447.

33 Ibid.

34 Ibid.

35 New Orleans v. Citizens Bank, 167 U. S. 371, 388.

36 C. F. Stromeyer Co. v. Aldrich, 227 Fed. 960.

37 Schreiber v. Sharpless, 110 U. S. 76, 28 L. ed. 65; Patton v. Brady, 184 U. S. 608, 612, 46 L. ed. 713, 716; Iron Gate Bank v. Brady, 184 U. S. 665, 46 L. ed. 739; May v. Logan County, 30 Fed. 250.

38 Pond v. U. S., C. C. A., 111 Fed. 989, 49 C. C. A. 582.

39 Schreiber v. Sharpless, 110 U. S. 76, 28 L. ed. 65.

40 Caillouet v. Am. Sugar Refining Co., 250 Fed. 639. *Contra*, Imperial Film Exch. v. General Film Co., 244 Fed. 985.

41 Imperial Film Exch. v. General Film Co., 244 Fed. 985.

42 Act of Feb. 4, 1887, ch. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159). Minds v. Penn. R. Co., 237 Fed. 267.

43 Bates v. Dresser, 229 Fed. 772.

plaintiff's executors or administrators[44] or against the defendant's personal representatives.[45] Such a suit does not abate by a judicial sale of the plaintiff's property.[46] An action to enforce a forfeiture abates unless the acts complained of were divisible and the wrongdoer's estate has derived a benefit therefrom.[47] It has been held that a judgment of conviction which imposes a fine, abates upon the defendant's death and is not enforceable against his personal representatives.[48] An action for the infringement of a patent survives to the representatives of the patentee,[49] and against the representatives of the infringer.[50] It has been held that the death of a sole defendant to a suit for an injunction against the infringement of a patent and for an accounting, when it occurs before a decree for an account, abates and terminates so much of the suit as seeks an injunction, so that it cannot be revived against his executor, unless it be shown that the latter continues the infringement;[51] but that the suit may be continued against the personal representative for an accounting of profits and for damages.[52] After an interlocutory decree for an accounting, such a suit may be revived against the personal representatives of the deceased defendant.[53]

The survivability of a cause of action, if it be one arising under the statutes or, it seems, the common law, of the State where the case is pending, depends upon the law of that State;[54] ex-

[44] Langdon v. Pennsylvania R. Co., 194 Fed. 486.

[45] Bates v. Dresser, 229 Fed. 772.

[46] Pennsylvania R. Co. v. International Coal Mining Co., C. C. A., 173 Fed. 1.

[47] U. S. v. De Goer, 38 Fed. 80; U. S. v. Riley, 104 Fed. 275.

[48] U. S. v. Pomeroy, 152 Fed. 279.

[49] May v. Logan County, 30 Fed. 250; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154.

[50] Ibid.; Head v. Porter, 70 Fed. 498; Hohorst v. Howard, 37 Fed. 97; Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391.

[51] Draper v. Hudson, 1 Holmes, 208; Walker on Patents, § 700.

[52] Kirk v. Du Bois, 28 Fed. 460; Hohorst v. Howard, 37 Fed. 97; Lake Superior I. Co. v. Brown, B. & Co., 44 Fed. 539; Head v. Porter, 70 Fed. 498; Atterbury v. Gill, 13 Off. Gaz. 276; Smith v. Baker, 1 Ban. & A. 117; Childs v. Ferguson, C. C. A., 181 Fed. 795.

[53] Atterbury v. Gill, 13 Off. Gaz. 276.

[54] Warren v. Furstenheim, 35 Fed. 691; Witters v. Foster, 26 Fed. 737; Houshaw v. Miller, 17 How. 212, 15 L. ed. 222; Hatfield v. Bushnell, 1 Blatchf. 393; Trigg v. Conway, Hempst. 711; Martin v. Wabash R. Co., C. C. A., 142 Fed. 650.

cept, perhaps, when it is originally brought in the Federal court and arises under some rule of general law, recognized in the courts of the Union.[55] If the action is transitory in its nature, the survival of the right to sue depends upon the law of the State where the suit is brought; not upon that where the cause of action arose.[56] A State statute which allows an executor or administrator to revive an action for personal injuries will be followed, as the law of the forum, by the Federal courts there held, although there was no such statute where the accident occurred.[57] A State statute was followed which permitted an administrator duly appointed and qualified to be substituted as plaintiff in a suit brought by a person claiming to be the personal representative of the same decedent who had never qualified as such.[58]

Unless there be some clause in its charter to the contrary, a suit by or against a corporation ordinarily abates by the dissolution of the corporation;[59] but it has been held that the entrance into liquidation and the closing of a business of a national banking association does not abate a suit brought in its name.[60] When upon its dissolution a State court appointed a trustee of the corporate assets his substitution as plaintiff was permitted.[61] A State statute which provided that a suit against a corporation shall not abate upon the dissolution of the defendant was held not to apply to a foreign corporation; and a judgment of the State court in such a case was held by the Federal court to be

55 Baltimore & O. R. R. Co. v. Joy, 173 U. S. 226, 229, 43 L. ed. 677, 678.

56 Martin v. Wabash R. Co., C. C. A., 142 Fed. 650. *Contra*, Stratton's Independence, L'd v. Dines, 126 Fed. 968.

57 Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 43 L. ed. 677.

58 Person v. Fidelity & Cas. Co., C. C. A., 92 Fed. 965.

59 National Bank v. Colby, 21 Wall. 609, 22 L. ed. 687; Greeley v. Smith, 3 Story, 658; Mumma v. Potomac Co., 8 Pet. 281, 22 L. ed. 687. But see Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. 539. As to municipal corporations, Hemingway v. Stansell, 106 U. S. 399, 27 L. ed. 245; Grantland v. Memphis, 12 Fed. 287; as to the effect of a consolidation of two corporations, Edison El. L. Co. v. Westinghouse, 34 Fed. 232; as to the effect of a State statute upon foreign corporations, Marion Phosphate Co. v. Perry, C. C. A., 33 L.R.A. 252, 74 Fed. 425.

60 National Bank v. Insurance Co., 104 U. S. 54, 72, 26 L. ed. 693.

61 Imperial Film Exch. v. Gen. Film Co., 244 Fed. 985.

void.[62] In the absence of a statute upon the subject, the appointment of a receiver for a plaintiff corporation does not abate the action and it may proceed in the corporation's name;[63] nor does the appointment of a receiver of a defendant corporation abate the suit.[64]

It seems that any step in the cause taken by the surviving party after the death of one or more of his opponents, is a waiver of his right to object that the case has not been revived. Thus, after a decree has been reversed upon appeal, and the cause sent back with a special mandate directing the further proceedings to be taken, or affirmed upon appeal and sent back with a mandate directing its enforcement, it is too late to claim for the first time that the suit has abated by the death of the complainant before the entry of the decree from which the appeal was taken.[65] An order denying a motion to dismiss an action upon the ground that it had abated by the death of the plaintiff is reviewable on a writ of error to the final judgment.[66] The plaintiff cannot describe his action as in tort in order to obtain jurisdiction for the Federal court, and then describe it as in contract in order to prevent its abatement.[67]

§ 217. Effect of abatement. "An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit when abated, is absolutely dead. But in equity, a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived."[1] Upon the total abatement

62 Marion Phosphate Co. v. Perry, C. C. A., 33 L.R.A. 252, 74 Fed. 425.

63 Boston El. Ry. Co. v. Paul Boyton Co., C. C. A., 211 Fed. 813; Delta Lumber Co. v. Schwarz Wheel Co., 218 Fed. 85.

64 Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 40 L. ed. 595.

65 *Ex parte* Story, 12 Pet. 339, 342, 9 L. ed. 1108, 1110; Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. 539; McNeil v. McNeil, C. C. A., 170 Fed. 289 (the argument of an appeal by the administrator).

66 Henderson v. Henshall, C. C. A., 54 Fed. 320.

67 Iron Gate Bank v. Brady, 184 U. S. 665, 46 L. ed. 739.

§ 217. 1 Story's Eq. Pl., § 354. See also Hoxie v. Carr, 1 Sumn. 173, 178; Mellus v. Thompson, 1 Cliff. 125, 129.

of a suit the cause is completely suspended while the abatement continues; and, in general, all orders made pending such abatement will be considered nugatory and may be discharged.[2] Applications may, however, be made by parties affected thereby, to discharge process of contempt issued or executed pending the statement.[3] Applications have, moreover, been granted during an abatement for the payment of money out of court, when the right thereto had been previously established;[4] for the preservation of the property in dispute;[5] for the punishment of a party for breach of an injunction;[6] and to set aside irregular proceedings pending the abatement.[7] So, too, a decree previously made could be enrolled;[8] and it has been held in England that depositions might be taken under a commission previously issued.[9]

Orders previously made continue in force until discharged.[10] But the time given a party within which to do a certain act is always suspended by an abatement.[11] Where a preliminary injunction has been previously granted, the court may issue an order requiring that the representatives of a deceased plaintiff revive within a certain time, usually a fortnight after notice, or that the injunction be dissolved.[12] No such order will be granted after a decree for a perpetual injunction; for that "would be in effect decreeing a perpetual suit."[13] The power of the court to make an order that the representative of a deceased plaintiff revive within a certain limited time after notice to them, or that the bill be dismissed, is doubtful.[14]

2 Daniell's Ch. Pr. (2d Am. ed.) 1714; Griswold v. Hill, 1 Paine, 483.

3 Daniell's Ch. Pr. (2d Am. ed.) 1715.

4 Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Roundell v. Currer, 6 Ves. 250; Daniell's Ch. Pr. (2d Am. ed.) 1715. See Wharam v. Broughton, 1 Ves. Sr. 185.

5 Washington Ins. Co. v. Slee, 2 Paige (N. Y.) 365, 368.

6 Hawley v. Bennett, 4 Paige (N. Y.) 163.

7 Quackenbush v. Leonard 10 Paige (N. Y.) 131.

8 Daniell's Ch. Pr. (2d Am. ed.) 1715.

9 Thompson v. Took 1 Dick. 115; Peters v. Robinson, 1 Dick. 116; Sinclair v. James, 1 Dick. 277.

10 Daniell's Ch. Pr. (2d Am. ed.) 1716; Lee v. Lee, 1 Hare, 622; Hawley v. Bennett, 4 Paige (N. Y.) 163.

11 Gregson v. Oswald 1 Cox, Eq. 343.

12 Jones v. Massey Brown v. Warner, Turner v. Cole, all quoted in Chowick v. Dimes, 3 Beav. 290, 292, 293; Chester v. Life Ass'n of America 4 Fed. 487.

13 Askew v. Townsend, 2 Dick. 471.

14 Compare *dictum* of Judge Story in Hoxie v. Carr, 1 Sumn. 173, 178.

Where the abatement is partial, as where it is caused by the death of a defendant, it prevents those proceedings only by which his interest may be affected.[15] Thus, if there be a decree against trustees and the beneficiary of their trust for a conveyance, and the beneficiary die, the trustees may still be obliged to convey;[16] and, after the death of one defendant, process of contempt may be issued and executed against the others.[17] After its abatement by the death of the owner of the equity of redemption, a foreclosure suit cannot be remanded before its revivor.[18] It has also been held that the death of a defendant after hearing but before a decree does not necessarily prevent judgment,[19] which should then be entered as of the date of the hearing, *nunc pro tunc*, and that, if practicable, a decree made before a defendant's death, for example, a decree for a sale, may be enforced without revivor.[20] But where the defendant died after his demurrer had been sustained and the time of the complainant to amend had expired, it was held that the court could not without revivor render judgment of dismissal *nunc pro tunc* as of the day following the expiration of the time allowed for amendment.[21]

§ 218. When a suit may be revived. A suit which has abated may generally be revived when anything further remains to be done therein.[1] But the old practice did not permit a suit to be revived merely for costs which were untaxed, and had not been previously directed to be paid out of a particular estate or fund, nor decreed against an executor out of assets.[2] Nor can a bill of

and the case of Chowick v. Dimes, 3 Beav. 290 where Lord Langdale, M. R., granted such an order, with that of Lee v. Lee, 1 Hare, 617, where Vice-Chancellor Wigram held that the court had no power to make one.

15 Daniell's Ch. Pr. (2d Am. ed.) 1716; Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2.

16 Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1716.

17 Daniell's Ch. Pr. (2d Am. ed.) 1716.

18 Wright v. Phipps, 58 Fed. 552.

19 Davies v. Davies, 9 Ves. 461; Daniell's Ch. Pr. (2d Am. ed.) 1717.

20 Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33.

21 McNeil v. McNeil, C. C. A., 170 Fed. 289.

§ 218. 1 Gilbert's Forum Romanum, 181; Johnson v. Peck, 2 Ves. Sen. 465; Fitzpatrick v. Domingo, 14 Fed. 216; Daniell's Ch. Pr. (2d Am. ed.) 1694. See Warner V. S. Co. v. Smith, 165 U. S. 28, 41 L. ed. 621, and *supra*, § 216.

2 Daniell's Ch. Pr. (2d. Am. ed.) 1694-1697; Story's Eq. Pl., § 371; Blower v. Morrets, 3 Atk. 772; Kemp v. Mackrell, 3 Atk. 812;

revivor be brought upon a bill filed merely for discovery, after the discovery required thereby has been obtained.[3]

The time within which an action to enforce a cause of action at common law not founded upon a statute of the United States may be revived, depends upon the State practice[4] or the State Statute of Limitations;[5] which, however, do not affect the United States.[6] The State Statute of Limitations has been held to be a bar to an application to revive an action by a receiver of a national banking association to collect an assessment from a stockholder.[7] In equity the running of the statute of limitations, State or Federal as the case may be, after the time when a person became entitled to revive, is in most cases, except after a decree for an account,[8] a defense and bar to a bill of revivor.[9] A suit cannot be revived seven years after its dismissal for a defect of parties caused by a failure to revive.[10]

§ 218a. Effect of revivor. Where the abatement is by the death or marriage of a plaintiff, an order to revive the suit places it and all proceedings in it in precisely "the same plight, state, and condition that the same were in at the time when the abatement took place."[1] The new plaintiff may then take the same

Travis v. Waters, 1 J. Ch. (N. Y.) 85.

3 Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125.

4 Goodyear Dental Vulcanite Co. v. White, 46 Fed. 278.

5 Browne v. Chavez, 181 U. S. 68, 45 L. ed. 752; Butler v. Poole, 44 Fed. 586; Barker v. Ladd, 3 Sawyer, 44; Price v. Yates, 19 Alb. L. J. 295; Goodyear Dental V. Co. v. White, 46 Fed. 278; Spaeth v. Sells, 177 Fed. 797, holding that under Ohio R. S. §§ 5150, 5157, the final order of revivor must be made within one year and that the obtaining of the conditional order within that time is insufficient.

6 U. S. v. Houston, 48 Fed. 207.

7 Butler v. Poole, 44 Fed. 586.

8 Hollingshead's Case, 1 P. Wms. 742; Daniell's Ch. Pr. (2d Am. ed.) 1711.

9 Daniell's Ch. Pr. (2d Am. ed.) 1710; Coit v. Campbell, 82 N. Y. 509; Perry v. Jenkins, 1 Myl. & Cr. 122; Mason v. Hartford, P. & F. Ry. Co., 19 Fed. 53, 56; Story's Eq. Pl., § 831. A bill of revivor was stricken from the file when filed twelve years after the delivery of an opinion dismissing the original bill, although no decree upon the opinion was ever entered. Hubbell v. Lankenau, 63 Fed. 881. *Contra*, Miller v. Wattier, 165 Fed. 359. See, also, Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73, a suit to compel the issue of a patent when the adverse party acquiesced in the bill.

10 Houth v. Owens, 30 Fed. 910.

§ 218a. 1 Gregson v. Oswald, 1 Cox Eq. 344.

proceedings that the original plaintiff might have done.[2] Thus, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it stood at the abatement; and if a process has been previously issued it will be revived with the revivor of the suit.[3] But where the abatement is caused by the death of a defendant, "the process, being personal, cannot be revived."[4] In general, however, an order to revive against the representatives of a deceased defendant, will place the suit as fully in the same position with regard to such representatives as can be done with reference to the change of the individuals before the court.[5] After revivor testimony previously taken can be used.[6]

§ 219. Who may revive a suit. It is generally necessary, in order to entitle one to revive, that there should be a privity in representation between him and the party whose death caused the abatement. Therefore, upon the death of one suing in a representative capacity the defect can usually be remedied only by a supplemental bill, and not by a bill of revivor.[1] It was held, however, that upon the death of an administrator, the administrator *de bonis non* might file a bill of revivor, "though there is no actual privity between him and the original plaintiff."[2] But Judge Story suggests that a bill in the nature of a bill of revivor would be more appropriate.[3] It is said by Lord Redesdale that in the case of a bill by creditors on behalf of themselves and other creditors, any creditor may revive;[4] but according to Daniell, in practice the form of a bill in such a case is that of a supplemental bill in the nature of a bill of revivor, and not of a mere bill of revivor.[5]

2 Vattier v. Hinde, 7 Pet. 252, 266; Philips v. Derbie, 1 Dick. 98; Hyde v. Forster, 1 Dick. 132; Daniell's Ch. Pr. (2d. Am. ed.) 1778.

3 Hyde v. Forster, 1 Dick. 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

4 Daniell's Ch. Pr. (2d Am. ed.) 1778.

5 Daniell's Ch. Pr. (2d Am. ed.) 1778.

6 Vattier v. Hinde, 7 Pet. 252, 266, 8 L. ed. 675, 680.

§ 219. 1 Daniell's Ch. Pr. (2d Am. ed.) 1697; Story's Eq. Pl., § 340.

2 Daniell's Ch. Pr. (2d Am. ed.) 1697; Mitford's Pl., ch. 1, § 3; Huggins v. York Bldg. Co., 2 Eq. Cas. Abr. 3; Owen v. Curzon, 2 Vern. 237; Newcombe v. Murray, 77 Fed. 492.

3 Story's Eq. Pl., § 382, note 4.

4 Mitford's Pl., ch. 1, § 3.

5 Daniell's Ch. Pr. (2d Am. ed.) 1703.

Before a decree, a suit can only be revived by one or all of the surviving plaintiffs, or the representatives of one that has died.[6] If any of these refuse to join, he must be made a defendant to the bill filed to revive the suit.[7] If the suit concerned solely the real estate of a deceased plaintiff, his heirs alone are entitled to represent him therein;[8] if solely his personal estate, his executor or administrator;[9] if both, separate bills of revivor may be filed by his heirs and personal representatives, and the neglect of one to revive will not prejudice the other.[10]

In the case of a suit by a corporation sole, the death of the plaintiff, if he were entitled to the subject-matter for his own benefit, caused an abatement; and the suit could be revived by his personal representative.[11] If, however, he were only entitled to the subject-matter in his corporate capacity, the suit became defective, and could only be continued by his successor by means of an original bill in the nature of a supplemental bill.[12] Where a corporation had, by purchase at a foreclosure sale, succeeded to the rights of one that was defunct, it was held that it could not by a bill of revivor take the benefit of a suit by the stockholders of the defunct corporation, to which the mortgagee had not been a party.[13] After a decree, a suit may be revived by any defendant, or by the representative of any deceased defendant, who has acquired any right thereunder, as well as by any plaintiff.[14]

§ 220. Manner of revivor at common law. "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in

6 Daniell's Ch. Pr. (2d Am. ed.) 1700; Chester v. Life Ass'n of America, 4 Fed. 487.

7 Daniell's Ch. Pr. (2d Am. ed.) 1700; Fallowes v. Williamson, 11 Ves. 309.

8 Mitford's Eq. Pl., ch. 1, § 3; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4; Mellus v. Thompson, 1 Cliff. 125.

9 Mitford's Pl., ch. 1, § 3; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

10 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 367; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

11 Daniell's Ch. Pr. (2d Am. ed.) 28, 1701; 1 Kyd on Corporations, 77.

12 Daniell's Ch. Pr. (2d Am. ed.) 28, 1701; 2 Bac. Abr., Corporation, E. 2.

13 Keokuk & W. R. Co. v. Scotland County, 152 U. S. 318, 38 L. ed. 457.

14 Williams v. Cooke, 10 Ves. 406; Devaynes v. Morris, 1 Myl. & Cr. 213, 225.

case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court."[1] It has been held that this statute is confined to personal actions and not to real actions,[2] nor to proceedings in bankruptcy,[3] which may be revived in a more summary manner than that provided by the statute or by the Equity Rules.[4] The writ to collect a judgment of the Federal court when issued against the representatives of one of the original parties, or against the indorser of a writ, is a continuance of the original action,[5] and an ancillary proceeding which can be maintained irrespective of the citizenship of the parties or the amount in controversy.[6] As a general rule the practice of the State where the proceedings is taken will be followed in the issue of and proceedings upon writs of *scire facias*,[7] but, it has been held, that a Federal court is not bound to follow the methods prescribed by the State statutes for serving a writ of *scire facias* to revive a judgment against a nonresident defendant; and that it may revive its own judgment by such a writ and prescribe a reasonable method for the service thereof without the district.

§ 220. [1] U. S. R. S., § 955. See Allen v. Fairbanks, 40 Fed. 188.

[2] Macker's Heirs v. Thomas, 7 Wheaton, 530, 5 L. ed. 515.

[3] Shute v. Patterson, C. C. A., 147 Fed. 509, 512.

[4] Shute v. Patterson, C. C. A., 147 Fed. 509, 512. Citing General Order in Bankruptcy, 37.

[5] McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187, 3 L. ed. 193, 194; Davis v. Davis, C. C. A., 174 Fed. 786.

[6] Pullman's Palace Car Co. v. Washburn, 66 Fed. 790, *supra*, § 21.

[7] McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187, 3 L. ed. 193, 194; Walden v. Craig, 14 Pet. 147, 151, 10 L. ed. 393, 395; Kenosha & R. R. Co. v. Sperry, 3 Biss. 309.

where the judgment debtor has departed from the same.[8] Whether an action upon the judgment thus revived will, in such a case, be entertained in a court in another State or district, where the debtor resided at the time of the revivor is, under the authorities, a doubtful question.[9]

It has been held: that in a *scire facias* to review a judgment in ejectment, the statement that the term recovered is yet unexpired is sufficient; and that there is no need of stating in the writ the term as laid in the declaration, nor the facts which show its continuance;[10] that to a *scire facias* to revive a judgment in ejectment it is not necessary to make the executor or administrator of the deceased defendants parties, but that the judgment must be revived against the heirs of the defendant in ejectment and the terretenants;[11] and that after a conveyance by the lessor of the plaintiff in ejectment to a third person of land for which judgment has been obtained, a *scire facias* or writ of *habere facias* must issue in the name of the original plaintiff in the original judgment.[12] To a *scire facias* to revive a judgment in ejectment, for the term and damages, the defendant cannot plead a conveyance by the lessor of the plaintiff, made subsequent to the judgment.[13] Upon a writ of *scire facias* to revive an action or a judgment against the personal representative of a deceased defendant, such personal represen-

8 Collins County Nat. Bank v. Hughes, C. C. A., 155 Fed. 389.

9 Collins County Nat. Bank v. Hughes, C. C. A., 155 Fed. 389, 393, 394. Citing Owens v. Henry, 161 U. S. 642, 40 L. ed. 837; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L.R.A. 782; Weaver v. Boggs, 38 Maryland, 255. Where the nonresidence of the defendant in the State where the judgment was revived does not appear in the record a declaration thereupon in a Federal court in another State is not demurrable. Davis v. Davis, C. C. A., 174 Fed. 786.

10 Lessee of Walden v. Craig's Heirs, 14 Pet. 147, 151, 10 L. ed. 393, 395.

11 Lessee of Walden v. Craig's Heirs, 14 Pet. 147, 10 L. ed. 393.

12 Penn v. Klyne, Pet. C. C. 446. Under the practice in Missouri, a writ of *scire facias* to revive a judgment which has been assigned is not demurrable because issued in the name of the assignor; but it is sufficient if the writ shows that it was issued on behalf of, and to the use of, the assignee, and permission may be given to amend the writ by striking out the name of the assignor. Wonderly v. Lafayette County, 74 Fed. 702.

13 Penn v. Klyne, Pet. C. C. 446.

tative can only plead what the decedent could have pleaded,[14] unless there be some matter which there was no opportunity to plead in the original action.[15] Upon a *scire facias* to revive a final or interlocutory judgment, the defendant cannot avail himself of matters of defense which occurred previous to the original judgment;[16] nor plead a general denial.[17] A payment which might have been pleaded to the original *scire facias* to revive a judgment cannot be given in evidence on a second *scire facias*.[18] If an heir sells after judgment against the executor upon the plea of *plene administravit* found for him, and before *scire facias* against the heir, the purchaser may, in the name of the heir, plead to the writ assets in the hands of the executor.[19] The writ of *scire facias* was issued to revive and obtain execution against the taxing district of Shelby county, which was the successor of the city of Memphis, on a judgment recovered against the city of Memphis before the repeal of its charter.[20] In that case, the order upon the return of the *scire facias* awarded execution for the amount of the original judgment, and simple interest, "which is, however, to be calculated in the marshal's office on the execution as in all cases."[21]

§ 221. Manner of revivor in equity in general. When a suit became abated after a decree signed and enrolled, it was anciently the practice to revive the decree by a subpœna in the nature of a *scire facias*, upon the return of which the party to whom it was directed might show cause against the reviving of the decree, by insisting that he was not bound by the decree, or that for some other reason it ought not to be enforced against him, or that the person suing the subpœna was not entitled to the benefit of the decree. If the opinion of the court was in his favor he was dismissed with costs. If it was against him, or if

14 McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187, 3 L. ed. 193, 194; Morsell v. Hall, 13 How. 212, 14 L. ed. 117; Allen v. Fairbanks, 40 Fed. 188.

15 Hatch v. Eustis, 1 Gall. 160.

16 U. S. v. Thompson, Glip. 614; Morsell v. Hall, 13 How. 212, 14 L. ed. 117; McKnight v. Craig's Adm'rs, 6 Cranch, 183, 3 L. ed. 193; Pennock v. Gilleland, 1 Pittsb. 37.

17 Wonderly v. Lafayette County, 77 Fed. 665.

18 Hatch v. Eustis, 1 Gall. 160; Wilson v. Hurst, Pet. C. C. 441; Wilson v. Watson, Pet. C. C. 269.

19 Hamilton v. Jones, 2 Hayw. 291.

20 Grantland v. Memphis, 12 Fed. 287.

21 Ibid.

he did not oppose the reviving of the decree, interrogatories were exhibited for his examination touching any matter necessary to the proceedings. If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree, this process was ineffectual, as it revived the decree only, and the subsequent proceedings could not be revived but by bill, and the enrollment of decrees being disused, it became the practice to revive in all cases indiscriminately by bill.[1]

The regular methods of reviving a suit in equity in the Federal courts have been by a bill of revivor, a bill in the nature of a bill of revivor, a bill of revivor and supplement, a supplemental bill in the nature of a bill of revivor and a bill in the nature of a bill of revivor.[2] The Equity Rules of 1912 provide: "In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary."[3] This authorizes the revivor of a suit by motion without a bill of revivor or a bill in the nature of a bill of revivor.[4] Another rule however, expressly recognizes the continuance of bills of revivor.[5]

By the former practice, a revivor might be made by motion upon consent;[6] and it was suggested that where one of the surviving parties had sued out a *scire facias,* the personal representative of the decedent might obtain a revivor upon motion.[7] When a board of public officers was abolished by statute and a

§ 221. [1] Mitford's Ch. Pr., ch. 1, § 3.

[2] Quoted with approval by McDowell, J., in Dillard's Adm'r. v. Central Va. Iron Co., 125 Fed. 159.

[3] Eq. Rule 45.

[4] *Ex parte* Slater, 246 U. S. 128, 133; Spring v. Webb, 227 Fed. 481.

[5] Eq. Rule 35; quoted infra, § 223.

[6] Griswold v. Hill, 1 Paine, 483.

[7] Dillard's Adm'r v. Central Virginia Iron Co., 125 Fed. 157.

new board substituted for it, it was held, without determining whether or not a revivor was necessary, that the members of the new board could properly be made parties to the suit by means of a bill of revivor,[8] although a supplemental bill,[9] or bill in the nature of a supplemental bill,[10] would have seemed more appropriate. If a revivor is denied, the denial may be reviewed upon appeal.[11]

§ 222. Definition of bill of revivor and parties to the same. A bill of revivor is a continuance of the original bill, when, by death, some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone.[1] "Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir-at-law, executor, or administrator; so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained; and therefore the suit may be continued in this case likewise by bill of revivor merely."[2] The persons who may be plaintiffs in a bill of revivor have been specified in a preceding section.[3] If the abatement be caused by the death or marriage of a plaintiff, all previous defendants to the suit must be made parties to the bill of revivor; unless it be filed after a decree, when all whose rights or duties have been fixed and ascertained thereby must be joined.[4] If any of the previous plaintiffs refuse to join in the continuance of the suit, they also must be made defendants to the bill of revivor.[5] If the abatement be caused by the death of a defendant, only his heirs or personal repre-

8 Hemingway v. Stansell, 106 U. S. 399, 402, 27 L. ed. 245, 246. See also The Sapphire, 11 Wall. 164, 20 L. ed. 127; Allen v. Mayor, 18 Blatchf. 239; s. c., 7 Fed. 483.

9 *Infra*, § 231.

10 *Infra*, § 234.

11 *Ex parte* Slater, 246 U. S. 128, 133.

§ 222. 1 Mitford's Pl., ch. 1, § 3; Fitzpatrick v. Domingo, 14 Fed. 216.

2 Mitford's Pl., ch. 1, § 3.

3 § 219.

4 Daniell's Ch. Pr. (2d Am. ed.) 1703, 1704.

5 Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1700.

sentatives, or both, according as the suit affected his interest in real or personal property, should be made defendants to the bill of revivor;[6] unless the bill be filed after a decree, when all parties interested thereunder should be joined.[7] There is no need of any difference of citizenship among the different parties to such a bill, provided that the court had jurisdiction of the original suit.[8] A suit cannot be revived against foreign executors unless ancillary letters are taken out in the State where the suit is pending.[9] A bill of revivor cannot be filed against the representatives of a defendant not served with process under the original bill.[10] They can only be brought in by a bill in the nature of an original bill.[11]

§ 223. Frame of bill of revivor. A bill of revivor must state the filing of the original bill, and the several proceedings thereon, and the abatement.[1] But the rules provide: "It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."[2] "It must show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit be revived accordingly."[3] Where a decree has been made reviving a former decree, a second bill for the same purpose properly seeks to revive the first decree of revivor, and so, *ipso facto*, the original decree.[4] If a bill of revivor seeks simply to revive the suit, it prays only for a subpœna to revive and answer.[5] This usually is required only in two classes of cases. Where the bill is filed against an executor or administrator, and requires an admission of assets, the prayer usually is, not only that the suit may be revived, but also that, in case the defendant shall not admit assets to answer the pur-

6 Bettes v. Dana, 2 Summ. 383; Daniell's Ch. Pr. (2d Am. ed.) 1704.

7 Daniell's Ch. Pr. 1704.

8 Clark v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; s. c., 2 Summ. 262.

9 Lawrence v. Southern Pac. Co., 177 Fed. 547.

10 U. S. v. Fields, 4 Blatchf. 326.

11 See *infra*, § 216.

§ 223. 1 Mitford's Pl., ch. 1, § 3.

2 Eq. Rule 35; copied from Eq. Rule 58, of 1842.

3 Mitford's Pl., ch. 1, § 3.

4 Shainwald v. Lewis, 69 Fed. 487.

5 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1707.

poses of the suit, an account of the estate of the deceased party may be taken; and so far the bill is in the nature of an original bill.[6] "If a defendant to an original bill dies before putting in an answer, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered."[7] A bill of revivor should be signed by the solicitor,[8] and in general comply so far as is practicable with the requirements for original bills.[9]

§ 224. Proceedings upon bills of revivor. The Equity Rules provide that: "In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary."[1] This changes the former practice, which required the issue of a subpœna and proceedings in the nature of an original suit.[2] The Revised Statutes provide "when either of the parties, whether plaintiff, petitioner, or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer, and the cause will be heard and determined, and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a *scire facias,* the court may nevertheless render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a contin-

6 Mitford's Pl., ch. 1, § 3.
7 Mitford's Pl., ch. 1, § 3.
8 Eq. Rule 24.
9 Daniell's Ch. Pr. (2d Am. ed.) 1707.

§ 224. 1 Eq. Rule 45. See Oliver v. Decatur, 4 Cranch, C. C. 592.
2 Mason v. Hartford, P. & F. Ry. Co., 19 Fed. 53; Sharon v. Terry, 36 Fed. 337; Foster's Fed. Pr., (fourth ed.) § 181.

uance until the next term."[3] The form of the subpœna upon a bill of revivor is the same as that upon an original bill, except that it states the nature of the bill to which the defendant is required to appear, and the time allowed him by the rules in which to do so.[4] The subpœna, if required is also sued out and served in the same manner as one upon an original bill;[5] but substituted service of the subpœna upon the attorney of the defendant to the original bill may be allowed when the original defendant is beyond the reach of process.[6] It has been held that a suit cannot be revived against the foreign executor or administrator of a deceased defendant who has not taken out letters within the jurisdiction of the court, and has no assets there.[7] If the defendant refuses to appear, process of contempt may be issued against him.[8] A defendant who wishes to oppose the revivor should plead to the bill, move to dismiss the same, or perhaps show cause by affidavit to the contrary.[9] It might perhaps not be expedient to take in the answer any objection to the revivor. For the English rule was that an objection thus taken would not prevent the order to revive, and the point could then only be determined by bringing the cause regularly to a hearing.[10]

A bill of revivor is defective if it does not show a sufficient ground for reviving the suit or any part of it, either by or against the person by or against whom it is filed;[11] for want of parties apparent upon its face, though not for the omission of such as had not appeared before, or were not before the court at the time of the abatement;[12] and for any serious defect in

3 U. S. R. S., § 955. See Griswold v. Hill, 1 Paine, 483.

4 Daniell's Ch. Pr. (2d Am. ed.) 1707.

5 Daniell's Ch. Pr. (2d Am. ed.) 1707.

6 Dunn v. Clarke, 8 Pet. 1, 2, 8 L. ed. 845; Morton v. Hepworth, 1 Hall & Tw. 158. See § 96.

7 Mellus v. Thompson, 1 Cliff. 125.

8 Daniell's Ch. Pr. (2d Am. ed.) 1707.

9 Daniell's Ch. Pr. (2d Am. ed.) 1709, 1710; Rule 58.

10 Daniell's Ch. Pr. (2d Am. ed.) 1709, 1711; Harris v. Pollard, 3 P. Wms. 348; Lewis v. Bridgman, 2 Sim. 465; Codrington v. Houlditch, 5 Sim. 286.

11 Harris v. Pollard, 3 P. Wms. 348; University College v. Foxcroft, 2 Ch. R. 244; Daniell's Ch. Pr. (2d Am. ed.) 1709, 1710; Story's Eq. Pl., §§ 617, 829.

12 Metcalfe v. Metcalfe, 1 Keen, 74; Crowfoot v. Mander, 9 Sim. 396; Daniell's Ch. Pr. (2d Am. ed.) 1710.

form. Upon demurrer to a bill of revivor, the sufficiency of the original bill could not be considered.[13] If, however, the original bill failed to state facts giving the Federal courts jurisdiction, that objection might be raised by a demurrer to the bill of revivor.[14] If a bill of revivor were brought without sufficient cause to revive, and this were not apparent upon its face, or if the plaintiff was not entitled to revive the suit at all, though a title was stated in the bill so that it was not demurrable, the defendant might set up his objections to it by plea.[15] No plea can be put in against a bill of revivor which has been pleaded to the original bill and overruled, although if a plea has been put in and the suit abated before argument, it may subsequently be pleaded anew to the original bill.[16] When an answer to a bill of revivor is required, it must be confined to such matters as are called for by the bill, or as would be material to the defense with reference to the order made upon it.[17] Allegations which might have been pleaded before abatement to the original bill will be considered as impertinent,[18] and disregarded.[19] It will not, however, be impertinent, if it states matters of defense which have occurred since the answer to the original bill was filed, though these do not affect the title of the plaintiff to revive.[20] Such an answer is impertinent when it describes and complains of irregularities in the suit before the abatement.[21] Such an answer should be signed by the solicitor.[22] One replication put in issue both the allegations in that and those in the original answer.[23] In all other respects, the forms and the proceedings upon demurrers, pleas, and answers to bills of revivor conformed as nearly as possible to those of and upon similar pleadings to origi-

13 Mason v. Hartford, P. & F. Ry. Co., 19 Fed. 53, 55; Sharon v. Terry, 36 Fed. 337.

14 Sharon v. Terry, 36 Fed. 337.

15 Daniell's Ch. Pr. (2d Am. ed.) 1710; Lewis v. Bridgman, 2 Sim. 465.

16 Daniell's Ch. Pr. (2d Am. ed.) 1711.

17 Daniell's Ch. Pr. (2d Am. ed.) 1711; Story's Eq. Pl., § 868a.

18 Nanney v. Tottey, 11 Price, 117.

19 Gunnell v. Bird, 10 Wall. 304, 308, 19 L. ed. 913, 915; Fretz v. Stover, 22 Wall. 198, 204, 22 L. ed. 769, 770.

20 Langley v. Overton, 10 Sim. 345.

21 Wagstaff v. Bryan, 1 R. & M. 28.

22 Daniell's Ch. Pr. (2d Am. ed.) 1712.

23 Catton v. Earl of Carlisle, 5 Madd. 427; Daniell's Ch. Pr. (2d Am. ed.) 1712.

nal bills.[24] A bill of revivor need not be set down for a hearing, unless it prays other relief than a mere revivor.[25] Where a bill of revivor sought merely an admission of assets and a revivor, and the defendant admitted assets, the cause might proceed upon the order of revivor merely.[26] If, however, any issue were joined upon the answer to it, a hearing was necessary.[27] The sole questions before the court when a bill of revivor is filed are the competency of the parties by and against whom it is filed and the frame of the bill.[28] A cause is not revived until an order of revivor has been entered.[29]

§ 225. Bills in the nature of bills of revivor in general. A bill in the nature of a bill of revivor is a bill filed "to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill."[1] The ancient practice is thus described. "If the death of a party whose interest is not determined by his death is attended with such a transmission of his interests that the title to it, as well as the person entitled, may be litigated in the court of chancery," as in the case of a devise[2] or conveyance[3] of real estate, "the suit is not permitted to be continued by a bill of revivor. An original bill upon which the title may be litigated must be filed, and this bill will so far have the effect of a bill of revivor that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor."[4] "The bill is said to be original merely for want of that privity between the party to the former and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by bill of revivor. Therefore, when the validity

24 Daniell's Ch. Pr. (2d Am. ed.) 1711, 1712.

25 Pruen v. Lunn, 5 Russ. 3; Daniell's Ch. Pr. (2d Am. ed.) 1713.

26 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1713.

27 Daniell's Ch. Pr. (2d Am. ed.) 1713; Mitford's Pl., ch. 1, § 3.

28 Bettes v. Dana, 2 Sumn. 383.

29 Atterbury v. Gill, 13 Off. Gaz. 276.

§ 225. 1 Mitford Pl., ch. 1, § 3. See Slack v. Walcott, 3 Mason, 508, 512; Sharon v. Terry, 36 Fed. 337, 353.

2 Slack v. Walcott, 3 Mason, 508.

3 Sharon v. Terry, 36 Fed. 337.

4 Mitford's Pl., ch. 1, § 3. See Slack v. Walcott, 3 Mason, 508.

of the alleged transmission of interest is established, the party to the new bill shall be equally bound by, or have advantage of the proceedings in the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; and the suit is considered as pending from the time of the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by original bill, if it could have been continued by bill of revivor merely."[5] So the pleadings filed and any testimony taken in the original cause can be used in the same manner in the second cause after a bill in the nature of a bill of revivor has been filed.[6] Such a bill can only be filed for the purpose of bringing in a person who claims in privity with the party whose death caused the abatement.[7] Thus, if a bill is filed by a devisee under a will, and afterwards a subsequent will is proved, the devisee under the second will can in no way avail himself of the proceedings in the suit; for there is no privity between him and the original plaintiff. If, however, a bill has been filed by the devisor himself for some matter concerning the estate devised, the second devisee may file a supplemental bill in the nature of a bill of revivor, even if the first devisee have already filed such a bill; for he derives his title so to do solely from the devisor independently of the first devisee.[8] The principal difference between the effect of an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill is that under the former the defendant is absolutely bound by the proceedings in the original suit, whereas under the latter he can avail himself of any defense which has arisen since the original bill was filed, or which he has a right to urge against the new complainant, although it did not exist against the original plaintiff.[9]

5 Mitford's Pl., ch. 1, § 3.

6 Slack v. Walcott, 3 Mason, 508; Battier v. Hinde, 7 Pet. 252, 266, 8 L. ed. 675, 680; Story's Eq. Pl., §§ 371-387; Daniell's Ch. Pr. (2d Am. ed.) 1719.

7 Daniell's Ch. Pr. 1720; Story's Eq. Pl., § 385; Rylands v. Latouche, 2 Bligh, 385; Tonkin v. Lethbridge, G. Cooper, 43.

8 Oldham v. Eboral, Cooper, Select Cas. 27.

9 Fulton v. Greacen, 44 N. J. Eq. 443.

When the court had jurisdiction of the original suit, a want of difference of citizenship between the parties to the bill in the nature of a bill of revivor will not be a defect in it.[10]

§ 226. Frame of bills in the nature of bills of revivor and proceedings upon them. A bill in the nature of a bill of revivor "must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it."[1] It usually prays that the original suit may be revived, and the party filing it have the benefit of the former proceedings therein.[2] Probably a subpœna issued in accordance with its prayer may be served upon the attorney of an absent defendant, who has already appeared, in the same manner as a subpœna upon a bill filed to stay proceedings at law.[3] Otherwise the form and the proceedings upon bills in the nature of bills of revivor were formerly the same as those upon bills of revivor;[4] and the difference between the two was practically one of mere nomenclature.[5]

§ 227. Manner of revivor upon appeal or error. The Supreme Court Rules provide: "1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee shall be entitled to have the writ of error or appeal dismissed:

10 Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; s. c., 2 Summ. 262; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886.

§ 226. 1 Mitford's Eq. Pl., ch. 1, § 3.

2 Daniell's Ch. Pr. 1721; Story's Eq. Pl., § 386.

3 Norton v. Hepworth, 1 Hall & Tw. 158; Dunn v. Clarke, 8 Pet. 1, 2, 8 L. ed. 845. See § 96.

4 Daniell's Ch. Pr. 1720, 1721; Rule 56.

5 Grew v. Breen, 12 Met. (Mass.) 369, 46 Am. Dec. 687.

and if the party so moving shall be plaintiff in error or appellant, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing. 2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate. 3. When either party to a suit in a'' District ''Court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the'' District ''Court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant

shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And, provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding such suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And, provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases."[1] The Circuit Courts of Appeals have a similar rule.[2] Where one of several joint defendants to a decree for damages and an injunction against the infringement of a patent dies after an appeal, the suit may be revived in the appellate court at the suit of the survivors, upon notice to the personal representatives of the decedent under the Supreme Court Rule without bringing them in as parties.[3] If in such a case the personal representatives of the deceased appellant voluntarily come in and ask to be made parties, they may be admitted.[4] Where the presence of the personal representatives of a deceased appellant will be required for the due prosecution of an appeal by his survivors, the appellate court may order that the appeal be dismissed unless properly revived within a limited time.[5] Where a defendant dies after judgment, an execution issued before the judgment is revived is no effect and all proceedings thereunder are void; unless, perhaps, when the writ was tested before the death occurred;[6] but the death of a judgment debtor does not affect the validity of a sheriff's deed sub-

§ 227. [1] Supreme Court Rule 15.

[2] C. C. A. Rule 19.

[3] Moses v. Wooster, 115 U. S. 285, 287, 29 L. ed. 391, 392.

[4] Thorpe v. Mathington, 1 Phill. Ch. 200; Moses v. Wooster, 115 U. S. 285, 288, 29 L. ed. 391, 392.

[5] Blake v. Bogle, Macq. Pr. of H. of L. 244 note; Moses v. Wooster, 115 U. S. 285, 288, 29 L. ed. 391, 392.

[6] Ransom v. Williams, 2 Wall. 313, 17 L. ed. 803.

sequently executed, but previously ordered.[7] Where a judgment for a personal injury had been erroneously set aside, the appellate court ordered judgment in favor of the original plaintiff *nunc pro tunc* as of a date before his death.[8] Where a writ of error to review a judgment of conviction was dismissed upon the defendant's death and the cause remanded for such further proceedings as "according to right and justice and laws of the United States ought to be had," on the filing of the mandate the court of first instance had the power to entertain a motion in abatement.[9]

§ 228. Bills of revivor and supplement. A bill of revivor and supplement is a bill which revives a suit after an abatement, and at the same time supplies a defect which has arisen in it since its institution.[1] Thus, where by the death of a defendant new rights accrue to the plaintiffs, a bill of revivor and supplement is necessary to state those facts.[2] And where after the conveyance by the complainant of the debt, he die, a bill of revivor and settlement is required.[3] It has been held in England that by such a bill a defect apparent upon the face of the original bill cannot be cured.[4] A bill of revivor and supplement is merely a compound of a bill of revivor and a supplemental bill, and its separate parts must be framed and proceed in the same manner.[5] It seems that it may be good as to the revivor, and bad as to the supplemental matter.[6] All parties to the original bill should be made parties to the bill of revivor and supple-

7 Insley v. U. S., 150 U. S. 512, 37 L. ed. 1163.

8 Coughlan v. District of Columbia, 106 U. S. 7, 27 L. ed. 74. But see Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673, 38 L. ed. 311.

9 U. S. v. Dunne, C. C. A., 173 Fed 254, 19 Ann. Cas. 1145.

§ 228. 1 Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., §§ 387, 627; Daniell's Ch. Pr. (2d Am. ed.) 1722, 1723.

2 Westcott v. Cady, 5 J. Ch. (N. Y.) 334, 342, 9 A. Dec. 306.

3 Miller v. Wattier, 165 Fed. 359. See Metal S. Co. v. Crandall, 18 Off. Gaz. 1531, where the court held that it was improper to revive the suit by a bill of revivor and said that he must file a "supplemental bill," evidently intending thereby a bill of revivor and supplement.

4 Bampton v. Birchall, 5 Beav. 330 s. c.; on appeal, 1 Phil. 568

5 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., §§ 387, 627; Daniell's Ch. Pr. 1722, 1723; Pendleton v. Fay, 3 Paige (N. Y.) 204.

6 Randolph v. Dickerson, 5 Paige Birchall, 5 Beav. 330; s. c., on appeal, 1 Phil, 568.

ment, although a revivor is sought against but one defendant.[7] A bill may be sustained upon demurrer where its allegations are sufficient to support equitable relief, whether properly or not styled a bill of revivor and supplement.[8]

§ 229. Supplemental bills in the nature of bills of revivor. A supplemental bill in the nature of a bill of revivor is a bill filed to cure an abatement when the person by or against whom the suit is to be continued, although claiming under the individual whose death caused the abatement, is not the representative whom the law allows to be recognized, but is one whose title could not have been litigated in the English Court of Chancery, but might have been disputed before another tribunal.[1] It has also been held that where during the pendency of a suit a trustee died, and the court appointed a successor to him, the new trustee could only be brought in by supplemental bill in the nature of a bill of revivor.[2] Upon the death of a trustee or assignee in bankruptcy or insolvency his successor is brought in by a bill of this character.[3] Where one of the complainants died leaving a will, which was proved in a foreign country, a motion of his executor and testamentary trustee to revive the suit upon a bill in the nature of a bill of revivor was denied with leave to him and the decedent's devisees to file a supplemental bill.[4] Such a bill, however, although designated as being in the nature a bill of revivor, is neither more nor less than a supplemental bill.[5]

§ 230. What renders a suit defective. If, after the institution of a suit in equity, a person who is a necessary party thereto comes into being, or any other event occurs, which, without abating the suit, occasions such an alteration in the interest of any of the original parties, or gives any person not a party such an interest therein, as makes it necessary that the change of interest shall be brought to the attention of the court, and the per-

7 Lake v. Austwick, 4 Jur. 314.

8 Shainwald v. Lewis, 69 Fed. 487. But see Campbell v. City of New York, 35 Fed. 14.

§ 229. 1 Daniell's Ch. Pr. (2d Am. ed.) 1721.

2 Greenleaf v. Queen, 1 Pet. 138, 148, 7 L. ed. 85, 89.

3 Daniell's Ch. Pr. (2d Am. ed.) 1721.

4 Currell v. Villars, 72 Fed. 330.

5 Daniell's Ch. Pr. (2d Am. ed.) 1721.

son not already a party brought before it, the suit is said to become defective.[1] This happens upon the dissolution of a corporation;[1a] but not by the entrance into liquidation and the closing of the business of a national bank,[2] nor by the appointment of a receiver of a corporation in the absence of a statute to the contrary.[3] The circumstances causing the change of interest must then be alleged, and the new party brought in by a supplemental bill, or a bill in the nature of a supplemental bill.[4] An assignment during the pendency of a suit, whether made voluntarily,[5] or, such as the election of a trustee in bankruptcy, by operation of law,[6] of the whole or a part of a defendant's interest therein, does not make the suit defective, nor affect the rights of the other parties, since the assignee takes the same rights and is subject to the same obligations as his assignor, and is equally bound or benefited by the decree. The assignee need not, therefore, be made a party,[7] unless the assignment disables the assignor from performing the decree of the court, when he should be brought before it;[8] but he may at any time be brought in at his own request[9] or at the request of the complainant.[10]

§ 230. [1] Jones v. Jones, 3 Atk. 217; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

[1a] National Bank v. Colby, 21 Wall. 609, 22 L. ed. 687; p. 763 A.; Greeley v. Smith, 3 Story, 658; Mumma v. Potomac Co., 8 Pet. 281, 22 L. ed. 687. But see Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. 539. See § 216 *supra*.

[2] Nat. Bank v. Insurance Co., 104 U. S. 54, 72, 26 L. ed. 693, 701.

[3] Chem. Nat. Bank v. Hartford Dep. Co., 161 U. S. 1, 40 L. ed. 595; National Bank v. Insurance Co., 104 U. S. 54, 72, 26 L. ed. 693, 701. The appointment of a receiver does not abate a suit against a national bank.

[4] Jones v. Jones, 3 Atk. 217; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

[5] *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355; Hazelton T. B. Co. v. Citizens' Street Ry. Co., 72 Fed. 325; Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co., 182 Fed. 398.

[6] Hewett v. Norton, 1 Woods, 68; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403.

[7] Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1664.

[9] Foster v. Deacon, Mad. & Geld. 59; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; *Ex parte* Railroad Co., 95 U. S. 221, 226, 24 L. ed. 355, 357; *infra*, § 234.

[10] Victor Talking Machine Co. v. Hawthorne & Sheble Mfg. Co. 173 Fed. 617. Cited with approval by Lanning, J., in Pittsburgh, S. & N. R. Co. v. Fiske, C. C. A., 178 Fed. 66, 67.

It has been held: that in a suit for an injunction, an assignment by a sole plaintiff, of his whole interest in the suit, compels a suspension of the proceedings until his successor is brought in.[11] Where, in a suit for the infringement of a patent, after an interlocutory decree for an injunction and an account, the complainant assigned its entire right to the patent, and took back from the assignees a license, which was not exclusive; it was held, that it could not recover any profits or damages on account of the infringement, which occurred after the execution of the assignment, nor proceed against the defendant for a violation of the injunction.[12] It has been held: that a reassignment to the original complainant does not restore the suit to its original condition, before the assignment by him was made; and that the suit cannot be continued without a bill in the nature of a supplemental bill.[13] The expiration of a patent does not render a suit for its infringement defective or abate the same.[14]

It has been said that a person entitled to the benefit of a decree by his subsequent acquisition of an interest in the subject-matter in controversy is not entitled to invoke the aid of the court or take further action until he has made himself a party by a supplemental bill or other appropriate pleading, and has thus brought in the representatives or successors in interest of the original parties, plaintiff or defendant.[15]

In a case in admiralty, it was held that a suit brought in the name of Napoleon III., on account of an injury to property,—a French ship held by him in his sovereign capacity,—did not abate by his deposition and the succession of the French Republic to the French Empire, and that the name of the plaintiff

11 Hoxie v. Carr, 1 Sumner, 173; Fed. Cas. No. 6,802; Ross v. Ft. Wayne, 63 Fed. 466, 470, 11 C. C. A., 288; Ecaubert v. Appleton, C. C. A., 67 Fed. 917, 923; Goss Printing Press Co. v. Scott, 134 Fed. 880; Automatic Switch Co. v. Cutler-Hammer Mfg. Co., C. C. A., 147 Fed. 250; George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496.

12 Goss Printing Press Co. v. Scott, 134 Fed. 880.

13 Automatic Switch Co. v. Cutler-Hammer Mfg. Co., C. C. A., 147 Fed. 250.

14 George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496; Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co., 182 Fed. 398; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631.

15 Secor v. Singleton, 11 Fed. 725, 726; *infra*, § 234.

could at any time be changed by order.[16] Where, after a receiver appointed by a State court had brought suit against a citizen of another State, his appointment was annulled, and he subsequently died; it was held, that the suit could not be continued by a citizen of the defendant's State, appointed to the same receivership after such death.[17]

§ 231. Supplemental bills. The Equity Rules provide: "Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."[1] A supplemental bill is merely an addition to the original bill.[2]

At first supplemental bills were filed, not only for the purposes mentioned in the last section, but also to supply such defects as might have been cured by amendment after the time to perfect a bill by amendment had expired.[3] Now, however, that amendments may be allowed at any stage of a suit,[4] they are no longer needed for that purpose; and as the fact that the matter pleaded in a supplemental bill may be inserted in the original bill by amendment, was also good ground of demurrer,[5] the propriety of their use for this purpose is doubtful;[6] but they are still occasionally so used.[7] Where plaintiff had no cause of ac-

16 The Sapphire, 11 Wall. 164, 20 L. ed. 127. See Allen v. The Mayor, 7 Fed. 483; s. c., 18 Blatchf. 239; Hemingway v. Stansell, 106 U. S. 399, 402, 27 L. ed. 245, 246.

17 Hubert v. New Orleans, C. C. A., 130 Fed. 21.

§ 231. 1 Eq. Rule 34.

2 Quoted with approval by Hazel, J., in Banks Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701. See Mitford's Pl., ch. 1, § 2.

3 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1653-1663; Story's Eq. Pl., § 334; Jenkins v. Eldredge, 3 Story, 299; Mosgrove v. Kountze, 14 Fed. 315.

4 Rule 29.

5 Mitford's Pl., ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

6 Tubman v. Wason Mfg. Co., 44 Fed. 429; Electrical A. Co. v. Brush El. Co., 44 Fed. 602. See, however, Davies v. Williams, 1 Sim. 5; Nevada Nickel Syndicate v. National Nickel Co., 86 Fed. 486; Mellor v. Smither, C. C. A., 114 Fed. 116, 120.

7 Banks' Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701; Murray v. Orr & Locket Hardware Co., C. C. A., 153 Fed.

tion when his bill was filed, he cannot by supplemental bill bring in subsequent matters which give him a right to relief.[8] In a case in Massachusetts where a stockholder's bill failed to show a sufficient application to the directors and other stockholders to bring a suit in the name of the company; it was held, that subsequent action at directors and stockholders meetings showing that such a request would have been denied could not be pleaded by supplemental bill.[9] A supplemental bill is demurrable when filed to introduce a claim founded upon a title entirely distinct from that in the original bill; as, when a man first sued claiming as heir-at-law, and afterwards sought by supplemental bill to plead a purchase of the interest of the true heir-at-law;[10] and when brought against a person who neither had nor claimed any interest in the subject-matter of the original suit.[11]

Where the bill is sufficient to entitle the plaintiff to some relief and facts subsequently occur, which entitle him to relief which is different and more extensive, he may obtain the latter by setting forth the new matter in a supplemental bill.[12]

The new matters must be germane to the purpose of the original bill,[13] and leave to file them may be denied when they might have been duly pleaded by an amended bill and there is no excuse for the delay.

Subsequent infringements of a patent,[14] even in a plain case by a different device from that charged in the bill,[15] or of copy-

369; Napier v. Westerhoff, 153 Fed. 985; St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220; Scott v. Lazell, 170 Fed. 1023.

8 Kryptok Co. v. Haussman & Co., 216 Fed. 267.

9 Bartlett v. N. Y. & N. H. R. Co., 226 Mass. 467.

10 Tonkin v. Lethbridge, G. Cooper, 43; Daniell's Ch. Pr. (2d Am. ed.) 1681.

11 Baldwin v. Mackown, 3 Atk. 817; Mitford's Pl., ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

12 Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160, 176. But see Young v. Herman, C. C. A., 232 Fed. 361.

13 Mitchell v. Big Six Development Co., 186 Fed. 552.

14 Healey Ice Machine Co. v. Green, 184 Fed. 515; Mitchell v. Big Six Development Co., 186 Fed. 552.

15 Murray v. Orr & Lockett Hardware Co., C. C. A., 135 Fed. 369. After the complainant had finished taking testimony he was allowed to file a supplemental bill setting up infringements which had occurred after the filing of the original bill. Turrell v. Spaeth, 9 Off. Gaz. 1163. Houghton v. Whitin Machine

rights in the same series of books,[16] have thus been pleaded. In a suit to restrain the infringement of a patent, "where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension; but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent, and hence it can no more be the foundation for the assertion of a right than can a legislative act which has been repealed without any saving clause of pending actions. Consequently, the infringement of the reissued patent becomes a new cause of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit."[17] Where, however, the defendant made no objection to the complainant's filing a supplemental bill setting forth an infringement of a reissued patent, but filed to it a plea similar to that which he had previously filed to the original bill, it was held that he had

Works, 161 Fed. 581; Sundh El. Co. v. Gen. El. Co., 217 Fed. 583, Nat. Metal Molding Co. v. Tubular Woven Fabric Co., C. C. A., 239 Fed. 907; Riverside Hts. Orange Growers' Ass'n. v. Stebler, C. C. A., 240 Fed. 703; J. D. Randall Co. v. Fogelsong Mach. Co., C. C. A., 216 Fed. 599, granted after hearing. But see Individual Drinking Cup Co. v. Public Service Cup Co., 234 Fed. 653; Charles Green Co. v. Henry P. Adams Co., C. C. A., 247 Fed. 485, denied after a decree. "Such an application is a practice which seems to be growing, and which I personally look upon with favor." Hough, J., in Gordoni Turco Holvaty Co., 233 Fed. 430, 432. It has been held that the complainant is not bound to bring such new method of infringement into the original suit and that a judgment therein is no bar to a subsequent suit by him for the infringement by means of the subsequent device. T. B. Wood's Sons Co. v. Valley Iron Works, 198 Fed. 869. See *supra*, § 186; *infra*, §§ 89a, 431.

16 Banks' Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701.

17 Clifford, J., in Reedy v. Scott, 23 Wall. 352, 364, 365, 23 L. ed. 109, 110, 111. See also Fry v. Quinlan, 13 Blatchf. 205; Jones v. Barker, 11 Fed. 597. But compare Woodworth v. Stone, 3 Story, 749; Reay v. Raynor, 19 Fed. 308.

waived his right to object upon appeal that the suit was improperly continued, and that an original bill should have been filed.[18]

After the institution of suits to enjoin the enforcement of State statutes fixing freight rates, supplemental bills to enjoin the enforcement of subsequent statutes fixing passenger rates[19] and to enjoin proceedings in the State court to obtain an adjudication there of the question previously pending in the Federal court,[20] have been permitted. In an extraordinary case, where creditors had sued to preserve a corporation's equity of redemption, praying that if the situation did not change a city might be made a party and an injunction granted to prevent municipal acts that would impair street railway franchise; a supplemental bill was allowed to show subsequent negotiations with the city and subsequent municipal acts.[21] Where, after a decision forbidding a city to impair a franchise, it adopted a resolution limiting the franchise in another way than that previously threatened; it was held proper to plead the adjudication and test the validity of the last ordinance by a supplemental bill.[22]

A forfeiture of the defendant's franchise pending a suit for an injunction may be pleaded by supplemental bill.[23] A bill to enjoin the enforcement of a municipal ordinance authorizing a street-railroad company to condemn for its use certain parts of the track of another corporation was entertained by a Circuit Court of the United States upon the ground, that the violation of a previous grant to the latter company, which complainant alleged, impaired the obligation of a contract. It was held: this did not give that court jurisdiction to decide a question arising

18 Reedy v. Scott, 23 Wall. 352, 23 L. ed. 109.

19 Missouri Rate Cases, 230 U. S. 474; St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220. So, when the statute in force at the beginning of the suit, which authorized public officers to sue, to enforce the same, was repealed and a new law enacted subject to the same objections, which provided that private persons might sue because of its violation. Central of Georgia Ry. Co. v. Railroad Com. of Ala., 161 Fed. 925.

20 Missouri Pac. Ry. Co. v. Jones, 170 Fed. 124.

21 U. S. v. Toledo Newspaper Co., 220 Fed. 458, 463.

22 City of Omaha v. Omaha El. Lt. & P. Co., C. C. A., 255 Fed. 801.

23 Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 269, 54 L. ed. 190, 192.

on a supplemental bill as to the right of condemnation by the former company under its charter, pursuant to which the city determined, pending the suit, that the streets were not wide enough for two companies to lay tracks side by side; because the matter involved was beyond the scope of the controversy, which gave the court jurisdiction of the case originally.[24] The prosecution of a suit in a State Court, which would interfere with the execution of a decree in a suit of which a Federal Court had prior jurisdiction, was restrained upon a supplemental bill although the plaintiff in the State suit was not a party in the Federal Court.[25] In a patent case, brought by an exclusive assignee, he was allowed to show by a supplemental bill that pending the suit the patent had been assigned to him.[26]

When an event happens subsequently to the filing of an original bill which gives a new interest in the matter in dispute to any person, whether or not already a party, without depriving of their interest all of the original plaintiffs suing in their own right, the defect arising from this event may be supplied by a supplemental bill.[27]

Where a board of directors seek to dismiss a suit by a corporation, minority stockholders may be allowed to come in by supplemental bill, and to continue the suit in their own right, and at their own expense, upon compliance with Equity Rule 27.[28]

[24] Mercantile Trust & Deposit Co. v. Collins Park & Belt Co., 107 Fed. 762. See August Busch & Co. v. Webb, 122 Fed. 665, 662.

[25] St. Louis, I. M. & S. Ry. Co. v. Bellyamy, 211 Fed. 172.

[26] Owatonna Mfg. Co. v. F. B. Fargo & Co., 94 Fed. 519; Banks Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701, a copyright case.

[27] Quoted with approval by Hazel, J., in Banks' Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701. See Hobson v. McArthur, 16 Pet. 180; Daniell's Ch. Pr. 1663-1675; Story's Eq. Pl., §§ 336-343; Mitford's Pl., ch. 1, § 3. It has been held that supplemental bills may be filed to plead the removal, subsequent to the original bill, of liens which were obstacles to part of the plaintiff's claim (Sheffield & B. I. & Ry. Co. v. Newman, C. C. A., 77 Fed. 787), and to plead an election to declare the principal of a mortgage due, made subsequent to the original bill to foreclose for a default in interest. (Seattle, L. S. & G. Ry. Co. v. Union Tr. Co., 79 Fed. 179); or to plead subsequent defaults in interest. N. Y. Security & Tr. Co. v. Lincoln Stone Ry. Co., 74 Fed. 67. See also, s. c., 77 Fed. 525.

[28] Eagle Iron Co. v. Colyar, 156 Fed. 954. See *supra*, § 145.

Where, pending a foreclosure suit, a majority of the bondholders, in accordance with the trust deed, removed the trustee, who had brought the suit, and appointed another in his place; the latter was permitted to file a supplemental bill to procure his substitution as complainant, when there appeared to be no fraud in his appointment.[29] Where, after a small minority stockholder had filed a bill to enjoin a consolidation of his corporation with another, the consolidation was effected and bonds to a large amount secured by mortgage were issued by the consolidated company; the court refused leave to file a supplemental bill to set aside the mortgages.[30] Where a holder of stock and bonds filed a bill on behalf of all stockholders to set aside an invalid assignment and for a determination of the status of the bonds, whereupon a judgment creditor intervened and contested the whole bond issue; plaintiff was permitted to file a supplemental bill praying for a determination of the validity of the bonds.[31]

A remainderman may also, in this same manner, be made a party to a suit brought by or against a tenant in tail upon the determination of the latter's estate, and the acquisition by the former of the present interest to the property in litigation.[32] A supplemental bill which brings in a new party may be original as to him, but supplemental as to the rest.[33] If, pending a suit, a tenant in tail of an estate thereby affected by it is born;[34] or if, pending a suit against a husband and wife concerning the latter's estate, the man dies, and the wife thus acquires a new interest;[35] or if one of two or more plaintiffs suing in their own right is entirely deprived of his interest, by any other event than an assignment of it;[36] or if the interest of a sole plaintiff suing in a representative capacity entirely determines by death or otherwise, and some other person becomes entitled to the same property under the same title,[37] the defect in the suit thereby

29 March v. Romare, C. C. A., 116 Fed. 355.

30 Williamson v. Collins, C. C. A., 283 Fed. 835.

31 Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co., 258 Fed. 160, 178.

32 Lloyd v. Johnes, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.), 1668-1672.

33 Mitford's Pl., ch. 1, § 3.

34 Mitford's Pl., ch. 1, § 3.

35 Daniell's Ch. Pr. (2d Am. ed.), 1663.

36 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

37 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1665; Marriott v. Tarpley, 9 Sim. 279.

occasioned must be cured by a supplemental bill. So, if pending a suit a party becomes a lunatic, or if pending a suit by or against a lunatic and his committee a new committee is appointed, the committee should be brought in by a supplemental bill.[38] A supplemental bill may be filed after a decree in aid of the same; as, it has been held, by a purchaser at a foreclosure sale to enjoin an attack upon his title by proceedings in a State court by privies to the original suit, such as stockholders or creditors,[39] and to enjoin the taking possession of property to which the complainant is entitled under the decree,[40] or to enforce a decree by consent.[41]

Before the act of February 8th, 1899,[42] it was held: that the successor in office of a cabinet officer could not be substituted for him in a suit for an injunction, and for a decree directing the issue of a patent;[43] but, that a supplemental bill might be filed to enjoin a State Attorney-General from continuing, in the State court, a suit, the prosecution of which, by his predecessor, had been enjoined.[44]

A stranger to the suit who might be estopped by the final decree cannot be made a party by supplemental bill.[45] After an interlocutory decree for an injunction and an accounting in a patent suit, and the conclusion of the accounting thereunder; the court refused to permit the complainant, by a supplemental bill, to bring in the officers and directors of the defendant, in order to charge them with individual liability upon the final decree.[46] But where such officers were originally made parties, proof that since the commencement of the suit the corporation has become insolvent and has transferred its property, may be received without the filing of a supplemental bill.[47]

38 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

39 Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24. But see Keokuk & W. R. Co. v. Scotland County, 152 U. S. 318, 38 L. ed. 457.

40 Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123.

41 Chapman v. Yellow Poplar Lumber Co., C. C. A., 143 Fed. 201.

42 30 St. at L. 822. Quoted *supra*, §§ 174, 216.

43 Warner Valley Stone Co. v. Smith, 165 U. S. 28, 41 L. ed. 621.

44 Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587.

45 G. & C. Merriam Co. v. Saalfield & Ogilbie, 241 U. S. 22. But see Searchlight Horn Co. v. Am. Graphaphone Co., 240 Fed. 745.

46 H. C. Cook Co. v. Little River Mfg. Co., 56 Fed. 676.

47 Saxlehner v. Eisner, 140 Fed. 938.

Pending a suit to restrain a house-owner from interfering with complainant's wires by moving his building along a street, leave was refused to file a supplemental bill against other house-movers moving other houses on the same road over the same street under separate permits.[48] Assignees of defendants enjoined from using a trade-mark, who use the mark, but do not base their claim to use it on any rights supposed to be derived from the original defendants, cannot be brought into the original suit by supplemental bill.[49] A bill by a surviving partner to settle the partnership affairs is a separate and distinct proceeding from a suit subsequently brought by the same party to subject real estate of the deceased partner to the payment of debts held by his heirs, and the statute of limitations cannot be avoided by styling the second bill a supplemental bill.[50] According to Lord Redesdale, upon the death of one suing in behalf of himself and others in the same position with him, if his representative do not choose to file a bill of revivor, any one of the class on behalf of whom he sued may revive;[51] but it seems that a more proper course would be for the one wishing to continue the suit to do so by means of a supplemental bill, which he can only obtain leave to file upon notice to the representatives of the deceased plaintiff, as well as to the defendants.[52] Where, however, a suit brought by one in a representative capacity becomes defective by his death, and another acquires the right to continue it under a different title,—as upon the death of an executor or administrator succeeded by an administrator *de bonis non,* according to Lord Redesdale and Daniell, the latter may continue by a bill of revivor,[53] according to Judge Story, only by a bill in the nature of revivor;[54] in no case by a supplemental bill. It has been held that in a case where the defendant is entitled to affirmative relief in his answer without a cross-bill, as a suit under Section 4918 of the Revised Statutes, the

48 Edison El. Light & Power Co. v. Blomquist, 185 Fed. 615.

49 Dadirrian v. Gullian, 80 Fed. 986.

50 White v. Miller, 158 U. S. 128, 39 L. ed. 921.

51 Mitford's Pl., ch. 1, § 3.

52 Houlditch v. Marquis Donnegall, 1 S. & S. 491; Dixon v. Wyatt, 4 Madd. 392; Daniell's Ch. Pr. (2d Am. ed.) 1671, 1672; Story's Eq. Pl., § 265.

53 Mitford's Pl., ch. 2, § 3; Daniell's Ch. Pr. (2d Am ed.) 1665; Owen v. Curzon, 2 Vern. 237; Huggins v. York Buildings Co., 2 Eq. Abr. 3, pl. 14.

54 Story's Eq. Pl., § 382, n. 1.

complainant may plead in a supplemental bill any matter in defense to such a claim for affirmative relief, that he might have pleaded by supplemental answer to a cross-bill, had one been filed.[55] A supplemental bill must not be inconsistent with the original bill. Thus, where the original bill stated that the defendants claimed to be a corporation, but were not incorporated, it was held improper to file a supplemental bill claiming relief upon the ground that the defendants were a corporation.[56] Where the original bill against a corporation prayed an injunction and, as incidental relief, a receiver, and the defendant was dissolved by proceedings in a State court, after the issue of an inquisition, but before the appointment of a receiver, a supplemental bill seeking to continue the injunction against the liquidators was held improper.[57] A defective original, cannot be cured by new matter subsequently arising, set forth in a supplemental bill, such as the entry of judgment in favor of the plaintiff subsequent to his filing a creditor's bill.[58] The only exceptions to this rule are the probate of a will, or obtaining letters of administration by a party who has sued as executor or administrator, and a few other cases of the perfection of an inchoate right.[59]

§ 232. Parties and frame of a supplemental bill. As a general rule, all parties to the original suit must be made such to a supplemental bill filed to supply a defect in it,[1] unless such a bill be filed to bring in a mere formal defendant, or to allege matter which cannot possibly affect a decree against more than one defendant, when the others need not be made parties to it.[2] An objection for want of parties must, however, be made by motion to dismiss, answer, or when the motion for leave to file

55 Electrical A. Co. v. Brush El. Co., 44 Fed. 602, 607

56 Maynard v. Green, 30 Fed. 643.

57 Lang v. Louisiana Canning Co., 56 Fed. 675.

58 Putney v. Whitmore, 66 Fed. 385; Neubert v. Massman, 37 Fla. 91, 19 So. 625; Heffron v. Knickerbocker, 57 Ill. App. 339; N. Y. Security & Tr. Co. v. Lincoln Street Ry. Co., 74 Fed. 67. But see s. c., 77 Fed. 525.

59 *Supra*, § 212.

§ 232. 1 Daniell's Ch. Pr. (2d Am. ed.) 1678; Jones v. Jones, 3 Atk. 217; Dyson v. Morris, 1 Hare, 413; Jones v. Howells, 2 Hare, 342.

2 Greenwood v. Atkinson, 5 Sim. 419; Dyson v. Morris, 1 Hare, 413; Wilkinson v. Fowkes, 9 Hare, 193; Story's Eq. Pl., § 343.

the bill is argued. It may be too late to make it at the hearing.[3] If the court had jurisdiction of the original bill it will take jurisdiction of the supplemental bill, no matter what may be the citizenship of the new parties;[4] provided at least that they have a right to sue and be sued in a Federal court.[5] A "supplemental bill must state the original bill, and the proceedings thereon, and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties."[6] The Equity Rules provide that "It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."[7] This, however, although copied in substance from an English Chancery order,[8] is merely a reaffirmance of the pre-existing practice.[9] If the bill brings in no new party, there is never any need of its containing any of the statements in the original pleadings.[10] When, however, it brings in a new party, as it is in fact original as to him, it must state enough of the former proceedings to show an equity against him.[11] These need not be averred positively; but it will be sufficient to state that such matters were alleged in the former bill or answer,[12] and only so much of the original pleadings need be set forth as suffice to show an equity against the new party.[13] The prayer of a supplemental bill is adapted to the object for which it is exhibited. It formerly always concluded with a prayer for process in the usual form.[14] Whether this is now necessary when no new defendants are brought in may be doubted.[15] It

3 Jones v. Jones, 3 Atk. 217.

4 Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886. See § 21.

5 See Adams Express Co. v. Denver & R. G. R. Co., 16 Fed. 712; Omaha H. R. Co. v. Cable T. Co., 33 Fed. 689.

6 Mitford's Pl., ch. 1, § 3.

7 Eq. Rule 35; copied from Eq. Rule 58 of 1842.

8 See Order 47 in Chancery, of August, 1841.

9 Daniell's Ch. Pr. (2d Am. ed.) 1675-1678.

10 Daniell's Ch. Pr. (2d Am. ed.) 1675.

11 Baldwin v. Mackown, 3 Atk. 817; Daniell's Ch. Pr. (2d. Am. ed.) 1675, 1676.

12 Lloyd v. Jones, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.) 1676.

13 Vigers v. Lord Audley, 9 Sim. 72; Attorney-General v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1676, 1677.

14 Daniell's Ch. Pr. 1680.

15 See Shaw v. Bill, 95 U. S. 10, 24 L. ed. 333.

should be signed by the solicitor,[16] and in other respects conform to the form of an original bill.[17] Where no objection to the form of proceedings is made, relief which regularly should only be granted upon a supplemental bill, may be allowed upon a petition.[18] A supplemental bill may be filed at any time during the progress of a suit, as well after as before a decree,[19] and even during the pendency of an appeal.[20] It seems, however, that if matters which make it necessary or advisable were known to the party filing it before the entry of the decree, afterwards it will be too late;[21] though such an objection must be taken before the hearing upon the supplemental bill.[22]

§ 233. Proceedings upon supplemental bills. The Equity Rules provide: "Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."[1] Where it is contended that a corporate defendant had ceased to exist, the pleading or motion must be filed by its attorney in his name and not in the name of the corporation.[2] The petition for leave to file such a bill need not state the averments which are intended to be inserted therein; but must state sufficient to advise the opposite parties and the court of the ground upon which the relief is sought.[3]

16 Eq. Rule 24.

17 Daniell's Ch. Pr. (2d Am. ed.) 1680.

18 Coburn v. Ohio Valley Land & Cattle Co., 138 U. S. 196, 223, 34 L. ed. 876, 887.

19 Root v. Woodworth, 150 U. S. § 401, 37 L. ed. 1123; Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24; Daniell's Ch. Pr. (2d Am ed.) 1659, 1660; Story's Eq. Pl., §§ 333, 338*a*; 2 Barbour's Ch. Pr. 167; O'Hara v. Shepherd, 3 Md. Ch. Dec. 306; Jenkins v. Eldredge, 3 Story, 299; Woodward v. Woodward, 1 Dick. 33; Dormer v. Fortesque, 3 Atk. 124; Secor v. Singleton, 41 Fed. 725.

20 Woodward v. Woodward, 1 Dick. 33.

21 Pendleton v. Fay, 3 Paige (N. Y.) 204; Story's Eq. Pl., § 338*a*.

22 Fulton Bank v. N. Y. & S. C. Co., 4 Paige (N. Y.) 127.

§ 233. 1 Equity Rule 34.

2 Culpeper Nat. Bank v. Tidewater Imp. Co., 89, S. E. 118.

3 Parkhurst v. Kinsman, 2 Blatchf. C. C. 72.

Before the Equity Rules of 1912, it was held that upon the return of the order to show cause an objection which was a proper ground for a demurrer could not be raised.[4] The objection that a supplemental bill was filed without leave was not a ground of demurrer, but only for a motion to dismiss which rested in the discretion of the court.[5] A motion would not lie to take a supplemental bill off the file for irregularity upon the ground that it did not state supplemental matter.[6] The proper course in such a case was to demur, or to object to the order allowing it to be filed.[7]

Such motion might, however, be granted if a bill filed should be different from that which the order allowed. A supplemental bill filed without leave may by a subsequent order be allowed to remain on file.[8] No subpoena need be issued upon a supplemental bill, unless new defendants are to be brought in; and then they only need be served with process.[9] Such a subpoena is in the same form as one issued upon the filing of an original bill, except that it specifies the nature of the bill upon which it is issued.[10]

A demurrer to a supplemental bill was in general subject to the same rules except as to time of filing the same, and would lie for the same reasons as if the bill were original;[11] but there were some grounds of demurrer peculiar to bills of this class. Thus, a demurrer would lie if it appeared upon the face of the bill that it pleaded matters which occurred before the institution of the suit, and which it was not too late to insert by amendment into the original bill.[12] A supplemental bill was demurrable where it showed on its face that the plaintiff knew the facts therein alleged before his time to amend had expired.[13] A supplemental bill was demurrable if when filed after a de-

4 Oregon & Trans. Co. v. N. Pac. Ry. Co., 32 Fed. 428.

5 Henry v. Travelers' Ins. Co., 45 Fed. 299, 303.

6 Bowyer v. Bright, 13 Price, 316; Daniell's Ch. Pr. (2d Am. ed.) 1682.

7 Ibid.

8 Mackintosh v. Flint & P. M. R. Co., 34 Fed. 582.

9 Shaw v. Bill, 95 U. S. 10, 14 24 L. ed. 333, 334.

10 Daniell's Ch. Pr. (2d Am. ed.) 1680.

11 Daniell's Ch. Pr. (2d Am. ed.) 1681; Secor v. Singleton, 41 Fed. 725.

12 Mitford's Pl., ch. 2, § 2, part 1; Story's Eq. Pl., § 614; Stafford v. Howlett, 1 Paige (N. Y.), 200.

13 Henry v. Travelers' Ins. Co., 45 Fed. 299, 302.

cree for an account it pleaded matter which it showed that the plaintiff knew before the decree.[14] An allegation made as a basis for relief not within the scope of the original bill is no ground for the dismissal or striking out of the supplemental bill,[15] although the court will refuse to grant such new relief[16] except under special circumstances.[17]

Any objections to a supplemental bill which do not appear upon its face may be taken by answer, which, in general, is subject to the same rules as answers to original bills.[18] If a defendant has not answered the original bill, his successor may be called upon in the supplemental bill to do so.[19] When that is done, the usual course is to include the answer to the original and that to the supplemental bill in the same pleading,[20] although it is not absolutely irregular to separate them.[21] A defense cannot be pleaded to a supplemental bill which has previously been pleaded to the original bill and overruled.[22] Before the Equity Rules of 1912, if the plaintiff wished to join issue upon averments in the answer, he might file a replication to it.[23] If the new matter in the supplemental bill is not admitted, it must be proved, or the bill will be dismissed with costs.[24] For this purpose evidence may be taken and a hearing had as upon an original bill.[25] Discovery might be obtained by a supplemental bill.[26] If there has been no previous hearing and decree, both bills may be brought to a hearing together, and a single decree will suffice for both.[27] If the supplemental bill is heard

14 Henry v. Travelers' Ins. Co., 45 Fed. 299, 303.

15 Whitaker v. Whitaker, Iron Co., 238 Fed. 980.

16 Ibid.

17 See General Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160. See *supra*, § 231.

18 Daniell's Ch. Pr. (2d Am. ed.) 1682.

19 Vigers v. Lord Audley, 9 Sim. 408.

20 Vigers v. Lord Audley, 9 Sim. 408.

21 Sayle v. Graham, 5 Sim. 8.

22 Pentlarge v. Pentlarge, 22 Fed. 412; Scott v. Lazell, 177 Fed. 608.

23 Daniell's Ch. Pr. (2d Am. ed.) 1683; Perkins v. Hendryx, 31 Fed. 522.

24 Daniell's Ch. Pr. (2d Am. ed.) 1683; Pedrick v. White, 1 Met. (Mass.) 76.

25 Lloyd v. Jones, 9 Ves. 27, Daniell's Ch. Pr. (2d Am. ed.) 1683.

26 Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1684, 1685.

27 Daniell's Ch. Pr. (2d Am. ed.) 1684; Turrell v. Spaeth, 9 Off. Gaz. 1663.

alone, the evidence taken in the original suit may be read in support of or in opposition to it.[28]

The effect of a supplemental bill when sustained is to put the suit in the same condition as if the supplemental matter had been alleged and the new party, if any, brought in at its institution.[29]

An injunction temporary or permanent may be granted upon a supplemental bill.[30] Ordinarily such relief is within the court's discretion and will not be renewed upon appeal.[31] A bill improperly styled a supplemental bill was dismissed upon a demurrer, which specified that objection, although it might have been sustained as a bill in the nature of a supplemental bill.[32] Where, pending an appeal, a supplemental bill was filed; it was held, that a mandate ordering the dismissal of the original bill did not affect the supplemental pleading.[33] The grant,[34] or refusal, of permission to file a supplemental bill will rarely be a ground of reversal upon an appeal, when the complainant has the right to file an original bill for the same relief.[35] After a reversal, where the mandate gives directions "to grant leave to both sides to adduce further evidence," the court of first instance has power to permit the filing of a supplemental bill.[36]

§ 234. Bills in the nature of supplemental bills in general. A bill in the nature of a supplemental bill is a bill filed to obtain the benefit of a suit, either after an abatement which cannot be cured by bill of revivor or a bill in the nature of a bill of revivor, or after the suit has become defective in cases which do not admit of a supplemental bill to supply that defect.[1] Cases

28 Daniell's Ch. Pr. (2d Am ed.) 1666, 1667.

29 Ibid.

30 J. D. Randall Co. v. Fogelsong, Mach. Co., C. C. A., 216 Fed. 599; Charles Green Co. v. Henry P. Adams Co., C. C. A., 247 Fed. 485.

31 Ibid.

32 Campbell v. New York, 35 Fed. 14. But see Ross v. City of Ft. Wayne, 58 Fed. 404, 406.

33 Berliner Gramaphone Co. 1 Seaman, C. C. A., 113 Fed. 750; *infra*, § 518.

34 Young v. Herman, C. C. A., 232 Fed. 361.

35 Brookfield v. Novelty Glass Mfg. Co., C. C. A., 170 Fed. 960; Liebing v. Matthews, C. C. A., 216 Fed. 1; General Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160.

36 Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 268, 54 L. ed. 190, 192.

§ 234. 1 Mitford's Pl., ch. 1, § 3; Campbell v. New York, 35 Fed. 14; Tappan v. Smith, 5 Biss. 73. But see Secor v. Singleton, 41 Fed. 725, 726; Napier v. Westerhoff, 153 Fed. 985; Haarmann-DeLaire-Scheffer Co. v. Leuders, 135 Fed. 120.

frequently occur in practice where the interest of an original party to a suit is completely determined, and another person becomes interested in the subject-matter by a title not derived from the other, but in such a manner as to make it proper that the benefit of the former proceedings should be had by or against the latter, without incurring the expense of commencing an entirely new proceeding. In such a case, the benefit of the former proceedings may be obtained by means of a bill called an original bill in the nature of a supplemental bill, or a bill in the nature of a supplemental bill.[2] Such a bill must be filed to bring into a suit the assignee of a sole plaintiff who had acquired his interest during its pendency.[3] The reason given for this is the doctrine of maintenance, in consequence of which "it is not enough for the new plaintiff to state that his assignor instituted a suit and assigned to him the benefit of it; he must show that his assignor had the property in respect of which the suit was instituted, and that property has been assigned and carries with it the right to sue."[4] Such a bill may be brought by the assignee of the complainant to a bill to enjoin the infringement of a patent and for an account of profits and damages, although the assignment was made, and the bill in the nature of a supplemental bill was filed, after the expiration of the patent, pending the suit, and merely for the purpose of collecting damages.[5] The assignee was allowed to give evidence showing an extension of the time of the infringement until his bill was filed.[6] Where a majority of the bondholders had removed a trustee, after he had brought a suit for the benefit of the minority, the court refused to permit the new trustee, who was hostile to the suit, to be sub-

2 Daniell's Ch. Pr. (2d Am. ed.) 1685; Mitford's Pl., ch. 1, § 3.

3 Daniell's Ch. Pr. (2d Am. ed.) 1667; Campbell v. New York, 35 Fed. 14; Ross v. City of Ft. Wayne, 58 Fed. 404; s. c. on appeal, 65 Fed. 466; Tappan v. Smith, 5 Biss. 73; George W. Jackson, Inc., v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496; Pittsburgh, S. & N. R. Co. v. Fiske, C. C. A., 178 Fed. 66. But see Hoxie v. Carr, 1 Summ. 173; Sedgwick v. Cleveland, 7 Paige (N. Y.) 290; Murray v. Orr & Lockett Hardware Co., C. C. A., 153 Fed. 369.

4 White on Supplement and Revivor, 126, 174; Daniell's Ch. Pr. (2d Am. ed.) 1667.

5 Ross v. City of Ft. Wayne, 58 Fed. 504; s. c. on appeal, 63 Fed. 466.

6 National E. Signaling Co. v. Telefunken W. Tel. Co., 208 Fed. 679.

stituted for the original plaintiff by a bill in the nature of a supplemental bill.[7]

The assignee of a decree for an injunction and an account of damages caused by the infringement of a trade-mark may have the benefit of the suit by filing an original bill in the nature of a supplemental bill.[8] An assignee, who files a bill in the nature of a supplemental bill, is ordinarily entitled to the benefit of all the proceedings in the original suit, as against the original defendants; but they may avail themselves of any equity or defense, which could be urged against the new complainant, although it did not exist against the original complainant; and also of any equity or defense, which has arisen since the original bill was filed.[9] Neither such a bill nor a supplemental bill will be sustained when filed by a purchaser of a railroad at a foreclosure sale to obtain the benefit of a decree enjoining the collection of taxes obtained by stockholders in a suit brought subsequent to the mortgage.[10] So where a defendant dies before appearance or a decree against him *pro confesso,* his successor can only be brought in by a bill in the nature of a supplemental bill, which, however, is considered merely supplemental as to the defendants.[11]

Such a bill may be filed by a purchaser of the complainant's interest even after a decree;[12] but where the purchase was made after a direction for a decree, the bill should not be filed until after the decree is entered.[13]

§ 235. Frame of a bill in the nature of a supplemental bill. A bill in the nature of a supplemental bill "must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the

7 March v. Romare, 114 Fed. 200.

8 Walter Baker & Co. v. Baker, 89 Fed. 673. But see New York, B. & P. Co. v. N. J. C. S. & R. Co., 47 Fed. 504.

9 Haarmann-DeLaire-Scheffer Co. v. Leuders, 135 Fed. 120.

10 Keokuk & S. W. R. Co. v. Scotland County, 152 U. S. 317, 38 L. ed. 457.

11 U. S. v. Fields 4 Blatchf. 326; Crowfoot v. Mander, 9 Sim. 396; Asbee v. Shipley, M. & G. 296; Daniell's Ch. Pr. (2d Am. ed.) 1673.

12 Walter Baker & Co. v. Baker, 89 Fed. 673; Hazelton T. R. Co. v. Citizens' St. Ry. Co., 72 Fed. 325.

13 Hazelton T. R. Co. v. Citizens' St. Ry. Co., 72 Fed. 325.

ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled, and pray the decree of the court adapted to the case of the plaintiff in the new bill."[1] It will not be impertinent for it to restate allegations of the bill or answer in the original suit, nor to charge new matter which occurred before the original bill was filed, for the purpose of meeting a defense in the original answer.[2] But a bill in the nature of a supplemental bill need contain no more of the allegations in the original bill than suffices to show a cause of action against the defendants to it.[3] Otherwise, its form should be, as far as possible, in compliance with that of an original bill. If, however, its object be merely to obtain the benefit of the proceedings in the original suit, the want of the difference of citizenship necessary to support an independent original bill will not deprive the court of jurisdiction of it, provided the first suit were properly brought.[4] A bill, which complies with the requirements of an original bill in the nature of a supplemental bill, may be sustained as one, although it is styled a supplemental bill,[5] or a petition of intervention.[6]

§ 236. Proceedings upon bills in the nature of supplemental bills. A bill in the nature of a supplemental bill is filed in the same manner as a supplemental bill, and the same rule governs the time of the filing of pleadings to it.[1] Otherwise, proceedings upon bills in the nature of supplemental bills resemble those upon independent original bills.[2] According to Lord Redesdale, "a new defense may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree."[3] As has been remarked by

§ 235. [1] Mitford's Pl., ch. 1, § 3.

[2] Woods v. Woods, 10 Sim. 197; Atty Gen. v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1667, 1668.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1675-1677; Vigers v. Lord Audley, 9 Sim. 72.

[4] Minnesota Co. v. St. Paul Co., 2 Wall. 609.

[5] Haarmann-DeLaire-Scheffer Co. v. Leuders, 135 Fed. 120. See Ross v. City of Ft. Wayne, 58 Fed. 404, 406. But see Campbell v. City of New York, 35 Fed. 14.

[6] Toledo Metal Wheel Co. v. Forger Bros & Co., C. C. A., 223 Fed. 350.

§ 236. [1] Rule 57. See § 233.

[2] Mexican Ore Co. v. M. G. M. Co., 47 Fed. 351, 356.

[3] Mitford's Pl., ch. 1, § 3. See

Lord Eldon, this passage contains an obscurity of language which is due to an obscurity in the subject.[4] But the probable meaning and the view of the matter best supported by authority are that upon the filing of what is called a bill in the nature of a supplemental bill, no further benefit of the proceedings in the original suit can be obtained than would be if it were styled merely an original bill; and the evidence and admissions and the benefit of the decree in the former suit will only be allowed when the parties to the second are in privity with those to the first suit.[5]

O'Brien v. Wheelock, 184 U. S. 450, 485, 46 L. ed. 636, 652.

[4] Lloyd v. Jones, 9 Ves. 37, 56.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1685, 1688; Great Western Tel. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986. But see George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496.

CHAPTER XIV.

IMPERTINENCE AND SCANDAL.

§ 237. Impertinence. Impertinence in a pleading consists of the introduction of any matter into the pleading which is not properly before the court for decision at the particular stage of the suit.[1] Facts not material to the decision are impertinent.[2] No matter is impertinent which is material in establishing the rights of the parties or in ascertaining the relief to be granted.[3] If an allegation in a bill, when proved, could exercise any proper influence upon the decision of the cause, it cannot be said to be impertinent.[4]

Objections for impertinence are only sustained when it is apparent that the matter excepted to is not material or relevant or that the same is stated with needless prolixity. If it may be material, the objection will not be sustained, as that would leave the pleader without a remedy; but the allegations objected to will be allowed to remain and the effect thereof, if found to be true, determined on the final hearing.[5] Where the question whether matter in an answer was impertinent or not depended upon the date of the facts alleged and the date was omitted, it was held that the answer must be construed against the pleader and was subject to exception for impertinence.[6] Deductions from the facts stated, for example, allegations concerning the legal effect of instruments, are sometimes proper in equity pleadings and

§ 237. 1 Blanton v. Chalmers, 158 Fed. 907.

2 Chancellor Kent in Woods v. Morrell, 1 J. Ch. (N. Y.) 103, 106. See also Hood v. Inman, 4 J. Ch. (N. Y.) 437; Harrison v. City of Tampa, 247 Fed. 569.

3 Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

4 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

5 Independent Baking Powder Co. v Boorman, 130 Fed. 726; Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117; *supra*, § § 68,147.

6 Greene v. Aurora Rys. Co., 158 Fed. 909.

they are then not considered to be impertinent.[7] It has been said to be permissible and it has been customary, to plead in answers in equity matters of law as well as matters of fact that constitute a defense.[8] It is customary in bills seeking the protection or enforcement of rights dependent upon complicated provisions of Federal or State statutes, to set forth such statutes, either at length or according to their legal effect; and when the complainant depends upon historical facts, of which the court will take judicial notice, to state such facts also. But allegations that a State Statute was unconstitutional which were clearly unfounded were stricken out as impertinent.[9] So were allegations of grounds of complaint not within the jurisdiction of the court.[10] Sometimes, especially in patent cases,[11] former decisions of the court are pleaded. Although this practice is not strictly correct, it is still convenient for the court as well as counsel, inasmuch as the case shown by the bill is thereby made more easy of comprehension. It seems that exceptions to such allegations for impertinence cannot be sustained.[12] So, in a patent case, allega-

7 Allen v. O'Donald, 23 Fed. 573; Louisville & N. R. Co. v. Wright, 190 Fed. 252.

8 Deady, J., Chapman v. School Dist. No. 1, Deady, 108, 110. See, also, Louisville & N. R. Co. v. Wright, 190 Fed. 252.

9 Everglades Drainage League v. Napoleon B. Broward Drainage Dist., 253 Fed. 246, 251.

10 Ibid. See Motion Picture Patents Co. v. Eclair Film Co., 208 Fed. 416.

11 Steam Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; Peters v. Chicago Biscuit Co., 142 Fed. 779. But see Nickola Tesla Co. v. Marconi Wireless Tel. Co. of America, 227 Fed. 903; Bayley & Sons v. Blumberg, C. C. A., 254, Fed. 696.

It was held not to be impertinent when a complaint charged fraud in a partition suit, for the answer to set forth facts to show the good faith and regularity of the proceedings in the same. Mound City Co. v. Castleman, 171 Fed. 520. Nor, when a bill referred to a decision of a court, for the answer to aver that it involved no consideration of a question in the pending suit and had no relation thereto. Louisville & N. R. Co. v. Wright, 190 Fed. 252.

12 Wells v. Oregon Ry. & N. Co., 15 Fed. 561; s. c., 8 Sawyer, 600; Allen v. O'Donald, 23 Fed. 573; Steam Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; Peters v. Chicago Biscuit Co., 142 Fed. 779; Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117; South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225. But see W. U. Tel. Co. v. Louisville & N. R. Co., C. C. A., 250 Fed. 199, 200.

In a bill to enjoin the enforcement of an order of a State railroad commission for the reduction of railroad charges, an allegation that the reduction was made at

tions concerning the issue of foreign patents and the acquiescence

the instance of the governor who was not a member of the commission; and quotations from his message to the legislature, and averments that he had in an address to the commission attacked a decision of the Supreme Court of the United States in violent language, were all held to be *impertinent;* but a statement of the action of the defendant's predecessors upon the same subject, and of the defendant's inaction against other railroad companies, was held to be relevant and *not* impertinent. Wilmington & W. R. Co. v. Board of R. Com'rs, 90 Fed. 33. See Einstein v. Schnebley, 89 Fed. 540. In a suit by a commercial exchange, to restrain the counterfeiting or simulating of prices of grain and pork, it was held: that it was *impertinent* to allege the number of members of the complainant, the cost of maintaining and conducting its operations, the manner in which the necessary funds were raised, the market value of a seat therein, the character of the persons who might be admitted, the relations and contracts between the complainant and certain telegraph companies, with which it was not claimed that the defendants were in any way connected; and that no person or corporation was receiving market quotations from any of the telegraph companies specified, without having executed complainant's written contract restraining the furnishing of such quotations to bucket shop operators; but that paragraphs were *not* impertinent, which contained a recital of the objects of the complainant's incorporation and of the powers conferred by its charter, the manner of its operations, the way in which information concerning the sales made there was distributed by telegraph companies throughout the country, the time occupied in the dissemination of this information, and the circumstances which induce the complainant to refuse to allow its quotations to be given to telegraph companies, except under contracts that the latter would not furnish the same to persons who operated bucket shops. Board of Trade of Chicago v. National Board of Trade of Kansas City, 154 Fed. 238. In a bill by a stockholder against his corporation and its directors, to enjoin the enforcement of a contract made by them, whereby the profits and earnings of the corporation were fraudulently diverted from its stockholders and paid to one of the directors as royalties for the use of a worthless patent, which also prayed the recovery from him of the sums he had already received under the contract, alleging that he was practically insolvent, and asking that he be enjoined from transferring his stock; it was held: that allegations that three of the other defendant directors were sons of this defendant, and with him constituted a majority of the board, and were corruptly influenced by him in their directorial action, that they had no business, and were dependent upon him for support, and were living in an expensive and extravagant manner at his cost are *not* scandalous, nor impertinent. Burden v. Burden, 124 Fed. 250. In a suit against an administrator and others, to enforce an agreement by

therein in this and other countries, were held not to be impertinent;[13] but it was held that averments as to decrees obtained by consent against strangers to the suit, and as to interference proceedings in the patent office, with which the defendants were not connected, were impertinent.[14]

Great liberality is allowed in actions founded on the anti-trust act, where proof of a conspiracy is necessary,[15] and in suits to determine the validity of statutes fixing railroad rates.[16] It has been held that a short sentence, inserted out of abundant caution, should not be expunged as impertinent.[17] Needless repetitions are impertinent.[18] Matter which is purely evidentiary is ordinarily held to be impertinent.[19]

an intestate to make the plaintiff his heir, and to protect plaintiff's rights in the business carried on by such intestate; it was held: to be proper to allege that the decedent carried on the business during his lifetime in partnership with one of the defendants; that the same became extremely profitable and its good will of great value; that he had trouble with his relatives, which led to an estrangement; that he left no will; that administrators of his estate were appointed in another State; that complainant had no notice of proceedings in the Probate Court, which resulted in the appointment of one of the defendants as administrator in the State where the suit was brought; that the relatives are so scattered and the property so widely distributed that it is impossible for the complainant to join all the parties in interest; and that she intends to institute another action in another State, to restrain them from interfering with the business there carried on; but that it was *impertinent* to allege; how the stores maintained by the decedent became valuable; and how interference with them in the manner proposed by defendants will destroy such value; and that complainant is trying to collect certain checks and drafts given her for value during her lifetime; and the administrators object and propose to contest. Hall v. Bridgeport Tr. Co., 122 Fed. 163. It has been said in England that similar allegations are improper, Hun Pr. 1913, p. 316.

13 Peters v. Chicago Biscuit Co., 142 Fed. 779.

14 Western El. Co. v. Williams, Abbott El. Co., 83 Fed. 842. See Board of Trade v. National Board of Trade, 154 Fed. 238.

15 Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117, 124.

16 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

17 Farmers' L. & T. Co. v. N. P. R. Co., 76 Fed. 15. But see Florida Mfg. & Inv. Co. v. Finlayson, 74 Fed. 671.

18 Kelly v. Boetteher, 85 Fed. 55, 60; Norton v. Woods, 5 Paige (N. Y.), 260; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 342; Nevada Nickel Syndicate v. National N. Co., 86 Fed. 486.

19 Ware-Kramer Tobacco Co. v.

§ 238. Scandal. Scandal is impertinent matter which is also reproachful.[1] Scandal is impertinent matter which is also criminatory or which otherwise reflects upon the character of an individual.[2] Usually nothing is considered scandalous which is relevant or responsive to the allegations of the bill.[3] But in an English case brought by a clergyman, where the defendant included in a schedule of accounts a charge for money paid by him for an order of filiation of a bastard made upon the plaintiff, the court held the item, although relevant, a proper subject of exception, because the mode of bringing it forward was intended to drive the plaintiff out of his parish.[4] It may be doubted whether so much respect for the cloth would be shown by an American court. Matters that are relevant are not scandalous, unless expressed in a needlessly offensive manner.[5] It has been held: that an allegation that a proposed decree was made "without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein," and not "after full consideration," is not scandalous, since it contains no imputation upon the court;[6] and that an averment in an answer to an action upon a judgment, that the judgment was fraudulent and had been obtained by false and perjured testimony,

American Tobacco Co., 178 Fed. 117. But see South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

§ 238. 1 Chancellor Kent in Woods v. Morrell, 1 J. Ch. (N. Y.) 103, 106. See also Hood v. Inman, 4 J. Ch. (N. Y.) 437. For an illustration of scandal, see the record in U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167.

2 Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

3 Peck v. Peck, Mosely, 45: Woods v. Morrell, 1 J. Ch. (N. Y.) 103, 106; Fisher v. Owen, L. R. 8 Ch. D. 645; McNulty v. Wiesen, 130 Fed. 1012; Story's Eq. Pl., § 862; Portsmouth v. Fellows, 5 Mass. 450. In a bill to remove the directors of a bank for paying a loss resulting from an illegal loan made by the officers, it was held proper to allege the previous unlawful management of the bank. Wilkinson v. Dodd, 42 N. J. Eq. 234; s. c. as Dodd v. Wilkinson, 42 N. J. Eq. 647. Allegations to meet charges of bad faith made in the bill were held not scandalous. Mercantile Tr. Co. v. Mo., K. & T. Ry. Co., 84 Fed. 379.

4 Atty. Gen. v. Hewit, in Chanc., July, 1801; cited in Cooper's Eq. Pl. 319; Story's Eq. Pl. § 862. See Kedrovsky v. Archbishop & Consistory of the Russian Orthodox Greek Catholic Church, etc., N. Y. Sup. Ct. Sp. Tm., per Hendrick, J., N. Y. L. J., Dec. 19, 1918.

5 Burden v. Burden, 124 Fed. 250.

6 Miller v. Buchanan, 5 Fed. 366.

was not impertinent or scandalous.[7] Allegations concerning motives are scandalous when not material.[8] When material, they are not scandalous.[9] An allegation concerning defendant against whom no specific facts are alleged "an attorney and counselor at law at this bar, has been an active participant, director, designer and operator and conspirator with the other defendants."[10] So it was said might be allegations that a defendant was "the agent, representative, straw man, employe, dummy, tool and operator of the bankrupt defendants"; that defendants were guilty of "designing, contriving and conspiring to swindle, cheat, deceive, hinder, delay, and defraud" creditors; that certain acts were "devices, fences, screens, and cloaks and legal disguises";

7 Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

8 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225, averments of the motive of State officers and legislature prescribing and enacting a law; U. S. v. Kettenbach, 175 Fed. 463, holding: that in a suit to cancel land patents under the timber and stone act (Act of June 3, 1878, c. 151, 20 St. at L. 80, Comp. St. 1901, p. 1545) for fraud, charging that the entrymen did not make their entries in good faith, but with intent to transfer their rights to others; charges of transfers and acts indicating a motive at the time final proof was made to transfer the land were subject to exception for impertinence, since the illegal purpose in the primary application was the sole test of good faith. It was further held that allegations setting forth the rules and regulations of the Department of the Interior prescribing interrogatories to applicants for timber land at the final proof and the scope of the alleged conspiracy and other acts relating solely to such final proofs, together with allegations of the inducement by the defendant of the entrymen to make false answers to such questions, and the false answers made accordingly "for the purpose and to the end that the said officers and the other officers of the United States concerned and charged with the administration of the laws governing the disposal of the public lands might, and should, thereby be deceived, imposed upon, and fraudulently misled, and so prevented from further inquiry, investigation, and consideration concerning such entries"; were all impertinent. Ibid. 175 Fed. 463, 465. An allegation is an answer that plaintiff brought this suit in a State distant from that of the defendants' residence for the purpose of harassing them and involving them in large expense was held to be impertinent. Whittemore v. Patten, 84 Fed. 51.

9 Portsmouth v. Fellows, 5 Madd. 450, holding that allegations that a trustee was actuated by corrupt and improper motives were not scandalous or impertinent in a suit by the beneficiaries to remove him.

10 Crim v. Triest, C. C. A., 232 Fed. 570.

that one of the defendants "has been an active participant, director, designor, and operator and conspirator"; that certain banks "have escaped publicity and criticism by the authorities for their negligence in lending money."[11] Allegations of want of good faith in the entry of land were impertinent, since good faith in the primary application for entry was not averred.[12] Threats to violate an injunction, if granted, were held not to be impertinent, nor scandalous, in a bill praying such injunction.[13] Averments that power conferred by a statute on a railroad commission was so used as to discriminate against the complainants and to favor their rivals, as a reward for dismissing suits brought by the latter to test the law's validity, are neither impertinent nor scandalous.[14]

§ 239. Striking out scandal and impertinence. Before the Equity Rules of 1912, objections to matter as impertinent or scandalous were raised by exceptions, which were regularly referred to a master.[1] The Equity Rules of 1912 provide: "The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit."[2] Before the adoption of these rules, the court had power to expunge scandalous matters on its own motion at any time.[3] Under Equity Rule 21, it has not yet been decided whether, in this manner, objections to the sufficiency in law of part of a charge in a bill or part of a defense in an answer can be raised.[4] Under the former practice, it was held that such

11 Ibid., C. C. A., 232 Fed. 570, 573, 574.

12 U. S. v. Kettenbach, 175 Fed. 463.

13 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

14 Ibid.

§ 239. 1 Eq. Rules of 1842, 26 and 27; Langdon v. Goddard, 3 Story, 13; Hood v. Inman, 4 J. Ch. (N. Y.) 437; Foster's Fed. Pr., 4th ed., §§ 68, 147.

2 Eq. Rule 21. Williams v. Pope, 215 Fed. 1000.

3 Kelly v. Boettcher, 85 Fed. 55; *Ex parte* Simpson, 15 Ves. 476; Daniell's Ch. Pr. (2nd Am. ed.) 402, 403; Story's Eq. Pl., § 270. See, also, Langdon v. Goddard, 3 Story, 13.

4 This has been done in Everglades Drainage League v. Napoleon B. Broward Drainage Dist., 253 Fed. 246, 251. *Contra.* It has been held that the question whether a release to a third person by the complainant had deprived it of the right to suit for the infringement of a patent is a question which must be reserved

matter in a bill [5] or answer [6] might be expunged by motion. But these cases have not been generally followed,[7] and it was settled that mere insufficiency of matter in an answer that was responsive could not be tested by exception [8] or by demurrer,[9] unless it was an erroneous conclusion of law.[10] The Equity Rules of 1912, however, provide: that the defendant may move to dismiss any part of the bill upon five days notice; and that any point of law going to the whole or a material part of the cause or causes of action stated in the bill or defense, theretofore presentable by plea in bar or abatement, may be separately heard and disposed of before final hearing in the discretion of the court;[11] and that if an answer sets up an affirmative defense, the sufficiency of the same may be tested upon motion to strike out, upon five days' notice or such further time as the court may allow.[12] "Exceptions for insufficiency of an answer are abolished."[13] "If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter."[14] Such a motion must quote or clearly describe the parts of the bill to which it is directed.[15] It is insufficient to set out the effect of the parts to which it refers.[16]

for the trial and cannot be adjudicated upon such a motion. Int. Steel Co. v. Bethlehem Steel Co., 233 Fed. 322.

5 Hobbs Mfg. Co. v. Gooding, C. C. A., 176 Fed. 259.

6 Savings & Tr. Co. v. Bear Valley Irr. Co., 112 Fed. 693, 702, 704.

7 In U. S. v. Kettenbach, 175 Fed. 463, held that such a motion to strike out part of an amended bill could not be made. In Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117, 123, held that such a motion could not be made to test the sufficiency of the complaint.

8 Walker v. Jack, C. C. A., 88 Fed. 576, 31 C. C. A. 462; Greene v. Aurora Rys. Co., 158 Fed. 909.

9 Crouch v. Kerr, 38 Fed. 549; Grether v. Wright, C. C. A., 75 Fed. 742, 23 C. C. A. 498, 43 U. S. App. 770; Besson & Co. v. Goodman, 147 Fed. 887; Blanton v. Chalmers, 158 Fed. 907; Louisville & N. R. Co. v. Wright, 190 Fed. 252.

10 Adams v. Bridgewater Iron Co., 6 Fed. 179; Bower-Barff R. I. Co. v. Wells R. I. Co., 43 Fed. 391. But see Ford v. Douglas, 5 How. 143, 165, 12 L. ed. 89, 99; Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; s. c., below, 7 New Mexico, 666.

11 Eq. Rule 29. Everglades Drainage League v. Napoleon B. Broward Drainage Dist., 253 Fed. 246, 251. But see Int. Steel Co. v. Bethlehem Steel Co., 233 Fed. 322.

12 Eq. Rule 33.

13 Ibid.

14 Ibid.

15 Everglades Drainage League v. Napoleon B. Broward Drainage Dist., 253 Fed. 246, 251; Harrison v. City of Tampa, 247 Fed. 569.

16 Ibid.

Under the former practice, matter that otherwise might have been considered to be impertinent or scandalous was not stricken out when intermingled with essential allegations so that their omission would render a sentence without meaning.[17] Neither scandal, nor impertinence, however gross was a ground for dismissing the whole bill, it being a maxim of pleading that *utile per inutile non vitiatur*.[18] Under the former practice, it was held that an exception for impertinence must be allowed in the whole or not at all.[19]

17 Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117, 123.

18 Daniell's Ch. Pr. (2d Am. ed.) 401. But see Crim v. Triest, C. C. A., 232 Fed. 570. See, also, Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 516, 522, 28 L. ed. 498, 502, 504.

19 Chapman v. School District, Deady, 108, 117.

CHAPTER XV.

MOTIONS TO MAKE PLEADINGS MORE DEFINITE AND CERTAIN AND BILLS OF PARTICULARS.

§ 240. Distinction between motions to make pleadings more definite and certain and bills of particulars. The Equity Rules provide: "A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just."[1] The distinction between these two kinds of relief is not clear. In Wisconsin it has been held that there is no such distinction.[2] In New York, an order will be made directing a pleading to be made more definite and certain only when its precise meaning or application is not clear.[3] Matters of time, place and circumstances, unless they constitute material parts of a cause of action or a defense, can only be obtained by a bill of particulars. It has been held that items of an account can only be obtained by a bill of particulars.[4]

§ 241. Motions to make pleadings more definite and certain. A demurrer for lack of certainty to the whole bill or to a part thereof took the place now occupied by a motion to make the bill more definite and certain.[1] Such demurrers were especially

§ 240. [1] Eq. Rule 20.

[2] Conover v. Knight, 84 Wisc. 639, 642, 54 N. E. 1002.

[3] Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Dumar v. Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669. See Cook v. Matteson, 33 N. Y. St. Rep. 497; Jackman v. Lord, 56 Hun (N. Y.) 192; Rouget v. Haight, 57 Hun (N. Y.) 119; Madden v. Underwriting Pub. Co., 10 Misc. (N. Y.) 27; Harrington v. Stillman, 120 App. Div. (N. Y.) 659, 105 N. Y. Supp. 75.

[4] Clegg v. Am. Newspaper Union, 7 Abb. N. C. (N. Y.) 59; St. John v. Beers, 24 How. Pr. (N. Y.) 377. *Contra*, MacAdam v. Scudder, 127 Mo. 345, 30 S. W. 168; Meyer v. Chambers, 68 Mo. 626; Gfeller v. Graefemann, 64 Mo. App. 162.

§ 241. [1] Chicago, M. & St. P. R. Co. v. Pullman P. C. Co., 50 Fed. 24; Green v. Terwilliger, 56 Fed.

favored as regards allegations of fraud.[2] In an action founded upon fraudulent representations the court may require the plaintiff's pleading to be amended so as to show which of the representations were made by the defendant and which by others and whether those made by others were by defendant's authority or procurement.[3] Such motions have been granted in the case of alternative averments;[4] or a failure to show the nature or source of a title pleaded;[5] or whether a contract was oral or in writing;[6] or in what a failure of consideration consisted;[7] or in what character the defendant was sued;[8] and as to allegations of time or place, which were material parts of the cause of action or defense as to which the motion was made.[9]

In suits for the infringement of a patent the plaintiff may be directed to set forth which of several patents, the defendant's articles infringed,[10] and whether he contends, that the combina-

384; Thomas v. Nantahala, M. & T. Co., C. C. A., 58 Fed. 485.

2 Rorback v. Dorsheimer, 25 N. J. Eq. 516, 518; Mason v. Daly, 117 Mass. 403; James v. City Investing Co., 188 Fed. 513; § 137, *supra*. See Patton v. Whitney, 5 N. Y. St. Rep. 845; Claflin v. Smith, 13 Abb. N. C. (N. Y.) 205, 4 Civ. Pro. R. (N. Y.) 240, 66 How. Pr. (N. Y.) 168. *Contra*, Williams v Folsom, 26 Abb. N. C. (N. Y.) 374, 37 N. Y. St. Rep. 635.

3 Murphy v. Mitchell, 245 Fed. 219.

4 Hasberg v. Moses, 81 N. Y. App. Div. 199, 80 N. Y. Supp. 867; Corbin v. George, 2 Abb. Pr. (N. Y.) 465.

5 Livingston v. Ruff, 65 S. C. 284, 43 S. E. 678; Waldo v. Milroy, 19 Wash. 156, 52 Pac. 1012.

6 New York First Presb. Church v. Kennedy, 72 N. Y. App. Div. 82, 76 N. Y. Supp. 284.

7 Griffith v. Wright, 21 Wash. 494, 58 Pac. 582.

8 Seasongood v. Fleming, 74 Hun. (N. Y.) 639, 26 N. Y. Supp. 831.

9 Pierce v. Baird, 48 Ind. 378; Melvin v. St. Louis, etc., R. Co., 89 Mo. 106, 1 S. W. 286; People v. Ryder, 12 N. Y. 433; Mutual L. Ins. Co. v. Raymond, 118 N. Y. App. Div. 828, 103 N. Y. Supp. 839; Pigone v. Lauria, 115 N. Y. App. Div. 286, 100 N. Y. Supp. 976; Cerro De Pasco Tunnel, etc., Co. v. Haggin, 106 N. Y. App. Div. 401 (action for libel); Warner v. James, 94 N. Y. App. Div. 257, 87 N. Y. Supp. 976; Dumar v. Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Supp. 669; Bennett v. Lawrence, 71 N. Y. App. Div. 413, 75 N. Y. Supp. 902; Dexter v. Fulton, 86 Hun (N. Y.) 433, 33 N. Y. Supp. 901; Barlow v. Pease, 5 Hun (N. Y.) 564; McGehee v. Cooke, 55 Misc. (N. Y.) 40, 105 N. Y. Supp. 60; Rosenthal v. Rosenthal, 10 N. Y. Supp. 455; Lynch v. Walsh, 11 N. Y. Civ. Proc. 446; 31 Cyc. 650.

10 Fischer v. Auto Supply Mfg. Co., 199 Fed. 191. (An order to make complaint at common law more definite and certain.)

tion alone is new and the parts used in the construction are old, or that the patent contains a new element or a new form of an old element.[11] The defendant who has set up a number of patents to show the state of the prior art may be compelled to set forth in what respect each of such patents disclose any of the elements or combinations described in plaintiff's patent and in what respect they negative the novelty and invention of the device in plaintiff's patent described.[12] Such motions have also been granted when denials were indefinite,[13] and when knowledge or information was denied concerning matters presumptively within the knowledge of the pleader.[14]

Under the practice of the different States it has been held: that a motion to make a pleading more definite and certain will not be granted when the indefinite allegations are immaterial,[15] or surplusage;[16] nor where the uncertainty has been removed by allegations in a subsequent part of the pleading;[17] nor where the details demanded pertain to the case or defense of the moving party.[18] A few cases hold: that the motion will not be granted where it appears that the matter demanded is not within

11 Coulston v. H. Frank Steel Range Co., 221 Fed. 674.

12 Ibid.

13 Snyder v. Free, 114 Mo. 360, 21 S. W. 847; Pfaudler Process Fermentation Co. v. McPherson, 3 N. Y. Supp. 609; Burley v. German Am. Bank, 5 N. Y. Civ. Proc. 172; O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399; Borsuk v. Blauner, 93 N. Y. App. Div. 306, 87 N. Y. Supp. 851; Morgan v. Sammons, 66 S. C. 388, 44 S. E. 966.

14 Winchester v. Browne, 11 N. Y. Supp. 614, 25 Abb. N. Cas. 148; Hardman v. Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 544, 14 Cinc. L. Bul. 346.

15 Smith v. Trafton, 3 Robertson (N. Y.) 709; Maretzek v. Cauldwell, 2 Robertson (N. Y.) 715.

16 Choctaw, etc., R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870; Knox v. Trafalet, 94 Ind. 346; Indiana Stone Co. v. Stewart, 7 Ind. App. 563, 34 N. E. 1019; Schoonover v. Hinckley, 46 Iowa, 207; Davidson v. Seligman, 51 N. Y. Super. Ct. 47; Pearce v. Weidemeyer, 52 Misc. (N. Y.) 456, 102 N. Y. Supp. 505; Cook v. Matteson, 11 N. Y. Supp. 572; Parshall v. Tillou, 13 How. Pr. (N. Y.) 7; Shoemaker v. Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 252, 19 Cinc. L. Bul. 322; McCarville v. Boyle, 89 Wis. 651, 62 N. W. 517; Spensley v. Janesville Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574; 31 Cyc. 647.

17 Barron v. Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, 7 Ohio N. P. 528.

18 Vanderveer v. Moran, 79 Neb. 431, 112 N. W. 581; Anonymous, 4 Ohio Dec. (Reprint) 234, 1 Clev. L. Rep. 148.

the reach of the pleader,[19] although, in one case, it was held that the objectionable allegations, if not sufficiently definite, should be stricken out;[20] or where it appears that the moving party has sufficient information upon the subject,[21] or as much information as the pleader.[22]

§ 242. Bills of particulars. Bills of particulars were formerly unknown to equity practice,[1] although they were frequently ordered in actions at common law. They are granted in bankruptcy.[2] It has been said that they should not be allowed in admiralty.[3] Bills of particulars in criminal cases are subsequently considered.[4] Where domination and undue influence were alleged, the plaintiff has been required to set forth the nature of her claim of domination and the particulars of the undue influence which she claimed existed, whether the same was exercised by threats, actual fraud or concealment, and to specify the nature of the threats, fraud concealment, or other instrumentality.[5] Where, in a suit to set aside a release as fraudulent, the answer set forth that the release was in consideration of a large sum of money advanced by the defendant to the plaintiff, a bill of particulars was ordered as to the amount of such ad-

19 Corns v. Clouser, 137 Ind. 201, 36 N. E. 848; Louisville, etc., R. Co. v. Balch, 105 Ind. 93, 4 N. E. 288; Wheelock v. Barney, 27 Ind. 462; Baltimore, etc., R. Co. v. Countryman, 16 Ind. App. 139, 44 N. E. 265; Atchison, etc., R. Co. v. Davis, 70 Kan. 578, 79 Pac. 130; Orth v. St. Paul, etc., R. Co., 43 Minn. 208, 45 N. W. 151; Kellogg v. Baker, 15 Abb. Pr. (N. Y.) 286.

20 Pugh v. Winona, etc., R. Co., 29 Minn. 390, 13 N. W. 189.

21 St. Louis, etc., R. Co. v. French, 56 Kan. 584, 44 Pac. 12; West v. O'Neill, 14 Misc. (N. Y.) 235, 35 N. Y. Supp. 714; People v. New York City Cent. Under-Ground R. Co., 15 N. Y. Supp. 225.

22 Dr. Blair Medical Co. v. U. S. Fidelity, etc., Co. (Iowa, 1902), 89 N. W. 20; Booco v. Mansfield, 66 Ohio St. 121, 64 N. E. 115; Herklotz v. Chase, 32 Fed. 433.

§ 242. 1 See Cornell v. Bostwick, 3 Paige (N. Y.) 160.

2 Hane v. Crown & Keystone Co., 223 Fed. 439.

3 Foster v. Compagnie Francaise, 219 Fed. 351.

4 *Infra*, § 522.

5 Davis v. Davis (Lehman, J., N. Y. Sup. Ct.) N. Y. L. J. March 2, 1912. In an action for conspiracy, the plaintiff was required to give a bill of particulars stating the respects in which the defendant's acts were unlawful and the manner of their combination or agreement to injure plaintiff, but not of the damages suffered by the plaintiff when there was no claim of special damages. Patterson v. Corn Exchange of Buffalo, 197 Fed. 686.

vances.[6] A bill of particulars is usually ordered when a fiduciary relation exists.[7] At common law bills of particulars may be ordered whether the action is founded on contract or tort.[8] In actions for personal injuries the courts have denied a motion for a bill of particulars directing plaintiff to state the nature, extent and probable duration of her injuries together with her present physical condition as thereby affected;[9] and a motion to direct defendants to furnish a bill of particulars of plaintiff's contributory negligence.[10] A bill of particulars will not be ordered concerning immaterial allegations,[11] nor concerning allegations as to which the burden of proof is on the applicant.[12] In England, it has been held that the knowledge by the party is no bar to his motion for a bill of particulars.[13] The rule in New York seems to be otherwise.[14] Upon a motion to vacate an injunction against the sale of property transferred to the defendant by a bankrupt, the complainant trustee was required to furnish a bill of particulars separating as far as possible the property transferred to the corporation by the bankrupt from that subsequently purchased by it.[15] In the Federal Courts bills of particulars will rarely be ordered concerning facts known by the moving party when he also knows that they are the facts upon which his opponent relies,[16] but bills have been

6 Ibid.

7 Zierenberg v. Labouchere (1893), 2 Q. B. 183.

8 Green v. Delaware L. & W. R. Co., 211 Fed. 774.

9 Green v. Delaware L. & W. R. Co., 211 Fed. 774.

10 Bowker v. Donnell, 226 Fed. 359.

11 Cave v. Torre, 54 L. T. 515; Gibbons v. Norman, 2 Times Rep. 676.

12 James v. Radnor County Council, 6 Times Rep. 40; Roberts v. Owen, 6 Times Rep. 172.

13 Harbord v. Monk, 38 L. T. 411. But see Keogh v. Incorporated Dental Hospital of Ireland (1910), 2 Irish R. 166.

14 Bowers v. Hughes, 39 N. Y. Supr. 482; Blackie v. Neilson, 6 Bosw. (N. Y.) 681; Young v. De Mott, 1 Barb. (N. Y.) 30; Hoeninghaus v. Chaleyer, 22 N. Y. St. Rep. 528; Fink v. Jetter, 38 Hun (N. Y.) 163; Wigand v. Dejonge, 18 Hun (N. Y.) 405; Passavant v. Sickle, 14 Civ. Pro. R. (N. Y.) 57; Train v. Friedman, 4 Civ. Pro. R. (N. Y.) 109; Stevens v. Webb, 12 Daly (N. Y.) 88, 4 Civ. Pro. R. (N. Y.) 64; Butler v. Mann, 9 Abb. N. C. (N. Y.) 49; Belasco v. Klaw, 96 App. Div. (N. Y.) 268. See Curtis v. Phelps, 209 Fed. 261.

15 Hane v. Crown & Keystone Co., 223 Fed. 439.

16 Curtis v. Phelps, 209 Fed. 261; O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469; United Lace &

ordered of facts known by the moving party when he did not know whether those relied upon the opposite side.[17] In suits for unfair competition a party who had charged derogatory statements concerning him by his opponent was obliged to disclose the nature of the statements and who made them.[18] But a motion to compel the complainant to disclose before the hearing the names of persons who had been deceived into buying the defendant's goods was denied.[19] Bills of particulars in criminal cases are subsequently discussed.[20]

§ 243. Practice upon motion for bill of particulars. It is the better practice to precede a motion for a bill of particulars by a demand for such a bill.[1] The New York rule is that the application must be accompanied by an affidavit showing that the moving party has no knowledge or information respecting the matters as to which the particulars are demanded and has no means of obtaining information in regard thereto.[2] The affidavit must be made by the party and not by his attorney,[3]

Braid Mfg. Co. v. Barthels Mfg. Co., 213 Fed. 535.

17 O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469.

18 O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469.

19 United Lace & Braid Mfg. Co. v. Barthels Mfg. Co., 213 Fed. 535.

20 *Infra*, ch. xxxi.

§ 243. 1 See 31 Cyc. 583.

2 Coolidge v. Stoddard, 120 N. Y. App. Div. 641, 105 N. Y. Supp. 544; Constable v. Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Supp. 1022; Webster v. Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Supp. 220; Dorgan v. Scheer, 31 Misc. (N. Y.) 801, 62 N. Y. Supp. 1030, (affirmed in 31 Misc. (N. Y.) 829, 64 N. Y. Supp. 383); Bowman Cycle Co. v. Dyer, 23 Misc. (N. Y.) 620, 52 N. Y. Supp. 159; Villiers v. Third Ave. R. Co., 22 Misc. (N. Y.) 17, 48 N. Y. Supp. 614; Wales Mfg. Co. v. Lazzaro, 19 Misc. (N. Y.) 477, 43 N. Y. Suppl. 1110 (*reversing* 18 Misc. (N. Y.) 352, 41 N. Y. Supp. 1134); Garfield Nat. Bank v. Peck, 1 Misc. (N. Y.) 126, 20 N. Y. Supp. 650; Gridley v. Gridley, 7 N. Y. Civ. Proc. 215; Orvis v. Dana, 1 Abb. N. Cas. (N. Y.) 268.

3 Toomey v. Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Supp. 826; Mungall v. Bursley, 51 N. Y. App. Div. 380, 64 N. Y. Supp. 674; Stevens v. Smith, 38 N. Y. App. Div. 119, 56 N. Y. Supp. 540; Mayer v. Mayer, 29 N. Y. App. Div. 393, 51 N. Y. Supp. 1079; Van Olinda v. Hall, 82 Hun (N. Y.) 357, 31 N. Y. Supp. 495; Gallerstein v. Manhattan R. Co., 27 Misc. (N. Y.) 506, 58 N. Y. Supp. 374 (*reversing* 26 Misc. (N. Y.) 852, 57 N. Y. Supp. 394); Mori v. Pearsall, 14 Misc. (N. Y.) 251, 35 N. Y. Supp. 829; Groff v. Hagan, 13 Misc. (N. Y.) 322, 34 N. Y. Supp. 462; Hœinghaus v. Chaleyer, 4 N. Y. Supp. 814; Dueber Watch Case Mfg. Co. v. Keystone Watch Case Co., 21 N. Y. Supp. 342, 50 N. Y. St. 417, 23 N. Y. Civ. Proc. 44. But see Sanders v. Soutter, 54 Hun (N. Y.) 310, 7 N. Y. Supp. 549. Statutes

unless it appears that the attorney is the only person who has knowledge of all the facts therein alleged, and that it is impossible to obtain the party's affidavit.[4] The affidavit must further show that the allegations, as to which particulars are asked, are denied by the party applying for the order.[5]

An objection that the bill of particulars might preclude a party from proving facts subsequently discovered may be obviated by applying for permission to file an amended bill including such new facts.[6] Delay until the first motion day of the trial term is not such laches as will defeat the motion.[7]

It has been said that a bill of particulars cannot be used as evidence.[8] That a bill of particulars is not a part of the record and unless saved in the bill of exceptions cannot be used in the Court of Review to show that the matter in dispute is below the jurisdictional amount;[9] but another case holds that on a motion for judgment on the pleadings a bill of particulars may be treated as a pleading.[10] A motion for a bill of particulars appeals to the discretion of the court [11] and will rarely be reviewed on writ of error or appeal.[12]

§ 244. Remedy for failure to give a bill of particulars. In New York, the remedy for a failure to give a bill of particulars, which has been ordered, is a motion to preclude the party from giving evidence concerning the matter, the particulars of which were directed,[1] or by a motion to strike out the pleading.[2] Where

providing for the verification of pleadings by attorney or agent do not apply to affidavits in support of applications of this character. Cohn v. Baldwin, 74 Hun (N. Y.) 346, 26 N. Y. Supp. 457.

4 Mungall v. Bursley, 51 App. Div. (N. Y.) 380, 64 N. Y. Supp. 674. See 31 Cyc. 586.

5 Talmadge v. Sanitary Security Co., 2 N. Y. App. Div. 43, 37 N. Y. Supp. 177; Webster v. Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Supp. 220.

6 O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469.

7 Wetmore v. Goodwin Film & Camera Co., 226 Fed. 352.

8 Wetmore v. Goodwin Film & Camera Co., 226 Fed. 352.

9 Cent. Commercial Co. v. Jones-Dusenbury Co., C. C. A., 251 Fed. 13.

10 Friede v. White Co., 244 Fed. 272.

11 Gimbel Bros., Inc., v. Adams Exp. Co., 217 Fed. 318; Harper v. Harper, C. C. A., 252 Fed. 39.

12 Harper v. Harper, C. C. A., 252 Fed. 39.

§ 244. 1 Gross v. Clark, 87 N. Y. 272, 276; Foster v. Curtis, 121 App. Div. (N. Y.) 689; Prym v. Peck & Mack Co., 136 App. Div. (N. Y.) 566; Loscher v. Hager, 124 App. Div. (N. Y.) 568.

2 Symonds v. Craw, 5 Cowen (N. Y. 279; Whitmore v. Jennys, 1 Barbour (N. Y.) 53; Purdy v. War-

an insufficient bill is given, the remedy is a motion for a further bill.[3] Evidence upon the point omitted will not be excluded until such further bill has been ordered and the order disobeyed.[4] It is the safer practice there to return the defective bill served when demanding a compliance with the original order.[5] It is the better practice to procure a specific order precluding the party from giving evidence, after his failure to comply with the second order for a bill, or to insert in the order for the further bill a provision precluding evidence upon any points not therein specified.[6]

§ 245. Form of bill of particulars. A bill of particulars will be held to be sufficient if it fairly, in substance, gives the opposite party the information to which he is entitled,[1] as required by

den, 18 Wendell (N. Y.) 671; Gross v. Clark, 87 N. Y. 272, 276.

3 Beirne v. Sanderson, 83 App. Div. (N. Y.) 62, 82 N. Y. Supp. 493; Romer v. Kensico Cemetery, 79 App. Div. (N. Y.) 100, 80 N. Y. Supp. 38; Mueller v. Tenth St., etc., Ferry Co., 38 App. Div. (N. Y.) 622, 56 N. Y. Supp. 310; Dueber Watch Case Mfg. Co. v. American, etc., Watch Co., 22 N. Y. Supp. 69, 29 Abb. N. Cas. 412; Mathushek Piano Co. v. Pearce, 21 N. Y. Supp. 920; Virtue v. Beacham, 17 N. Y. Supp. 450 (*affirmed* in 18 N. Y. Supp. 949); Gas-Works Constr. Co. v. Standard Gas-Light Co., 1 N. Y. Supp. 265; Bates v. Wotkyns, 2 How. Pr. (N. Y.) 18; Barnes v. Henshaw, 21 Wend. (N. Y.) 426; Purdey v. Warden, 18 Wend. (N. Y.) 651; James v. Goodrich, 1 Wend. (N. Y.) 289.

4 Cerra de Paseo Tunnel, etc., Co. v. Haggin, 114 N. Y. App. Div. 116, 99 N. Y. Supp. 683; Reader v. Haggin, 114 N. Y. App. Div. 115, 99 N. Y. Supp. 684; Reader v. Haggin, 114 N. Y. App. Div. 112, 99 N. Y. Supp. 681.

5 Ward v. Littlejohn, 2 Silv. Sup. (N. Y.) 589, 6 N. Y. Supp. 170, 17 N. Y. Civ. Proc. 178.

6 Locker v. Am. Tobacco Co., 200 Fed. 973.

§ 245. 1 Boykin v. Persons, 95 Ala. 626, 11 So. 67; Ames v. Bell, 5 Cal. App. 1, 89 Pac. 619; Vila v. Weston, 33 Conn. 42; Columbia County v. Branch, 31 Fla. 62, 12 So. 650; Leib v. Butterick, 68 Ind. 199; Pierce v. Wilson, 48 Ind. 298; Morehead v. Anderson, 100 S. W. 340, 30 Ky. L. Rep. 1137; Scott v. Leary, 34 Md. 389; Snell v. Gregory, 37 Mich. 500; Voorhees v. Barr, 59 N. J. L. 123, 35 Atl. 651; Matthews v. Hubbard, 47 N. Y. 428; Kindberg v. Chapman, 115 N. Y. App. Div. 153, 100 N. Y. Supp. 685; Baker v. Sutton, 86 Hun (N. Y.) 588, 33 N. Y. Supp. 1072; Moss v. Crimmins, 30 Misc. (N. Y.) 300, 63 N. Y. Supp. 416; Redmond v. Buckley, 20 N. Y. Supp. 969; Donohue v. Pomeroy, 19 N. Y. Supp. 569; Duffy v. Ryer, 17 N. Y. Supp. 843; Stanley v. Millard, 4 Hill (N. Y.) 50; Smith v. Hicks, 5 Wend. (N. Y.) 48; MacDonald v. New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795; Columbia Acc. Assoc. v. Rockey, 93

the terms of the order directing the service of the same.[2] It should be as definite as the means of information at the command of the party serving the same will allow.[3] In England, a party may be allowed to give the best particulars he can, with leave to supplement the same within a reasonable and specified time before the trial.[4] A party suing or being sued in a representative capacity is only ordered to give the best particulars he can.[5] Its object is not to furnish the opposite party with the names of his opponent's witnesses.[6] But a motion which otherwise should be granted will not be denied because it would disclose such names.[7] It was held that a paper improperly filed as an amended pleading might be treated as an amplification of a bill of particulars previously filed.[8] It has been said that, ordinarily, a bill of particulars need not be verified, unless an affidavit is required by statute.[9]

§ 246. Amendment of bill of particulars. An application for leave to amend the bill of particulars is the proper remedy when new facts are discovered which should have been therein included.[1] An application to amend, or add to, a bill of particulars, if made a reasonable time before the trial will usually be allowed,[2] but not if it is sought thereby to introduce a new

Va. 678, 25 S. E. 1009; Burnham v. Milwaukee, 69 Wis. 379, 34 N. W. 389; Chesapeake, etc., Canal Co v. Knapp, 9 Pet. 541, 9 L. ed. 222; Church v. Spiegelberg, 33 Fed. 158; Whitaker v. Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463; Perkins v. Irvine, 23 Nova Scotia, 250.

2 Quinn v. Fitzgerald, 87 N. Y. App. Div. 539, 84 N. Y. Supp. 728; Mueller v. Tenth St., etc., Ferry Co., 38 N. Y. App. Div. 622, 56 N. Y. Supp. 310; People v. Cox, 23 Hun (N. Y.) 269; Mason v. Ring, 10 Bosw. (N. Y.) 598.

3 Baremore v. Taylor, 53 N. Y. Super. Ct. 119; Mason v. Ring, 10 Bosw. (N. Y.) 598; Humphry v. Cottleyou, 4 Cow. (N. Y.) 54; Sullivan v. Waterman, 21 R. I. 72, 41 Atl. 1006; Long v. Kinard, Harp. (S. C.) 47; 31 Cyc. 588.

4 14 days' time. Marshall v. Interoceanic, etc., Co., 1 Times Rep. 394; Harbord v. Monk, 38 L. T. 411.

5 Higgins v. Weekes, 5 Times Rep. 38.

6 Curtis v. Phelps, 209 Fed. 261.

7 O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469.

8 Ontario Powder Works v. Powell, 132 Mich. 451, 93 N. W. 1075.

9 31 Cyc. 589, citing Jones v. Barrett, 35 Md. 258.

§ 246. 1 O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469.

2 O-So-Ezy Mop Co. v. Channell Chem. Co., 230 Fed. 469; Clarafede v. Commercial Union Ass'n, (C. A.), 32 W. R. 262.

cause of action, such as fraud,[3] nor to increase a claim after payment of the full original claim into court.[4] In England, at the trial, leave to amend the bill of particulars is usually refused[5] although a change of date has then been allowed on terms.[6] The rule in the different States of this Union is similar,[7] except that amendments of a bill of particulars at the trial are often granted when the opposite side will not be prejudiced by surprise.[8]

3 Cocksedge v. Metropolitan Coal Consumers' Ass'n, 65 L. T. 432.

4 Sanders v. Hamilton, (1907) 96 L. T. 679.

5 Moss v. Mailings, 33 Ch. D. 603.

6 McCarthy v. Fitzgerald (1909, Ca.) 2 Irish R. 445.

7 31 Cyc. 589, 590.

8 31 Cyc. 589; citing Brownell Imp. Co. v. Critchfield, 96 Ill. App. 84 (*affirmed* in 197 Ill. 61, 64 N. E. 332); Farmers', etc., Bank v. Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Marion County School Dist. No. 73 v. Dudley, 28 Kan. 160; Gardner v. Gardner, 2 Gray, (Mass.) 434; Felter v. Manville, 23 Kan. 191. *Compare* Tate v. Hamilton, 81 Mich. 221, 45 N. W. 822. Fielder v. Collier, 13 Ga. 496; Reed v. Cooper, 30 Kan. 574, 1 Pac. 822; Towle v. Blake, 38 Me. 528; Lester v. Thompson, 91 Mich. 245, 51 N. W. 893; Mead v. Glidden, 79 Mich. 209, 44 N. W. 596; Collins v. Beecher, 45 Mich. 436, 8 N. W. 97; Haviland v. Fidelity Ins., etc., Co., 3 Pa. Co. Ct. 222; Lewis v. Jewett, 51 Vt. 378; Hopkins v. Stefan, 77 Wis. 45, 45 N. W. 676. But see Goforth v. Stingley, 79 Miss. 398, 30 So. Rep. 690.

CHAPTER XVI.

MOTIONS AND PETITIONS.

§ 247. Definition and classification of interlocutory applications. An interlocutory application is a request, not incorporated in a bill, made to the court for its interference in a matter arising in a cause either before or after a decree. An interlocutory application is made by motion or petition.

§ 248. Definition and classification of motions. A motion has been defined as "an application either by a party or his counsel, not founded upon any written statement addressed to the court."[1] But the rules of the Supreme Court of the United States provide that "all motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.[2] And most motions are supported by affidavits. Motions are either of course or special. Special motions are either *ex parte* or upon notice."

§ 249. Motions of course. Motions of course are those which, by some rule or practice of the court, are invariably granted without notice, and to which no opposition is allowed.[1] In Federal equity practice, the term is usually confined to such motions as are granted as of course by the clerk without the intervention of a judge of the court.[2] The equity rules provide that "all motions and applications in the clerk's offices for the issuing of mesne process and final process to enforce and execute decrees; for taking bills *pro confesso;* and for other proceed-

§ 248. 1 Daniell's Ch. Pr. (2d Am. ed.) 1787. See the language of Folger, J., in Shaft v. Phoenix Mut. L. Ins. Co., 67 N. Y. 544, 547, 23 Am. Rep. 138. It has been said, however, that careful practitioner should prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299.

2 Supreme Court Rule 6.

§ 249. 1 U. S. v. Parrott, 1 Mc All. 447, 454; Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 390; s. c., 14 C. C. A. 449.

2 Robinson v. Satterlee, 3 Saw. 134, 141.

ings in the clerk's office which do not require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown."[3] The order dismissing a bill for an omission to duly file a replication is an order as of course.[4] It has been held that an order for the issue of a commission is not.[5]

§ 250. Special motions without notice. A special motion is a motion which can only be granted by a judge of the court under special circumstances or in his discretion.[1] Such motions are either upon notice or without notice. Orders granted upon motions without notice are said to be *ex parte;* and the same term is applied to the motions upon which they are granted. An *ex parte* special motion must be supported by an affidavit.[2] *Ex parte* special motions are not common.[3] They are usually granted to prevent some irreparable injury to the moving party which would otherwise occur within the time limited for notice, when the same is required; and the court should always lend a willing ear to an application to discharge or set aside an *ex parte* order.[4] *Ex parte* orders may be obtained at any time and in any place within the jurisdiction of the judge, whether in court or elsewhere.[5] As a general rule, where a party has appeared he is entitled to receive notice of every application for an order, except applications for an extension of time and those of a like nature and motions which are granted as of course.[6]

3 Equity Rule 5.

4 Robinson v. Satterlee, 3 Saw. 134, 141.

5 U. S. v. Parrott, 1 McAll. 447.

§ 250. 1 U. S. v. Parrott, 1 McAll. 447, 454; Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 390; s. c., 14 C. C. A. 449.

2 Daniell's Ch. Pr. (2d Am. ed.) 1789.

3 McLean v. Lafayette Bank, 3 McLean, 503; U. S. v. Parrott, 1 McAll. 447; Marshall v. Mellersh, 5 Beav. 496; Gray v. C. I. & N. R. Co., 1 Woolw. 63.

4 Daniell's Ch. Pr. (2d Am. ed.) 1789, 1790; Isnard v. Cazeaux, 1 Paige (N. Y.) 39; Hart v. Small, 4 Paige (N. Y.) 551.

5 Daniell's Ch. Pr. (2d Am. ed.) 1789; Equity Rule 3; Horn v. Pere Marquette R. Co., 151 Fed. 626; infra, § 255.

6 Isnard v. Cazeoux, 1 Paige (N. Y.) 38; Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 390. See, also, Marshall v. Mellersh, 5 Bev. 496; Daniell's Ch. Pr. (2d Am. ed.) 1789, 1790.

No preliminary injunction is granted without notice;[7] but when notice has been given of a motion for an injunction, and there appears to be danger of irreparable injury from delay, a temporary restraining order may be granted without notice.[8] The matter must then be returnable within ten days, and the stay order is dissolved unless the party who obtained the order proceeds with his application for an injunction.[9] It may also be dissolved or modified upon two days' notice.[10] Under extraordinary circumstances, receivers may be appointed *ex parte*.[11] Writs of *ne exeat republica* are usually granted *ex parte*.[12] The proper practice, when the judge is absent, is to submit the motion papers to the clerk, not to send them to the judge by mail.[13]

§ 251. Notice of motion. "Any district judge may, upon reasonable notice to the parties; make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."[1] "Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order."[2] The length and manner of service of notices of motion is usually regulated by rule or local practice differently in the several districts or circuits. The State practice is often followed.[3] It

7 Eq. Rule 73; *infra*, § 292.

8 Ibid. Jud. Code, § 263, 36 St. at L. 1087.

9 Ibid.

10 Ibid.

11 Phelps v. Mutual Reserve Fund Life Ass'n, C. C. A., 61 L.R.A. 717, 112 Fed. 453; Worth Mfg. Co. v. Bingham, C. C. A., 116 Fed. 785; and other cases cited, *infra*, § 317.

12 Collinson v. ————, 18 Ves. 353; Daniell's Ch. Pr. (2d Am. ed.) 1789, 1937; *infra*, § 328.

13 *Re* Kinney, C. C. A., 135 Fed. 340.

§ 251. 1 Eq. Rule 1.

2 Eq. Rule 4. But see Eq. Rule 8; quoted *infra*, § 257.

3 S. D. N. Y., Rule 15.

Where the attorney for a party has died and no successor has appeared or been appointed, it seems that notice of a motion may be served upon such a party personally. Hoffman v. Rowley, 13 Abb. Pr. N. Y. 399.

has been held, that service of a notice of a motion for a relief by a receiver may be made by mail, addressed to a party to the suit, who lives outside the district.[4] Notice of a motion for any process of contempt or commitment, when notice is required, must be served personally on the party against whom the process is sought,[5] except, perhaps, when an order for substituted service has been previously obtained.[6] In England, under special circumstances, notice of a motion could be made upon an agent of a person without the jurisdiction.[7]

An appearance in court upon the day appointed for the motion or a consent to an adjournment, is a waiver of a defect in the time and manner of service [8] and in the form of the notice [9] or a waiver of an omission to serve any notice [10] unless the objection is first specifically made. Notice of motion is given either by a notice signed by the solicitors or parties or by an order to show cause granted by the court. An order to show cause is an order requiring a party to appear and show cause why a certain thing should not be done or permitted.[11] It is equivalent to a notice of motion, and except in cases where it is required by statute,[12] its ordinary use is to procure the argument of a motion within a shorter time than the term for notice required by the rules or statute. In England the corresponding practice is by what is termed a rule *nisi*.[13]

A notice of motion should be properly entitled in the cause

4 Appeal dismissed in Bache v. Hunt, 193 U. S. 523. *Cf. Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046; *Re* Brockton Ideal Shoe Co., C. C. A., 200 Fed. 745. See Staunton v. Wooden, C. C. A., 179 Fed. 61; *Re* Waukesha Water Co., 116 Fed. 1009; and Chapter on Bankruptcy, *infra*.

5 Daniell's Ch. Pr. (2d Am. ed.) 1794; Gray v. C., I. & N. R. Co., 1 Woolw. 63; *supra*, § 165.

6 Hope v. Hope, 4 De G., M. & G. 328.

7 Daniell's Ch. Pr. (2d Am. ed.) 1794; Hope v. Hope, 4 De G., M. & G. 328; Cooper v. Wood, 5 Beav. 391; Pulteney v. Shelton, 5 Ves. 147; Hunt v. Lever, 5 Ves. 147; and *supra*, § 165.

8 New York Times v. Sun Printing & Publishing Co., 195 Fed. 173.

9 Marye v. Strouse, 6 Sawyer 204.

10 Holmes v. Conway, 241 U. S. 624; Central Tr. Co. v. Pittsburg S. & No. R. R. Co., N. Y. Ct. App., May 7, 1918, 223 N. Y. 347.

11 Spaeth v. Sells, 176 Fed. 797.

12 See Spaeth v. Sells, 176 Fed. 797.

13 Geneva Basket Co., 71 Misc. (N. Y.) 156. See People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750, 752.

or matter in which it is made.[14] Where there are separate plaintiffs or defendants, a notice is not defective which names the first of each of them with the affix "and others," provided the opposite party is not misled thereby.[15] Where there are two titles and one is incorrect, if the other is correct the notice is good.[16] When the parties are the same, the same notice may be entitled in several actions.[17] The notice should be addressed to the solicitor of the party intended to be affected by it, or to the party himself when he appears in person or personal service is intended. It should be dated,[18] and signed by the solicitor for the moving party, or by that party himself if he appears in person.[19] It has been held in New York that a notice signed in person by a defendant who has previously appeared by a solicitor who has not been removed is irregular.[20] A notice of motion should state the day, place, and hour at which the motion will be made.[21] It is usual, however, to designate the hour by the expression "at the opening of the court on that day," and to add the words "or as soon thereafter as counsel can be heard."[22] Where the motion can be made only by leave of the court, the notice ought to mention that it is so made; or, otherwise, it seems that it may be disregarded.[23] Where the object of the motion is to discharge an order for irregularity, it is usual for the notice to state the ground of the application.[24] It is usual for the notice also to state before what judge the

14 Barb. Ch. Pr. 570; Rowlatt v. Cattell, 2 Hare, 186; Salomon v. Stalman, 4 Beav. 243; Davis v. Barrett, 7 Beav. 171; Morrall v. Prichard, 11 Jur. (N. S.) 969; Foote v. Emmons, 2 How. Pr. (N. Y.) 89; Hawley v. Donnelly, 8 Paige (N. Y.) 415.

15 Jerauld County v. Williams, 7 S. D. 196, 63 N. W. 905.

16 Matter of Ungrich, 201 N. Y. 415.

17 Hornfager v. Hornfager, 6 How. Pr. (N. Y.) 13.

18 Barb. Ch. Pr. 570; Moody v. Hebberd, 11 Jur. 941; Hutchinson v. Horner, 9 Jur. 615; Parker v. Francis, 9 Jur. 616, note.

19 Barb. Ch. Pr. 570; Perry v. Walker, 4 Beav. 452.

20 Halsey v. Carter, 6 Robertson (N. Y.) 535; Webb v. Dill, 18 Abb. Pr. (N. Y.) 264.

21 Barb. Ch. Pr. 570; Bodwell v. Willcox, 2 Caines (N. Y.), 104; Anon., 1 J. R. (N. Y.) 143.

22 Barb. Ch. Pr. 570; In re Electric Tel. Co. of Ireland, 10 W. R. 4.

23 Hill v. Rimell, 8 Sim. 632; Jacklin v. Wilkins, 6 Beav. 607.

24 Brown v. Robertson, 2 Phil. 173; Alexander v. Esten, 1 Caines (N. Y.) 152; Jackson v. Stiles, 1 Cowen (N. Y.) 134.

motion will be made; and to specify the affidavits and other documents which will be used in its support.[25] The notice must state clearly the terms of the order which will be asked for, and everything which the party would have should be expressed, as the court will not extend the order beyond the notice.[26] For this reason, it is prudent to add a notice of a motion for general relief; that is, "for such other or further order or relief as to the court shall seem just;" under which, other relief germane to that, a motion for which has been specifically noticed, may be granted.[27]

A number of objects not inconsistent with each other, and even inconsistent objects, if prayed for in the alternative, may be included in the same notice and motion.[28] The court will

25 Daniell's Ch. Pr. (2d Am. ed.) 1793; Clement v. Griffith, C. P. Coop. 470; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425.

26 Barb. Ch. Pr. 570; Mann v. King, 18 Ves. 297.

27 Barb. Ch. Pr. 570. People v. Turner, 1 Cal. 152; Landis v. Olds, 9 Minn. 90; Ferguson v. Jones, 12 Wendell (N. Y.) 241; Rogers v. Toole, 11 Paige (N. Y.) 212; Bissell v. New York Cent. & H. R. R. Co., 67 Barbour (N. Y.) 385; Boylen v. McAvoy, 29 How. Pr. (N. Y.) 278; Van Slyke v. Hyatt, 46 N. Y. 259; Randall v. Randall, 139 App. Div. (N. Y.) 674; People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750, 752. But see Schneider v. Meyer, 56 Mo. 475; Northrop v. Van Dusen, 5 How. Pr. (N. Y.) 134; 3 Code Rep. (N. Y.) 140; Bellinger v. Martindale, 8 How. Pr. (N. Y.) 113; De Walt v. Kinard, 19 S. C. 286. It has been held: that on the hearing of a motion for the production of papers under a subpoena *duces tecum* coupled with a prayer for general relief, if the other party appears by counsel, an order may be granted committing him, or, if a corporation, committing its officers, for contempt for disobedience to the subpoena, Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. 294, 300. That a motion for the appointment of a receiver cannot be made at the hearing of a motion for an injunction against an interference with a railroad claimed to be in the possession of the moving party, St. L., K. C. & C. Ry. Co. v. Dewees, 23 Fed. 691. That a motion to suppress depositions brings up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witness examined, if the party moving to suppress has never done anything to waive the objection, Bradley, J., in Eslava v. Mazange, 1 Woods. 623, 627. It was held, that, when the notice specified an application to punish a party in contempt of court, under the general prayer for relief an order requiring him to deposit certain monies in a Trust Company could not be granted. Matter of Weeks v. Coe, 111 App. Div. 337. See Boston Nat. Bank v. Armour, 50 Hun. 176, 177.

28 Daniell's Ch. Pr. (2d Am. ed.) 1792, 1793.

discourage when directing as to costs the making of separate motions for objects which might have been conveniently obtained by a single application.[29] It is irregular to grant affirmative relief to a party opposing a motion, when he has served no notice of his application for the same:[30] but this objection unless taken at the time or by a motion to set aside the order upon that ground is waived.[31] After notice of a motion has been served, it cannot be withdrawn without the consent of the court.[32]

A motion may be made by any party to a cause except one who is in contempt.[33] It has been said: that a party in contempt cannot move for any other purpose than to discharge the contempt proceedings,[34] or to expunge scandal from the record;[35] and in such cases he should apply by petition.[36] The rule in the Federal courts, however, is that he is only debarred from applications which are not of strict right, but are matters of favor in the discretion of the court,[37] such as an application to open a default,[38] and that his answer cannot be stricken out of the record nor can he be denied a hearing.[39]

No one should join in a notice for a motion in which he is not directly interested.[40] The joinder of one disinterested party with others who had an interest was held in England a sufficient reason for refusing the whole motion.[41]

A motion in the course of proceedings under an information cannot be made on behalf of the relators, but only on behalf

29 Hawke v. Kemp, 3 Beav. 288.

30 Garcie v. Sheldon, 3 Barbour (N. Y.) 232.

31 Holmes v. Conway, 241 U. S. 624.

32 People v. Hart, N. Y. L. J. June 5th, 1905.

33 Daniell's Ch. Pr. (2d Am. ed.) 1787; Nicholson v. Squire, 16 Ves. 259, 260; *infra*, § 431.

34 Daniell's Ch. Pr. (2d Am. ed.) 554–558, 1787 Anon., 5 Ves. 656.

35 Everett v. Prythergeh, 12 Sim. 363.

36 Lord Eldon v. Nicholson v. Squire, 16 Ves. 259, 260.

37 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215.

38 Ellingwood v. Stevenson, 4 Sandf. Ch. (N. Y.) 366.

39 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215; Sibley v. Sibley, 76 App. Div. (N. Y.) 132, 136. *Contra* Walker v. Walker, 82 N. Y. 260; Pickett v. Ferguson, 45 Ark. 177, 191. See Bennett v. Bennett, 208 U. S. 505, 52 L. ed. 590, *infra*, § 431.

40 Daniell's Ch. Pr. (2d Am. ed. 1793; Folland v. Lamotte, 10 Sim. 486.

41 Folland v. Lamotte, 10 Sim. 486.

of the Attorney-General or district attorney.[42] Where it is clearly for the interest of a person under a disability to make a motion, and he has no next friend, or his next friend refuses to do so, a next friend for the purposes of the application may move on his behalf.[43]

After a motion has been denied, it cannot, without leave of the court, be renewed upon the same papers, nor upon additional proof of facts that existed at the time the original motion was made;[44] but where the new motion is made on facts that have occurred since the former motion was made, no leave to renew is necessary, and the motion may be made as a matter of right.[45] Leave to renew will not be granted when the time to appeal has expired.[46] The fact that no formal leave to renew a motion on additional papers was granted does not necessarily determine that a second motion made on an order to show cause is not a renewal; the grant of the order to show cause, and the hearing of the second motion on the original and additional papers is, in effect, a grant of leave to renew, and a renewal.[47]

§ 252. Argument of motions. The manner of bringing motions to a hearing is regulated by local rule or usage differently in the different circuits. Either no method is observed, and motions are made by counsel as they catch the judge's eye, or a calendar is made and called upon which motions are placed by the clerk in the order in which they were first brought to his attention. In the Supreme Court of the United States the Attorney-General and the Solicitor-General take precedence.[1]

42 Atty. Gen. v. Wright, 3 Beav. 447.

43 Cox v. Wright, 9 Jur. (N. S.) 981; Guy v. Guy, 2 Beav. 460; Furtado v. Furtado, 6 Jur. 227; *supra*, §§ 90, 91.

44 Mitchell v. Allen, 12 Wendell (N. Y.) 290; Sheehan v. Carvalho, 12 App. Div. (N. Y.) 430; Haskell v. Moran, 117 App. Div. (N. Y.) 251, 252; De Lacy v. Kelly, 147 App. Div. (N. Y.) 37.

45 Le Lacy v. Kelly, 147 App. Div. (N. Y.) 37.

46 Stierle v. Union Railroad Co., 11 Misc. (N. Y.) 124; Matter of Silliman, 38 Misc. (N. Y.) 226; A. Klipstein & Co. v. Marenmedt, 39 Misc. (N. Y.) 794; Security Warehouse Co. v. Am. Exchange Nat. Bank, per Hendrick, J., N. Y. L. J., May 7, 1910. See *Re* Thompson, C. C. A., 264 Fed. 913.

47 Harris v. Brown, 93 N. Y. 390.

§ 252. 1 Lord Campbell has thus described the former English practice, which was abolished by Lord Mansfield, whose rules for the hearing of motions at common law were followed by the Court of Chancery: "Day by day during the term, each counsel when called upon had been accustomed to make as many motions successively and continuously

"Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district."[2]

When, at the hearing of a motion, the opposite party is not represented, proof of service must be shown by affidavit, or admission, and the hearing then proceed *ex parte*.[3] When the moving party does not then appear, his motion will be dismissed. When both sides are represented, the moving party has the right of opening and replying.[4] The English rule was that, "in injunction cases, where upon an order to dissolve an injunction *nisi* the plaintiff shows cause upon the merits confessed in the answer; then no reply is allowed, the motion for

as he pleased. The consequence was, that by the time the Attorney and Solicitor-General, and two or three other Dons, had exhausted their motions, the hour had arrived for the adjournment; and as the counsel of highest rank was again called to at the sitting of the court next morning, juniors had no opportunity of making any motions with which they might be intrusted till the last day of the term, when it was usual, as a fruitless compliment to them, to begin with the back row,—after the time had passed by when their motions could be made with any benefit to their clients. The consequence was, that young men of promise were unduly depressed, and more briefs were brought to the leaders than there was time for them to read, even had they been toiling all night at their chambers instead of siting up in the House of Commons, — absorbed in party struggles. Thus the interests of the suitors were in danger of being neglected, and the judges did not receive the fair assistance from the bar in coming to a right conclusion which they were entitled to expect. To remedy these evils, a rule was made that the counsel should only make one motion apiece in rotation; and that if by chance the court rose before the whole bar had been gone through, the motion should begin next morning with him whose turn it was to move at the adjournement. The business was thus both more equally distributed and much better done." Campbell's Lives of the Chief Justices, ch. xxxiv, pp. 398, 399. See also Daniell's Ch. Pr. (2d. Am. ed.) 1797.

2 Eq. Rule 6.

3 Daniell's Ch. Pr. (2d Am. ed.) 1799.

4 Ibid.

the order *nisi* being considered as the application, to which the plaintiff answers by showing causes upon the merits; after this, the defendant's counsel is allowed to argue against the cause shown by the plaintiff, and this is considered as the reply."[5] As a general rule, no person can be heard in support of a motion unless he has been one of the parties who gave notice of it.[6] But when the object of a motion is to reverse the conclusion of a master, it seems that all persons interested in the master's report are entitled to be heard in its support.[7]

Proof of facts, which are not established by documents, is then regularly given by affidavits;[8] but, in the Circuit Court of the United States for the Eastern District of Pennsylvania, a rule, which has been held to be valid,[9] provides: that "on all motions or rules to show cause, on the hearing of which, facts are to be investigated, the testimony of witnesses shall be taken by deposition in writing * * * and no witness shall be examined at the bar unless by special previous order of the court;"[10] and a witness there may be subpœnaed to give testimony by deposition for use on such a hearing in an action at law.[11]

At the hearing, if the English practice which prevails to some extent in the First Circuit should be followed, any affidavit might be read by either party that had been filed in the clerk's office before the hearing. If an affidavit were filed too late for the other side to take a copy of it, or to obtain an affidavit controverting facts stated therein, that was a ground for moving to postpone the hearing. No affidavit filed previous to the entry of the motion could be used by the moving party, unless he had in his notice of motion stated specifically that he intended to use it. By permission of the court, subsequent affidavits may be served, provided that the opposite party is given a reasonable opportunity to answer the same.[12] A separate notice to that effect, if served a reasonable time before the

5 Ibid.

6 Stubbs v. Sargon, 3 Beav. 408; Daniell's Ch. Pr. (2d Am. ed.) 1793.

7 Johnston v. Todd, 5 Beav. 394; Daniell's Ch. Pr. (2d Am. ed.) 1793.

8 *Infra*, §§ 334–338.

9 Despeaux v. Penn. R. Co., 147 Fed. 926.

10 Rule 7, § 4. Despeaux v. Pennsylvania R. Co., 147 Fed. 926.

11 Despeaux v. Pennsylvania R. Co., 147 Fed. 926.

12 Rubino v. Mariano, 65 App. Div. (N. Y.) 314, 317.

hearing of the motion, might, however, be sufficient.[13] This subject is, however, by local rule or custom regulated differently in the different circuits. A verified answer has the effect of an affidavit.[14]

In New York, no affidavit in chief can be read in support of a motion unless a copy of the same has been served on the adverse party.[15] Papers upon file can be read in support or in opposition to the motion.[16] It is the safer practice for the moving party to specify them in his notice.[17] Whether a notice stating that the motion will be made "upon all the proceedings herein" is sufficient, is a subject upon which the authorities are in conflict.[18] It has been held that a petition which has been withdrawn, abandoned and dismissed could not be read by other petitioners who had not adopted the same by a reference in their papers.[19] Affidavits upon information and belief, where the grounds of the belief are set forth, may be read in support of a motion,[20] and other proof which would be incompetent upon a trial may be used.[21] In a proper case a bill of particulars may be required of a moving party.[22]

§ 253. Petitions in general. A petition is a request in writing directed to the judge or judges of the court, and showing some matter or cause whereupon the petition prays some direc-

13 Daniell's Ch. Pr. (2d Am. ed.) 1797, 1798.

14 Dady v. Georgia & A. Ry. Co., 112 Fed. 838, 844.

15 Northrup v. Village of Sidney, 97 App. Div. (N. Y.) 271.

16 Moliver v. Finegan, 175 App. Div. (N. Y.) 180.

17 Faxon v. Mason, 87 Hun (N. Y.) 139; Southack v. Southack, 61 App. Div. (N. Y.) 105.

18 Hessberg v. Haber, N. Y. Sup. Ct. Sp. Tm. per Delehanty, J., N. Y. L. J. Dec. 13, 1913 (holds that it is sufficient); Moliver v. Finegan, 175 App. Div. (N. Y.) 180 (that the statement "upon all the pleadings and proceedings had herein" is sufficient to authorize the reading of the pleadings); *Contra*, Faxon v. Mason, 87 Hun (N. Y.) 139; Southack v. Southack, 61 App. Div. (N. Y.) 105.

19 Rospigliosi v. New Orleans M. & C. R. Co., C. C. A., 237 Fed. 341.

20 City of Detroit v. Detroit City Ry. Co., 54 Fed. 1.

21 Casey v. Cincinnati Typographical Union No. 3, 12 L.R.A. 193, 45 Fed. 135, 147; Coeur d'Alene Am. Mining Co. v. Mining Union of Warden, 19 L.R.A. 382, 51 Fed. 260; Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. 529, 542; Buck v. Hermance, 1 Blatchf. 322; Mathews v. Ironclad Mfg. Co., 19 Fed. 321; *infra*, §§ 293, 334.

22 Hane v. Crown & Keystone Co., 223 Fed. 439.

tion or order.[1] It may be made by one who is, or by one who is not, a party to a cause pending in the court. Lord Erskine said formerly: "I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the court to grant or refuse them, according to circumstances; but, generally speaking, motions which have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion arises out of recent proceedings upon which there is no doubt; for as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly cognizant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."[2] But petitions are now rarely filed by a party to a cause, since any relief which he desires can usually be obtained equally well by a motion supported by an affidavit containing the allegations which would be necessary in a petition. A party who by his contempt has forfeited the right to make a motion should apply by petition. It has been held, in New Jersey, that where a motion is founded upon prior proceedings in the cause, the proper practice is to present the matter by a written petition, so that the grounds of the application can be made a matter of record.[3] Petitions are usually filed by some person not a party in order to obtain the benefit of proceedings in a cause pending in the court, or else to obtain an order in relation to some matter which is not the subject of any litigation in it. Petitions which are made in a cause are termed cause petitions.[4] The most common instances of cause petitions are petitions for the appointment of a next friend, petitions of intervention, petitions for payment out of a fund in the hands of an officer of the court, and petitions for leave to sue a receiver. But in most, of these cases, the application can also

§ 253. 1 2 Barb. Ch. Pr. 579.

2 Lord Shipbrooke v. Lord Hinchinbrook, 13 Ves. 387, 393. See, however, Nicholson v. Squire, 16 Ves. 259, 260.

3 Holcomb v. Coryell, 12 N. J. Eq. 289.

4 Daniell's Ch. Pr. (2d Am. ed.) 1801.

be made by motion, unless a long statement of facts is needed to show the right of the applicant to relief.[5] It has been held that the right to intervention, for which no provision has been made by a previous order or decree, can only be made by a petition.[6] The most common instances of petitions which are not cause petitions are petitions for the appointment, removal, or resignation of a trustee, and petitions for the appointment of the guardian of an infant, and the maintenance of the infant out of his property. In New York, applications affecting trust funds may be instituted by petition.[7]

After a decree which purports to finally dispose of the suit, one plaintiff cannot obtain relief against another by means of a petition setting up matters which could not have been introduced by an amended or supplemental bill; at least without notice to the party against whom he seeks relief.[8] Ordinarily, a petition cannot be presented in a cause before the bill has been filed.[9] A petition for leave to sue *in forma pauperis* is an exception to this rule;[10] and in an extraordinary case a stay order might perhaps be granted upon a petition before the filing of a bill.[11] The objection, that a party who has proceeded by a petition should have filed a cross-bill, a supplemental bill, or a supplemental answer, is too late when not taken till after an answer to the petition and a decree thereupon.[12] A paper improperly styled a petition may, if it contains the necessary allegations, be sustained as a dependent original bill,[13] and a paper improperly described as a cross-bill or other bill not original, may be sustained as a petition.[14]

§ 254. Form of petitions and practice upon them. A petition should be properly entitled in the cause in which it is

5 Jones v. Roberts, 12 Sim. 189; Barker v. Todd, 15 Fed. 265.

6 Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. 561. See *infra*, §§ 258, 259.

7 Matter of Foster, 15 Hun (N. Y.) 387; Matter of Ungrich, 201 N. Y. 415.

8 Smith v. Woolfolk, 115 U. S. 143, 29 L. ed. 357.

9 Daniell's Ch. Pr. (2d Am. ed.) 1801.

10 *Infra*, § 413.

11 Mayor of London v. Bolt, 5 Ves. 129 Daniell's Ch. Pr. (2d Am. ed.) 1801.

12 Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. ed. 961, 963; Coburn v. Cedar V. C. & L. Co., 138 U. S. 196, 222, 34 L. ed. 876, 886.

13 Central Tr. Co. of N. Y. v. Marietta & N. G. R. Co., 63 Fed. 492.

14 Heath v. Erie Ry. Co., 9 Blatchf. 316; *supra*, § 253; *infra*, § 259.

presented.[1] When not a cause petition, a petition is entitled "In the matter of the application of," &c. The petitioner, if not a party to a cause in which the petition is filed, should state his name, residence, and description.[2] Where a petition is founded upon a former decree it is sufficient to state that decree without setting out the papers upon which that decree was rendered.[3] Where its title recites the name of a pending suit or proceeding, the petition need not state, in its body, the pendency of the same;[4] although the better practice is to make such a statement. A petition should contain no scandal or impertinence; which, as in any other proceedings, may be expunged.

It is the usual practice to verify a petition by the oath of the petitioner.[5] An affidavit by the petitioner, that the allegations in the petition "are true as he verily believes," was held to be sufficient; and, in the absence of a traverse, they were presumed to be true upon an appeal.[6] A petition need not be signed by counsel unless it seeks a rehearing on appeal.[7] Petitions are usually signed by the party making them, either personally or by his solicitor.[8]

"Petitions are either for orders of course, or for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered; if they are for special matters a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained as of course, upon petition."[9] All petitions which are for matters not granted as of course must be served upon all parties interested in the matter prayed for in them. Service is made substantially in the same way and at the same time before the hearing as that of notices of motions.[10] If actual, and not constructive, service

§ 254. 1 Daniell's Ch. Pr. (2d. Am. ed.) 1802.

2 Glazbrook v. Gillatt, 9 Beav. 492.

3 Davis v. Davis, 65 Fed. 380.

4 In re Goldberg, 117 Fed. 692.

5 Daniell's Ch. Pr. (2d Am. ed.) 1803; Eq. Rule 21, § 156, *supra*.

6 Louisville Trust Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 687-689, 43 L. ed. 1130, 1135, 1136, s. c., as Farmers' Loan & Trust Co. v. Louisville, New Albany & C. Ry. Co., 103 Fed. 110, 115.

7 Daniell's Ch. Pr. (2d Am. ed.) 1803.

8 Daniell's Ch. Pr. (2d Am. ed.) 1803.

9 Daniell's Ch. Pr. (2d Am. ed.) 1802.

10 See Rules 5 and 6 Daniell's Ch. Pr. (2d Am. ed.) 1804.

is required, it seems that it must be made by delivering a copy of the petition, and at the same time showing the original to the person served,[11] unless the court otherwise directs. By the Chancery practice objections to the form of a petition could regularly be taken only by demurrer.[12] It has been said: that in the case of a petition for intervention, the right of the petitioner to intervene should be contested by plea, demurrer or motion, and is waived by an answer upon the merits.[13] By answering a respondent loses his right to demur,[14] and, it has been held, waives the objections that the petitioner had a complete and adequate remedy at law,[15] that he should have proceeded by bill instead of by petition;[16] and, if a receiver, that he has not obtained leave to sue.[17] Adverse parties may file answers denying the facts stated in a petition, or setting up other facts in avoidance. Such answers should be verified by affidavit.[18] If the parties are at issue as to the facts, according to the more formal practice testimony may be taken as in the regular course of a suit;[19] but the more usual course is for the parties on either side to support their claim by affidavits, in the same manner as when supporting or opposing a motion.[20] Proceedings upon the hearing of petitions are similar to those upon the hearing of motions.[21] It has been said by Daniell that a petition cannot be amended by adding to it a statement of facts which have occurred since it was filed;[22] but an English judge has held otherwise.[23]

§ 255. Orders. An order is a direction of the court or a judge thereof in writing.[1] A telegram may be an order, but a message by telephone is not.[2] The absence of a formal order

11 Daniell's Ch. Pr. (2d Am. ed.) 1804.

12 U. S. R. S., § 954; Newman v. Moody, 19 Fed. 858.

13 Horn v. Pere Marquette R. Co., 151 Fed. 626, 629. See *infra*, § 259.

14 Newman v. Moody, 19 Fed. 858.

15 Newman v. Moody, 19 Fed. 858.

16 Newman v. Moody, 19 Fed. 858; Horn v. Pere Marquette R. Co., 151 Fed. 626, 629.

17 Newman v. Moody, 19 Fed. 858.

18 Mitford's & Tyler's Pl. 448.

19 Mitford's & Tyler's Pl. 448.

20 Daniell's Ch. Pr. (5th Am. ed.) 1608.

21 Daniell's Ch. Pr. (2d Am. ed.) 1805.

22 Daniell's Ch. Pr. (5th Am. ed.) 1610.

23 Malins, V. C., In re Westbrook's Trusts, L. R. 11 Eq. 252.

§ 255. 1 See U. S. R. S., § 719; Klein v. Southern Pac. Co., 140 Fed. 213.

2 See Schofield v. Horse S. C. Co., 65 Fed. 433, 435; State v. Holmes, 56 Ia. 588, 41 Am. Rep. 121.

of a court need not necessarily prevail over its essential action; and a court of review may treat the case as if an order, evidently intended, had been made.[3] A court order should regularly have a caption stating that it was granted at a term of the court and a direction to the clerk to enter the same, which may be signed by the judge's initials although in the Federal courts it is the custom for the judges to sign such orders with their full name and the direction for entry is often omitted. A judge's order has no direction to the clerk, is signed by the judge, is sometimes not entered when signed and is usually not filed until its return day.[4] Orders are described as either judge's orders or court orders. The distinction may be of importance, since, formerly at least, a judge's order upon an application for habeas corpus was not appealable.[5] The rules of the District Court for the Southern District of New York provide: "In any action or proceeding any order, whether known in practice as a court order or judge's order, may be made and entered by any judge."[6] It has been held in New York that when an order which should have been a judge's order was in the form of a order of the Court, in the absence of any objection made at the time and therein noted, it must be presumed that both sides consented that it should be made by the court.[7]

It has been said: that a court cannot make an order *nunc pro tunc*, as of a preceding term; although the judge has, at such preceding term, expressed his willingness to make the same.[8] When contained in a decree, an order is termed a decretal order. An order is regularly entitled in the cause in which it is entered, and it is irregular to entitle the same order in several cases.[9] Such orders, when not objected to, are valid,[10] and where the parties to the two suits were the same, and orders entitled in both were thus made concerning a receivership under an order

3 Gila Bend Reservoir & Irr. Co. v. Gila Water Co., 202 U. S. 270, 50 L. ed. 1023.

4 Beal v. Greenbaum, 183 App. Div. (N. Y.) 238.

5 Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882. See § 467, *infra*.

6 U. S. D. C., S. D. N. Y., Rule 25.

7 Beal v. Greenbaum, 183 App. Div. (N. Y.) 238.

8 Klein v. Southern Pac. Co., 140 Fed. 213.

9 August v. Fourth Nat. Bank, 9 N. Y. Supp. 270.

10 Gila Bend Reservoir & Irr. Co. v. Gila Water Co., 202 U. S. 270, 273, 50 L. ed. 1023.

in one; it was held, that the objection that there had been no order formally extending the receivership to the other suit, could not subsequently avoid an order therein for the sale of property by such receiver.[11]

It has been held: that restraining orders may be made in a suit, before the bill in equity is filed;[12] that a receiver cannot be appointed upon petition, before the bill is filed;[13] that a receiver may be appointed by a judge at chambers upon the presentation of a bill and answer which have not been filed, in an order containing a direction that it shall take effect upon the filing thereof; that thereupon the appointment relates back to the date of the judge's signature, so as to cut off all intervening rights;[14] and that when an order is filed before the date recited in the same, it takes effect from its filing, and not from the latter date.[15]

Orders may be made at any place within the territorial jurisdiction of the court.[16] "The District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."[17] Whatever a judge may lawfully

[11] Gila Bend Reservoir & Irr. Co. v. Gila Water Co., 202 U. S. 270, 50 L. ed. 1023.

[12] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220.

[13] In re Bryant, 96 Fed. 257; and cases cited *infra*, § 315.

[14] Horn v. Pere Marquette R. Co., 151 Fed. 626, 633. *Contra*, Wilcox v. Nat. Shoe & Leather Co., 67 App. Div. (N. Y.) 466.

[15] In re McCall, C. C. A., 145 Fed. 898.

[16] In re Tampa S. R. Co., 168 U. S. 583, 588, 42 L. ed. 589, 590; Goodyear Dental Vulcanite Co. v. Folsom, 3 Fed. 509. It has been held, that when a District Judge has, under the order of the Circuit Judge, tried a case in another district than his own, he may hear in his own district a motion for a new trial when the counsel for all parties waive his return to the district of the trial for the purpose of hearing and deciding the motion. Cheesman v. Hart, 42 Fed. 98, 105.

[17] Jud. Code, § 9, 36 Stat. at L.

do in chambers, he may do at any other place within the district.[18] It has been held that the clerk may make entries of adjournments by a rubber stamp,[19] and that they may be recorded on days subsequent to their entry at any time during the term.[20] It has been held: that an order in a suit in equity, pending in another district of the same circuit may be made by a Circuit Judge in any part of the circuit.[21] Where no objection was taken below, it was held that an appeal from an order, upon an application for the writ of habeas corpus, might be argued before the Circuit Justice at chambers in any district of the circuit.[22] If the former practice is followed in a District Court when all judges authorized to sit therein are absent from the circuit, an order may be made by a Justice of the Supreme Court sitting anywhere within the United States.[23] The Judicial Code provides that "no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing except when it cannot be heard by the district judge of the district."[24] It is customary to recite in an order or judgment, upon whose motion the same was granted; but it has been said that this is not necessary, nor appropriate, although the order or judgment should show who moved for the

1087. It has been said: that any order in a suit in equity which tends to prepare the cause for a hearing, or to preserve the subject-matter until a hearing, may be made at chambers. Horn v. Pere Marquette R. Co., 151 Fed. 626, 636. An order for the release of a vessel which has been libelled, may be made at chambers. U. S. v. The Little Charles, 1 Brock. 380; Fed. Cas. No. 15,613.

18 Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495.

19 Harlan v. McGourin, 218 U. S. 442, 449, 54 L. ed. 1101, 1105, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849.

20 U. S. v. Louisville & N. R. Co., 177 Fed. 780, 785

21 Horn v. Pere Marquette R. Co., 151 Fed. 626, 635. *Cf.* Hollon v. Parker, 131 U. S. 221, 225, 33 L. ed. 123, 124.

22 Roberts v. Reilly, 116 U. S. 80, 93, 29 L. ed. 544, 548.

23 U. S. v. Louisville & P. C. Co., 4 Dill. 601; Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621; U. S. R. S., § 719, 8 Ry. & Corp. L. J. 200. Thus, in United States v. Louisville, &c., Canal Co., 4 Dill. 601, Fed. Cas. No. 15,633, Mr. Justice Miller granted an injunction upon a bill pending in the Sixth Circuit, at chambers in New Jersey; although he was not the Justice allotted to that circuit.

24 Jud. Code, § 264, 36 St. at L. 1087.

relief and what he asked.[25] A recital of the date when an order was granted, although made in a subsequent order, was held upon appeal to be conclusive.[26] The following recital, "that defendant would have no further affidavits or evidence upon a hearing to be had later and that the matter of a temporary injunction might be considered upon hearing as for a permanent injunction," was held to be a submission to a final hearing and not a consent to the order.[27] Where an order or judgment grants less,[28] or other relief[29] than that for which the mover asks, a recital that it was made upon his motion is erroneous, and if inserted should be stricken out upon a resettlement. The recital in an order that it was granted "upon all the papers and proceedings" was said to be too indefinite.[30] Where improper recitals are embodied in an order, it has been held by a State court: that the objection cannot be made by an appeal from the order, but only by a motion for a resettlement and an appeal from the order denying such motion.[31] It is possible that in the Federal courts, there might be a remedy by an application to the Circuit Court of Appeals for a mandamus.[32]

It is usual, though not indispensable, in the Federal courts, before the entry of an order or decree upon the decision of the court after argument, to serve upon the attorney for the opposite party a copy of the paper proposed to be entered, with a notice that it will be presented for settlement at a specified time and place.[33] If the attorneys live in the same town as

25 Davis v. Fogarty, 134 App. Div. (N. Y.) 500.

26 *Re* National Pressed Brick Co., C. C. A., 212 Fed. 878.

27 L. E. Waterman Co. v. Standard Drug Co., C. C. A., 202 Fed. 167, 169.

28 Davis v. Fogarty, 134 App. Div. (N. Y.) 500.

29 Raymond v. Tiffany, 115 App. Div. (N. Y.) 350, where terms were imposed upon the moving party without his consent; Rector, & c., of St. Stephen's Church v. Rector, &c., of the Church of the Transfiguration, 134 App. Div. (N. Y.) 452.

30 Faxon v. Mason, 87 Hun (N. Y.), 139; Southack v. Southack, 61 App. Div. (N. Y.) 105; *Contra*, Hessberg v. Haber, N. Y. Sup. Ct. Sp. Tm. per Delehanty, J., N. Y. L. J. December 13, 1913; Moliver v. Finegan, 175 App. Div. (N. Y.) 180. See *supra*, § 252.

31 Matter of Radam Microbe Killer Co., 114 App. Div. (N. Y.) 199.

32 *Infra*, § 457.

33 Nevada Nickel Syndicate v. Nat. Nickel Co., 103 Fed. 391, 394.

the judge, one day's notice of settlement is usually sufficient. It is the better practice for the solicitor who obtains an order upon an interlocutory application, to serve a copy of the same upon the solicitor of the opposite party. When the order is made without notice to a party, in his absence, it is the duty of the clerk to mail him a copy of the same.[34] Usually attorneys of record are chargeable with notice of all proceedings taking place in open court.[35]

Ordinarily an order takes effect from the day when the decision was pronounced although it was subsequently entered.[36] If the other party takes a step in the action after an *ex parte* order has been obtained but before its service, "that step in itself regular, the order which had been obtained and not served cannot afterwards be acted upon, if it will interfere with the step so taken."[37]

Where a decree directs the performance of a specific act, it should prescribe the time within which the act shall be done, and the defendant will be bound without further service to take notice thereof.[38] The word "instanter" in an order usually means within twenty-four hours.[39] Ordinarily, if it is intended to enforce the order by contempt proceedings, it should be served personally upon the party to be affected by it,[40] unless possibly, in an extraordinary case, an order should be granted allowing substituted service.[41]

Interlocutory orders made upon motion may be altered or vacated at any time before the final decree.[42] But one case holds that an order for a permanent injunction cannot be modified at

34 Eq. Rule 4.

35 Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 54 L. ed. 190.

36 *Ex parte* Hookey, 4 De G., F. & J. 456; *Ex parte* Whitton, 13 Ch. D. 881; *Re* National Pressed Brick Co., C. C. A., 212 Fed. R. 878; May v. Cooper, 24 Hun (N. Y.) 7; Hull v. Thomas, 3 Edw. Ch. (N. Y.) 236.

37 Nevada N. S. v. National N. Co., 103 Fed. 391, 394.

38 Eq. Rule 8. See *infra*, § 428.

39 St. Bernard v. Shane, C. C. A., 220 Fed. 852.

40 Daniell's Ch. Pr. (2d Am. ed.) 1789; Church v. Marsh, 2 Hare, 652.

41 *Re* Cary, 10 Fed. 622.

42 Hunter v. ——, 6 Sim. 429; Lorton v. Seaman, 9 Paige (N. Y.), 609; People v. Brower, 4 Paige (N. Y.), 405; Stafford v. Brown, 4 Paige (N. Y.), 360; Penn. Steel Co. v. N. Y. C. Ry. Co., 221 Fed. 440; Calaf v. Fernandez, C. C. A., 239 Fed. 795.

a subsequent term.[43] Orders made *ex parte* upon petition may also be discharged upon motion for irregularity.[44] According to the English practice, orders made after a hearing upon a petition could not be altered or discharged without the filing of a petition for a rehearing, or upon appeal.[45] A court has, during the term at which it is entered, the power to review and modify or set aside any order or decree, interlocutory or final.[46]

The court has power by order to carry over pending motions for determination at a subsequent term.[47] In some cases the courts have adjourned the term to a time concurrent to a subsequent term confining the adjournment to the purpose of continuing proceedings in a specified case.[48] When the time to appeal had expired judges have entertained a motion for a resettlement of an order *pro forma* in order that the same might be denied and the time to appeal extended.[49] This is a legal fiction unauthorized by law and has been condemned by the New York courts.[50]

It has been held to be improper to file a bill of review or supplemental bill in the nature of the same in order to set aside an interlocutory order or decree.[51] It has been held that an order in an action at common law staying plaintiff's proceedings till he pays costs of a former action is *res adjudicata* upon a subsequent motion, and is in so far a final order that it cannot be modified or set aside at a subsequent term.[52] It has been held that, even in a criminal case, the court, at a term after final judgment,

43 L. E. Waterman Co. v. Standard Drug Co., C. C. A., 202 Fed. 167, 169.

44 Daniell's Ch. Pr. (2d Am. ed.) 1616, 1807; Eslava v. Mazange, 1 Woods, 623, 627; Nelson v. Barker, 3 McLean, 379.

45 In re Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed.) 1807.

46 Bishop v. Willis, 2 Ves. Sen. 113; In re Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed. 1808. But see In re Dovenby Hospital, 1 Myl. & Cr. 279; West v. Smith, 3 Beav. 306.

47 Calaf v. Fernandez, C. C. A., 239 Fed. 795.

48 See § 65, *supra*.

49 See Am. Grain Separator Co. v. Twin City Separator Co., C. C. A., 202 Fed. 202, *infra*, § 666. Similar practice disapproved. *Re* Thompson, C. C. A., 264 Fed. 913.

50 Schiffner v. Buck, 159 App. Div. (N. Y.) 821.

51 Doss v. Tyack, 14 How. 297, 313, 14 L. ed. 428, 435; Bassett v. U. S., 9 Wall. 38, 41, 19 L. ed. 548, 549; Henderson v. Carbondale C. & C. Co., 140 U. S. 25, 40, 35 L. ed. 332, 338. See *infra*, § 443.

52 Buckles v. Chicago, M. & St. P. Ry. Co., 53 Fed. 566.

may enter an order correcting a clerical error, *nunc pro tunc* as of the preceding term.[53] An order granted after a hearing before one judge of a court will not, unless under extraordinary circumstances, be modified or vacated by another except upon appeal.[54] Unless limited by their terms, or by a rule, or by statute,[55] orders within the jurisdiction of the judge or court that grants them remain in force until discharged by a subsequent order;[56] or until the final decree, when, unless renewed by its terms, all orders expire.[57]

Before the Evarts Act, no appeal lay before the final decree from an interlocutory order which was not final in its nature.[58] It has been said by Chief Justice Taney, that "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal, and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if by an interlocutory order or decree he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order is immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the Circuit Courts of the United States, in framing their interlocutory or-

53 C. & A. Potts Co. v. Creager, 71 Fed. 74. In re Wright, 134 U. S. 136, 33 L. ed. 865. Regularly the date of an order should be the day when it was pronounced, not the day of its entry. Ex parte Hookey, 4 De G., F. & J. 456; Ex parte Whitton, 13 Ch. D. 881.

54 Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 685, 689; Oglesby v. Attrill, 14 Fed. 214; Newcomb v. Burbank, 159 Fed. 569; *Ex parte* Steele, 162 Fed. 694; *Re* Ennis, 183 Fed. 859; Camp v. Camp, 59 N. Y. 212; People v. McLaughlin, 150 N. Y. 365; People v. National Trust Co., 31 Hun (N. Y.) 20, 24. But see Birch v. Steele, C. C. A., 165 Fed. 577; *Re* Steele, 161 Fed. 886; of which the former overruled *Re* Steele, 156 Fed. 853; *Ex parte* Steele, 162 Fed. 694.

55 See Eq. Rule 73 quoted *infra* § 291.

56 Eslava v. Mazange, 1 Woods, 623, 627.

57 Gardner v. Gardner, 87 N. Y. 714; Daniell's Ch. Pr. (2d Am. ed.) 1902.

58 See *infra*, § 695.

ders, and in carrying them into execution, should keep in view the difference between the right of appeal, as practiced in the English chancery jurisdiction, and as restricted by the act of Congress, and abstain from changing unnecessarily the possession of property or compelling payments of money by an interlocutory order.'' [59] An appeal lies to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction or appointing a receiver.[60]

§ 256. Judges who may grant orders. An order may be made by any judge authorized to sit in the court in which the cause is pending. In the Supreme Court it is the custom for each Justice to refer to the full bench every application of importance which is made to him.[1] Orders in a case pending in a District Court may be made by any judge of that district;[2] or by any district judge, in the same circuit; or, in the absence of all the circuit judges, by the Circuit Justice of the same;[3] or, in case of the absence and disability of all the circuit judges and the Circuit Justice, by the Chief Justice, of the United States;[4] or by any circuit judge of the circuit, designated by the senior circuit judge, or Circuit Justice thereof or the Chief Justice of the United States;[5] or by any member of the Commerce Court, assigned by the Chief Justice of the United States for service therein.[6] In case of the absence from the district or disability of the district judge, any circuit judge of the circuit may grant an injunction or restraining order in any case pending in the District Court.[7]

It is ordinarily the duty of a judge to follow a ruling made

[59] Forgay v. Conrad, 6 How. 201, 205, 12 L. ed. 404, 406.

[60] Act of June 16, 1900, 31 St. at L. 660; *infra*, §§ 300, 325.

§ 256. [1] Spies v. Illinois, 123 U. S., 131, 31 L. ed. 80.

[2] See Jud. Code § 1, 36 St. at L. 1087; Birch v. Steele, C. C. A., 165 Fed. 577.

[3] Jud. Code, § 14, 36 St. at L. 1087, *Cf.* Ibid., §§ 13, 16, 17, 18, 19, 20. All of these are quoted in § 370, *infra*. An order made by the District Judge of another district in the same State who was not sitting nor designated to sit in the district where the suit was pending, the office of District Judge of the latter district not being vacant, was held null and void. Am. L. & T. Co. v. East & West R. Co., 40 Fed. 182.

[4] Jud. Code, § 15, 36 St. at L. 1087; quoted *infra*, § 370.

[5] Jud. Code, § 18, 36 St. at L. 1087; quoted *infra*, § 370.

[6] Jud. Code, § 205, 36 St. at L. 1087; quoted *infra*, § 370.

[7] Jud. Code, § 264, 36 St. at L. 1087.

in the same cause;[8] or when rules or property or practice are involved, in another cause, by a judge of co-ordinate jurisdiction;[9] but when he has so done, he may be reversed, if the court of review construes the ruling to be erroneous.[10] If there is no ruling by the Circuit Court of Appeals for the same circuit, a Circuit or District Judge will ordinarily follow a decision of a Circuit Court of Appeals in another circuit.[11]

Greater respect is paid to a ruling by a Circuit Justice than to one by a Circuit or District Judge;[12] and a ruling by a Circuit Judge has more weight than one by a District Judge.[13] Where there were two district judges in the same district, each with equal and concurrent authority, and one, during the absence of the other from the district, had appointed a referee in bankruptcy; it was held that the latter might, without the former's concurrence, remove the referee from office.[14] It has been held that a judge of another district, assigned generally to hold court, may make orders in cases tried by a resident judge;[15] but that he should not make such orders when in his own district and the district judge of the other district is present therein.[16]

§ 257. The clerk's office. All court orders should be filed in the clerk's office. Restraining orders, signed by a judge, must also be forthwith filed there.[1] Orders to show cause are not usually filed there until their return. Orders extending time are not usually filed, unless some motion is founded upon the same. The Judicial Code provides: "A clerk shall be appointed for each district court by the judge thereof, except in cases

8 Plattner Implement Co. v. International Harvester Co., C. C. A., 133 Fed. 376, 379.

9 Plattner Implement Co. v. International Harvester Co., C. C. A., 133 Fed. 376, 378. See § 375, *infra*.

10 Plattner Implement Co. v. International Harvester Co., C. C. A., 133 Fed. 376, 379.

11 In re Baird, 154 Fed. 215.

12 Preston v. Walsh, 10 Fed. 315. But see U. S. v. Huggett, 40 Fed. 636, 644.

13 *Cf.* E. Regensberg & Sons v. Am. Exch. Cigar Co., 130 Fed. 549. *Infra*, § 375. But see U. S. v. Huggett, 40 Fed. 636, 644.

14 Birch v. Steele, C. C. A., 165 Fed. 577; *Re* Steele, 161 Fed. 886; of which the former overruled *Re* Steele, 156 Fed. 853, *Ex parte* Steele, 162 Fed. 694.

15 Hall v. McKinnon, C. C. A., 193 Fed. 572.

16 Gay v. Hudson River El. Power Co., 190 Fed. 812.

§ 257. 1 Eq. Rule 73.

otherwise provided for by law."[2] "Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasance in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime."[3] "The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes."[4] "The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge."[5] The equity rules direct: "The clerk shall keep a book known as 'Equity Docket,' in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number. The clerk shall also keep a book entitled 'Order Book,' in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers. He

[2] Jud. Code, § 33, 36 St. at L. 1087.
[3] Ibid.
[4] Ibid. § 5.
[5] Ibid. § 6.

shall also keep an 'Equity Journal,' in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time. Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court." [6] The file marks made by the clerk are usually considered to be conclusive evidence that the papers were filed upon the dates therein stated.[7] "Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order." [8]

"All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills pro confesso; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown." [9]

The Revised Statutes provide: "All moneys paid into any court of the United States or received by the officers thereof in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer or Assistant Treasurer or a designated depository of the United States in the name and to the credit of such court, provided that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court." [10]. "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term time or in vacation to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn, and it shall be the duty of the judge or

6 Eq. Rule 3.
7 *Re* Libby, 253 Fed. 278.
8 Eq. Rule 4.
9 Eq. Rule 5.
10 U. S. R. S., § 995, Comp. St. 1901, p. 711.

judges of said courts, respectively, to cause any moneys deposited as aforesaid which have remained in the registry of the court unclaimed for ten years or longer to be deposited in a designated depository of the United States to the credit of the United States."[11] It is the duty of the clerk to make the deposit at once although a State sheriff has made a levy thereupon.[12] The clerk commits no criminal offense by depositing the money in a bank not a Government depositary which pays a higher rate of interest when so ordered by the consent of the parties.[13] Even when the Government is a party entitled to the money it has not become the property of the United States nor "accrued to the United States" before an order of the judge or final judgment.[14] Where the final judgment or decree does not dispose of the title to the fund it is still subject to the order of the court and no independent action will lie for its recovery.[15] Monies so deposited are not public monies of the United States.[16] In the absence of any agreement by the depositary it cannot be compelled to pay interest upon such funds to a party to the suit;[17] nor to the United States.[18] When the deposit was made as security to the complainant and he recovered less than its amount it was held that he was not liable to the depositor for interest in excess of that paid by the depositary.[19] After the ten years had expired it was held that the court had no power to award the deposit to any claimant but that all claims must be presented to the Department of the Treasury.[20] It is not unusual for the court and counsel when a deposit of money is made to arrange that it be placed in a

11 U. S. R. S., § 996, as amended by Act of February 19, 1897, ch. 265, § 3, 29 St. at L. 578, Comp. St. 1901, p. 711. See *Re* Moneys in Registry of District Court, 170 Fed. 470; *infra*, chapter on "Admiralty."

12 D. B. Martin Co. v. Shannonhouse, 203 Fed. 516.

13 U. S. v. Conway Lumber Co., 234 Fed. 961.

14 U. S. v. Smart, C. C. A., 237 Fed. 978.

15 Menasha Woodenware Co. v. Southern Oregon Co., C. C. A., 241 Fed. 83.

16 Chatam & Phenix Nat. Bank v. Guaranty Trust Co., C. C. A., 256 Fed. 90.

17 Ibid.

18 U. S. v. MacMillan, 209 Fed. 256; See Chatam v. Phenix Nat. Bank v. Guaranty Trust Co., C. C. A., 256 Fed. 90, 92.

19 Brooks v. Kerr, C. C. A., 223 Fed. 1016.

20 *Re* Moneys in Registry of District Court, 170 Fed. 470.

trust company subject to the order of the court without going through the clerk's office. By this means, the clerk's fee of one per cent [21] is saved.[22] Where a statute authorized sailors to prosecute suits without the prepayment of his fees it was held that he need not account for them until after their collection,[23] but when tendered a fee for service demanded of him, he cannot refuse to perform the same until fees due him for other services have been paid.[23a] It is customary in the Second Circuit to require a deposit, as security for costs, to be paid by each party before any paper is filed by him.[24]

All books in the offices of the clerks of the District Courts containing the docket or minutes of the judgments, or decrees thereof, must during office hours be open to the inspection of any person desiring to examine the same, without any fees or charges therefor.[25] A title insurance company has the right to make such inspection, provided it does not interfere with the rights of other searchers.[26] The sureties upon a clerk's bond are liable, by a suit in the name of the United States, for the use of a private suitor, who has been damaged by his misconduct in refusing to file papers in a case.[27] Such sureties are similarly liable to the owner of a fund deposited with the clerk, which the latter has misappropriated.[28] But where the clerk had refused to enter judgment by default in a case where garnishee process had been issued, it was held that his sureties were not liable for damages in the absence of proof that there were funds of the defendant in the hands of the garnishee subject to garnishment.[29] The complaint is filed when it is lodged in the hands of the clerk and his fees are paid, although he fails to put the file marks upon the same.[30]

21 U. S. R. S., § 828, *infra*, § 417.

22 Easton v. H. & T. C. Ry. Co., 44 Fed. 718.

23 The Memphian, 245 Fed. 484.

23a Jenning v. Johnson, C. C. A., 148 Fed. 337.

24 In equity, on filing bill of complaint $25, on filing appearance by defendant, $15, at law, on filing summons $15, on filing appearance by defendant $10; appraisers' appeals on filing petition $5.

25 U. S. R. S., § 828; *Re* McLean, 9 Cent. L. J. 425; s. c., 2 Flip. 512.

26 Bell v. Commonwealth Title Ins. Co., 189 U. S. 131, 47 L. ed. 741.

27 U. S., to Use of Kinney v. Bell, C. C. A., 135 Fed. 336.

28 Howard v. U. S., 184 U. S. 676, 46 L. ed. 754.

29 U. S. v. U. S. Fidelity & Guaranty Co., C. C. A., 186 Fed. 477.

30 Emmons v. Marbelite Plaster Co., 193 Fed. 181.

CHAPTER XVII.

INTERVENTIONS.

§ 258. Interventions in general. An intervention is generally instituted by a petition. A petition of intervention is filed in a pending cause by a person, who is not a party to it and prays permission to intervene and become a party, either plaintiff or defendant. A person not named as a party in the pleadings cannot ordinarily intervene without permission of the court.[1] New parties can always intervene by consent of the original parties.[2]

By the Equity Rules of 1912, "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."[3] To what extent this changes the pre-existing practice has not yet been decided. It has been held that the interest must be a legal interest which will or may be affected by the decree[4] and that a city has no right to intervene to protect its citizens who are gas consumers by defending a suit to enjoin the enforcement of a statute reducing the price of gas supplied to them but not affecting those which the city pays.[5] An appeal from the decision is pending in the Supreme Court of the United States.

A person who claims an interest in, or lien upon a fund,[6] or other property in the possession of the court or by a receiver or

§ 258. [1] Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 17 L. ed. 725; Forbes v. Memphis El. P. & Pac. Ry. Co., 22 Woods, 323; Putnam v. New Albany, 4 Bissell, 365, 367; Gregory v. Pike, 67 Fed. 837; U. S. Gypsum Co. v. Hoxie, 172 Fed. 504.

[2] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 464, 20 L. ed. 199; French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956.

[3] Eq. Rule 37.

[4] Consol. Gas Co. v. Newton, 256 Fed. 238, aff'd without opinion, C. C. A., 266 Fed. 1022, reversed for want of jurisdiction of C. C. A., 252 U. S. —, in which the author was counsel.

[5] Ibid.

[6] See *infra*, § 258e.

otherwise,[7] or who is interested in the title to property the right to which is in dispute,[8] unless he is adequately represented in the litigation,[9] may be allowed to intervene to protect his rights. An application to compel the receiver to pay money into court may be made by intervention, although the intervenor might proceed by an independent action against the receiver and the sureties on his bond.[10]

It has been held that any person who is a proper although not a necessary party may be allowed to intervene.[11]

It was formerly the general rule in chancery that the court had no power to allow a stranger to a cause "to be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like."[12] A stranger is not allowed to intervene in order to contest the complainant's right to sue,[13] nor, it has been held, to object to the jurisdiction of the court,[14] nor to his ownership of the cause of action,[15] nor to be substituted in his place, because of an adverse title.[16] An intervention should not ordinarily be permitted in order to substitute the intervenor for the complainant.[17] But an insurer claiming by subrogation an interest in a fund recovered by a plaintiff was authorized to intervene to assert such claim.[18] Receivers were authorized to intervene and continue a pending suit for the infringement of a patent brought by the party over whose estate they were ap-

7 See *infra*, §§ 258g, 258h.

8 See *infra*, § 258f.

9 See *supra*, § 113; *infra*, §§ 258b, 258e.

10 Haines v. Buckeye Wheel Co., C. C. A., 224 Fed. 289.

11 Brinekerhoff v. Holland, C. C. A., 146 Fed. 338, 203. See *infra*, § 258f.

12 Bradley, J., in Anderson v. Jacksonville, P. & M. R. Co., 2 Woods 628, 629. See also Searles v. Jacksonville, P. & M. R. Co., 2 Woods 621, 625; Shields v. Barrow, 17 How. 130, 145, 15 L. ed. 158, 162; Bronson v. Railroad Co., 2 Black, 524, 17 L. ed. 347; Coleman v. Martin, 6 Blatchf. 119; Drake v. Goodridge, 6 Blatchf. 151; Page v. Holmes B. A. Tel. Co., 18 Blatchf. 118.

13 Hopkins v. Lancaster, 254 Fed. 190; Caufield v. Laurence, 256 Fed. 714.

14 Horn v. Pere Marquette R. R. Co., 151 Fed. 626, 634.

15 Hopkins v. Lancaster, 254 Fed. 190.

16 Caufield v. Laurence, 256 Fed. 714; nor to enforce an independent claim against him. Glass v. Woodman, C. C. A., 223 Fed. 621.

17 Caufield v. Laurence, 256 Fed. 714. See *supra*, §§ 231, 234.

18 Fed. Ins. Co. v. Detroit Fire & Marine Ins. Co., C. C. A., 202 Fed. 648.

pointed.[19] An assignee of part of the cause of action by an assignment made before or after the beginning of the suit may intervene.[20]

When the court acquired jurisdiction of the original bill, the fact that an intervenor has the same citizenship as a party on the opposite side of the controversy[21] or that his claim is less than the jurisdictional amount does not oust it.[22]

Persons belonging to a class represented in the suit are regarded as *quasi*-parties; and for that reason they are often allowed to intervene.[23]

§ 258a. Interventions in class suits. When a suit is brought by a member of a class on behalf of himself and others similarly interested, another member of the class who desires the success of the complaint[1] should be permitted to intervene,[2] even after a decree for a sale, provided there has been no distribution of the assets,[3] upon payment of his share of the costs, expenses, and reasonable counsel fees which have been previously paid or incurred.[4]

19 Nat. El. Signaling Co. v. Telefunken Wireless Tel. Co., C. C. A., 208 Fed. 679.

20 Rhinehard v. Victor Talking Machine Co., 261 Fed. 646.

21 Kripendorf v. Hyde, 110 U. S. 276, 283, 284, 28 L. ed. 145, 148; Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159; Irving-Pitt Mfg. Co. v. Twinlock Co., 220 Fed. 325, *supra*, § 46.

22 Stanwood v. Wishard, 134 Fed. 959, *supra*, § 6.

23 Fidelity Tr. & S. D. Co. v. Mobile S. Ry. Co., 53 Fed. 850.

§ 258a. 1 Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323. See Southern Pac. Co. v. Bogert, 250 U. S. 483, 498. The right was denied where the petitioner acquired his claim pending the suit. Terry v. Bank of Cape Fear, 20 Fed. 777. *Cf.* Davis v. Sullivan, 33 N. J. Eq. 569.

2 Ogilvie v. Knox Ins. Co., 2 Black, 539, 17 L. ed. 349; s. c., 22 How. 380, 16 L. ed. 349; Myers v. Fenn, 5 Wall. 205, 18 L. ed. 604; *Ex parte* Jordan, 94 U. S. 248, 24 L. ed. 123; First Nat. Ins. Co. v. Salisbury, 130 Mass. 303; Hallett v. Hallett, 2 Paige (N. Y.) 432; Leigh v. Thomas, 2 Ves. Sen. 312; Atkins v. Trowbridge, 162 App. Div. (N. Y.) 161 (an action by the holder of a certificate of bonds deposited under a reorganization agreement); Story's Eq. Pl., § 99. *Cf.* Tift v. Southern Ry. Co., 159 Fed. 555. But see Farmers' & Merchants' Bank v. Arizona, C. C. A., M. L. & T. Ass'n, 220 Fed. 1.

3 George v. St. Louis C. & W. Ry. Co., 44 Fed. 117.

4 Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

It has been held by an intermediate court of review in New York that this rule does not apply to a suit brought by a stockholder who sues to enforce a cause of action owned by the corporation such as the right to set aside a sale of its assets,[5] but the contrary rule seems to be established in the Federal courts when the stockholder expressly sues on behalf of himself and the others.[6] Another Circuit Court of Appeals has held: that in a suit by a stockholder to set aside a consolidation, when the bill does not state that he sues on behalf of all, the other stockholders have no right to intervene unless the court in its discretion so determines.[7] But it has been said by a judge of wide experience at the New York bar: "The stockholders' action being but a derivative one, no stockholder has the right to sue for himself alone; his action is necessarily representative whether he calls it so or not."[8] After an agreement for a settlement of the entire litigation had been made between the original complainant who sued on behalf of himself and the rest of a class, and one of the defendants, a motion to intervene by a member of the class, for whose benefit the suit was brought, was denied; although no motion to dismiss the bill, nor for a discontinuance, had been made or noticed.[9]

Ordinarily an intervenor in a suit brought on behalf of a class will be joined as plaintiff. If he is a citizen of the same state as one of the defendants, that will not in most, if in any, cases deprive the court of jurisdiction.[10] If there should be any danger that it would, he may be joined as a defendant.[11] If he intends to act in hostility to the original complainant, the court may, in

5 Hay v. Brookfield, 160 App. Div. (N. Y.) 277. See Jackson v. Gardiner Inv. Co., C. C. A., 200 Fed. 113, 117; *infra*, § 258c. But see Grant v. Greene Consol. Copper Co., 169 App. Div. (N. Y.) 206, 215; Brown v. Penn. Canal Co., 244 Fed. 980.

6 Dana v. Morgan, C. C. A., 232 Fed. 85. See Southern Pac. Co. v. Bogert, 250 U. S. 483, 498.

7 Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113, 117.

8 Grant v. Greene Consol. Copper Co., 169 App. Div. (N. Y.) 206, 215. See *supra*, §§ 114-116, 145, 149.

9 Snyder v. DeForest Wireless Telegraph Co., U. S. C. C., E. D. Mo. 1907. But see Snyder v. DeForest Wireless Telegraph Co. (D. M.) 154 Fed. 142, 145. In both of these cases the author was counsel. See § 361, *infra*.

10 Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329. See § 260, *infra*. But see Mangels v. Donau Br. Co., 53 Fed. 513.

11 Brown v. Pac. M. S. S. Co., 5 Blatchf. 525, 535.

its discretion, add him to the defendants.[12] The defendant from whom the fund has been recovered cannot share in the same without paying its proportion of the expenses of the litigation.[13]

§ 258b. Intervention by bondholders. A provision in the mortgage, that no bondholder can bring a foreclosure suit until after a refusal by the trustee, does not preclude the intervention of a bondholder.[1]

In suits brought by or against a trustee, or otherwise affecting trust property, the beneficiaries of the trust, such as holders of bonds secured by a railroad mortgage, may be allowed to intervene for the purpose of protecting their interests;[2] but ordinarily the right to intervene before a sale is denied them in the absence of fraud, neglect, inability, collusion, or bad faith by the trustee,[3] even when the application is made for the purpose of taking an appeal, after the trustee has refused to appeal.[4] The better rule is that bondholders should always be allowed to intervene when their trustee refuses to make an active contest against the validity of a prior lien or of other bonds secured by the same mortgage.[5] The facts showing misconduct or collusion by the trustee must be specifically pleaded. A general allegation of fraud, collusion, and co-operation with one of two parties of bondholders, is insufficient.[6] So, it has been

12 Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478; Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323.

13 Brown v. Penn. Canal Co., 244 Fed. 980.

§ 258b. 1 Farmers' Loan & Tr. Co. v. Nor. Pac. R. Co., 66 Fed. 169.

2 Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559; Drew v. Harman, 5 Price, 319; Saylors v. Saylors, 3 Heisk. (Tenn.) 525; Birdsong v. Birdsong, 2 Head (Tenn.), 289; Carter v. New Orleans, 19 Fed. 659; Farmers' L. & Tr. Co. v. Mo. I. & N. Ry. Co., 21 Fed. 264; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 66 Fed. 169; Central Tr. Co. v. Washington County, 124 Fed. 813.

3 Richards v. Chesapeake & O. R. Co., 1 Hughes, 28, 36; Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320, 350–352, per Bond, J., Hughes, J., dissenting; Farmers' L. & Tr. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182; Clyde v. Richmond & D. R. Co., 55 Fed. 445; Bowling Green Tr. Co. v. Va. Passenger & Power Co., 132 Fed. 921; Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588, 596; Investment Registry v. Chic. & M. El. R. Co., 213 Fed. 492. See *supra*, § 171. Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269. See Eq. Rule 37.

4 Fink v. Bay Shore Terminal Co., C. C. A., 144 Fed. 837.

5 But see *Ex parte* Equitable Trust Co., C. C. A., 231 Fed. 571.

6 Bowling Green Tr. Co. v. Virginia Passenger & Power Co., 161

held, is the charge: that the trustees and others who are members of the majority of the bondholders have conspired to cause the mortgaged property to be sold free and clear of the claims of the intervening bondholders and other creditors for a sum much less than its actual value, insufficient to pay in full the claims of the intervening bondholders and insufficient to pay any thing whatever on the claims of general creditors; and that the books of the mortgagor in violation of the State statute have been kept, and are still kept, outside of the State.[7]

Where a trustee represents bondholders under different mortgages with conflicting interests; or where, if a corporation, one of its officers or directors or controlling stockholders or counsel is a member of a reorganization committee which intends to buy the mortgaged property or is interested in a large claim against it, the trustee is under such disability to exercise unbiased judgment that an intervention should always be allowed.[8] It has been held: that the facts that the trustee has consented to act with a majority of the bondholders in a reorganization wherein it will be the depositary of the bonds;[9] that the attorney of the trustee represents the mortgagor, the trustee under another mortgage, a committee of second mortgage bondholders and a committee of general creditors and a large bondholder;[10] that certain directors of the trustee are holders of bonds and stock of the defendant;[11] that the trustee has failed to claim certain assets as to the inclusion of which in the mortgage there is room for doubt;[12] that the trustee disobeyed the covenants in the deed of trust by using the proceeds of mortgaged property taken in con-

Fed. 753, 756; Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600. See Howard v. Shinn, C. C. A., 190 Fed. 940.

7 Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588.

8 Farmers' L. & Tr. Co. v. Nor. Pac. R. Co., 66 Fed. 169; Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. 38; Grand Tr. Ry. Co. v. Central Vt. Ry. Co., 88 Fed. 622; Fowler v. Jarvis-Conklin M. Tr. Co., 64 Fed. 279; Hamlin v. Toledo, St. L. & K. C. R. Co., 36 L.R.A. 826, 78 Fed. 664, 672. See Bowling Green Tr. Co. v. Virginia Passenger & Power Co., 164 Fed. 753, 756; Howard v. Shinn, C. C. A., 190 Fed. 940. But see Clyde v. Richmond & D. R. Co., 55 Fed. 445.

9 Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588.

10 Ibid.

11 Bowling Green Tr. Co. v. Va. Passenger & Power Co., 132 Fed 921.

12 Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588.

demnation proceedings to buy bonds from the trustees of the mortgagor instead of in the open market, it not appearing that the price paid for the bonds was too high, that the bonds could have been bought in the open market, or that the mortgagor had asked the trustee to use the money for betterments of the property;[13] that the trustee was also trustee under a collateral trust indenture pledging for the security of note-holders' bonds issued under the instrument which it has sued to foreclose, the trustee having resigned from his position under the indenture;[14] that the president of the trustee owned a controlling interest in the stock and bonds of a connecting railroad which he had agreed to sell to the reorganization committee, payment to be made when the reorganization was consummated conditioned upon approv by the court or its receiver;[15] that the trustee has failed to comply with the State statute directing it to appoint an agent within the State or to file certain papers in the State office when it contends that the statute does not apply;[16] that after the refusal of the court to confirm the sale of part of the mortgage property in one state and district the trustee applied for the confirmation of the same sale so far as it covered property in another State and district[17] are not, in themselves alone, sufficient to allow the individual holders of a small minority of the bonds to intervene. Bondholders who objected to the appointment of a certain person as receiver have been allowed to intervene.[18]

After a plan for the reorganization of a railroad company in the hands of a receiver has been submitted to bondholders for their acceptance, since they are not represented in this matter by the trustee they have the right to intervene before the sale.[19] Where the trustee was not proved to be guilty of co-operation with those wishing to reorganize the corporation, except that against the protest of the minority he had brought a foreclosure suit at the majority's request and that he had failed to answer

13 Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588, 596.

14 Investment Registry v. Chic. & M. El. R. Co., 213 Fed. 492.

15 Ibid. But see Coal v. Philadelphia & E. Ry. Co., 140 Fed. 944.

16 Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588.

17 Investment Registry v. Chicago & M. El. R. Co., 213 Fed. 492.

18 Coal v. Philadelphia & E. Ry. Co., 140 Fed. 944, 945.

19 Guaranty Tr. Co. v. Mo. Pac. Ry. Co., 238 Fed. 872; Central Trust Co. v. Chic. R. I. & P. R. Co., C. C. A., 218 Fed. 336.

within two days a series of questions by a bondholder; leave to intervene was denied.[20]

When there is a substantial dispute between the bondholders as to the policy to be pursued, it is also proper to allow the intervention of committees representing them.[21] It has been held that where there was no dispute as to the validity of all of the bonds as against the corporation, the holder of a part thereof should not be allowed to intervene before the sale for the purpose of litigating a claim of priority over other bondholders; that being said to be a question, which could be litigated before the master upon the application for the distribution of the proceeds of the sale.[22] The obligee of bonds pledged by a corporate mortgage was not allowed to intervene in the foreclosure suit, to litigate the question of its liability, since he had a right to contest the same in an action by the purchaser.[23] A bondholder was refused permission to intervene generally for the purpose of enforcing claims for misconduct of persons other than the mortgagor in relation to the reorganization of the mortgagor's assets.[24]

The bondholders have the right to delegate to such a committee their individual rights to take part or intervene in the litigation.[25] The consent of a trustee to act as depositary under a reorganization agreement does not bind it to obey the instructions which the agreement gives the committee power to make on behalf of the bondholders,[26] although the trustee issues certificates to depositors certifying that the holder is bound by the terms of the agreement and entitled to the advantages accruing to the depositors of bonds thereunder.[27] Where the interest of such com-

20 Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600.

21 Farmers' L. & T. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. 38; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. 168; Pennsylvania Steel Co. v. N. Y. City Ry. Co., 181 Fed. 285; Coal v. Philadelphia & E. Ry. Co., 140 Fed. 944; Guaranty Tr. Co. v. Mo. Pac. Ry. Co., 238 Fed. 872.

22 Mercantile Tr. Co. v. U. S. Shipbuilding Co., 130 Fed. 725. See Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269.

23 Morton Tr. Co. v. Metropolitan St. Ry. Co., 168 Fed. 941.

24 Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413.

25 Farmers' Loan & Tr. Co. v. Cape Fear & T. V. Ry. Co., 71 Fed. 38; Toler v. East Tenn. V. & T. Ry. Co., 67 Fed. 168; Penn. Steel Co. v. N. Y. City Ry. Co., 181 Fed. 285.

26 Guaranty Trust Co. v. Missouri Pac. Ry. Co., 238 Fed. 872.

27 Ibid.

mittee is adverse to that of bondholders who have not deposited under the reorganization agreement and it is alleged that the trustee acts in cooperation with the committee such bondholders should be allowed to intervene.[28] In general, injustice is more apt to result from the denial, than from the grant, of a prayer for intervention in a railroad foreclosure suit.

§ 258c. Intervention by stockholders. Analogous rules regulate the intervention by stockholders, in suits brought by or against their corporation.[1] In suits brought by or against a corporation, stockholders may be allowed to intervene if there is any danger of their being injured by fraud, neglect or collusion on the part of the officers;[2] and in some such cases stockholders have been allowed to file an answer and defend the suit in the name of the corporation.[3] The court has also allowed cross-bills to be filed for the same purpose.[4] Where the assets of a corporation had been sold in receivership proceedings at the instance of a creditor, who was also a director, the right of a stockholder to hold the complainant in that suit, the receiver, and the other directors liable to him personally for losses incurred as a stockholder by reason of such sale, was enforceable by a separate bill against them, and not by intervention in the receivership proceedings.[5]

Stockholders were denied the right to intervene to set up as a defense the default of a contractor who had received the greater part of the bonds and still retained a large portion of them, when the controversy was in litigation in another court.[6] It was said

28 Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413.

§ 258c. 1 Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Pa. Steel Co. v. N. Y. City Ry. Co., 160 Fed. 222.

2 Bayliss v. Lafayette, M. & B. Ry. Co., 8 Miss. 193. See U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

3 Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 17 L. ed. 725; Guarantee Tr. & S. Co. v. Duluth & W. R. Co., 70 Fed. 803; *Ex parte* Jordan, 94 U. S. 248, 249, 24 L. ed. 123; Bayliss v. Lafayette, M. & B. Ry. Co., 8 Biss. 193. *Contra, Ex parte* Printup, 87 Ala. 148; Stretch v. Stretch, 2 Tenn. Ch. 140. In Central Tr. Co. v. Marietta & N. G. R. Co., 48 Fed. 14, the facts were held not to justify the intervention; but this case might very properly not be followed. See also Blackman v. Central R. & B. Co., 58 Ga. 189; Central Tr. Co. v. Washington County, 124 Fed. 813.

4 Bartlett v. Gates, 118 Fed. 66.

5 Hutchinson v. Philadelphia & G. S. S. Co., 216 Fed. 795.

6 Fidelity Tr. Co. v. Elberton & E. Ry. Co., 235 Fed. 1009.

the controversy should be determined when the rights to the proceeds of the foreclosure sale were ascertained.[7]

In the absence of fraud, neglect, or collusion by the officers of the corporation, stockholders will not ordinarily be allowed to intervene in a foreclosure suit before a decree [8] unless a receiver has been appointed, when each separate group of stockholders with conflicting interests or taking opposite positions may be allowed an intervention.[9] The failure of the board of directors to defend a foreclosure action, when a colorable defense exists, is a sufficient ground for allowing the intervention.[10]

A stockholder who prays leave to intervene and defend on behalf of his corporation should show a previous request to the board of directors and their refusal to defend, or else circumstances which would make such a request a vain form;[11] but if a petition defective in this respect shows a good defense, the proceedings should be stayed until an opportunity has been afforded for the petitioner to apply to the board of directo

7 Ibid.

8 Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323, 333. For a peculiar case, see Coffin v. Chattanooga W. & P. Co., 44 Fed. 535. For cases where it was held, that there was no collusion, see Land Title & Trust Co. v. Asphalt Co., C. C. A., 127 Fed. 1; *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

9 Fowler v. Jarvis-Conklin M. Tr. Co., 64 Fed. 279; Hamlin v. Toledo, St. L. & K. C. R. Co., 36 L.R.A. 826, 78 Fed. 664, 672. See Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., 95 Fed. 497, 535.

10 Farmers' Loan & Tr. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49, 53. It has been said: "It will not avail a stockholder, seeking to avoid a default suffered by a corporation, to allege merely that the corporation had cash and cash assets sufficient to pay the claim. The managing officers may, consistently with their duty, resolve not to pay it, and it is incumbent upon the stockholders to show that the refusal to so apply its assets cannot be reconciled with prudent and fair management; and this must be shown by facts of themselves disclosing the fraud or breach of duty, and not by allegations which embody nothing but the ultimate conclusion necessary to be established." Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 613.

11 Farmers' L. & Tr. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49; General El. Co. v. West Asheville Imp. Co., 73 Fed. 386; Rospigliosi v. New Orleans, M. & C. R. Co., C. C. A., 237 Fed. 347. See § 145, *supra*. The facts must be alleged with particularity. General charges of fraud and collusion are insufficient. Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600.

and then file a new petition.[12] Where a receiver had been appointed and was defending the foreclosure suit, the stockholders were not allowed to intervene before they had communicated the defense to the receiver and he had refused to interpose the same.[13] In the Second Circuit, the usual practice after receiverships is to permit the intervention of committees of stockholders representing conflicting interests; but ordinarily, not to allow individual stockholders or additional committees to intervene.[14] Where bad faith or oppression on the part of the intervening committee is shown, intervention by an individual stockholder thereby injured should be allowed.[15] To entitle a stockholder to intervene before a judgment in a suit against the corporation, he must set forth facts sufficient to have enabled him to maintain an independent suit to assert or protect the corporate right.[16] Intervening stockholders have been refused permission to litigate the question whether other stockholders have paid their subscriptions in full.[17]

An intermediate State court of review has held: that except under special circumstances a stockholder has no right to intervene in a suit by another stockholder to enforce a cause of action belonging to the corporation such as the sale of its assets, even though the party seeking the intervention owns a majority of the stock.[18] But the Circuit Court of Appeals for the second circuit has held to the contrary effect.[19] Another Circuit Court has held: that in a suit by a stockholder to set aside a consolida-

12 Farmers' L. & T. R. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49, 53; Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Dickerman v. Northern Trust Co., 176 U. S. 181, 185, 44 L. ed. 423, 425.

13 Cohley v. Int. Pump Co., 237 Fed. 296.

14 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 181 Fed. 285, in which the author was counsel. This practice has been followed in one case in the Seventh Circuit. Thomasson v. Guaranty Trust Co. of N. Y., C. C. A., 159 Fed. 126. See Central Tr. Co. v. Chic. R. I. & P. R. Co., C. C. A., 218 Fed. 336; Investment Registry v. Chic. & M. El. R. Co., 213 Fed. 492.

15 Thomasson v. Guaranty Trust Co. of N. Y., C. C. A., 159 Fed. 126.

16 Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600. See *supra*, § 145.

17 Fidelity Tr. Co. v. Elberton & E. Ry. Co., 235 Fed. 1009; Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588, 601.

18 Hay v. Brookfield, 160 App. Div. (N. Y.) 277.

19 Dana v. Morgan, C. C. A., 232 Fed. 85.

tion when the bill does not state that he sues on behalf of all, the other stockholders have no right to intervene unless the court in its discretion so determines.[20]

But it has been said by a judge with wide experience at the bar: "The stockholders' action being but a derivative one, no stockholder has the right to sue for himself alone; his action is necessarily representative whether he calls it so or not."[21]

The lower courts have refused the intervention of stockholders in friendly suits brought by creditors in which receivers have been appointed without objection by the corporation;[22] but such rulings have not been approved by the Supreme Court. It has been said: that stockholders cannot intervene for the purpose of questioning the propriety of the selection of the person appointed receiver;[23] nor to attack the conduct of a receiver because of fraud;[24] and that the proper remedy, in the latter case, is an original bill.[25]

A stockholder or creditor of a corporation may be allowed to intervene in a suit by, or against, the receiver of the company; but only under very extraordinary circumstances.[26]

§ 258d. Interventions by general creditors. In general, a creditor of a defendant who has no judgment cannot intervene to defend the suit:[1] but where the parties act in collusion to cut off the rights of creditors, who are not secured, the intervention of the latter may be permitted.[2] Creditors who objected to the

20 Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113, 117.

21 Grant v. Greene Consol. Copper Co., 169 App. Div. (N. Y.) 206, 215. See § 258a, *supra*.

22 Scattergood v. Am. Pipe & Const. Co., C. C. A., 249 Fed. 23. See Hutchison v. Phila. & Gulf S. S. Co., 216 Fed. 795.

23 Land Title & Trust Co. v. Asphalt Co., 114 Fed. 484. See Scattergood v. Am. Pipe Const. Co., C. C. A., 249 Fed. 23.

24 Forbes v. Memphis El. P. & Pac. Ry. Co., 2 Woods, 323; Fed. Cas. No. 4,926. See Hutchinson v. Phila. & Gulf S. S. Co., 216 Fed. 795.

25 Forbes v. Memphis El. P. & Pac. Ry. Co., 2 Woods 323, Fed. Cas. No. 4,926.

26 Hosmer v. Darrah, 85 App. D. 485.

§ 258d. 1 Lombard Inv. Co. v. Seaboard Mfg. Co., 74 Fed. 325; Farmers' L. & T. Co. v. Chicago & N. P. Ry. Co., 68 Fed. 412. See George v. St. Louis, C. & M. Ry. Co., 44 Fed. 117.

2 Louisville Tr. Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S 674, 43 L. ed. 1130; *infra*, §§ 261, 394.

appointment of a certain person as receiver have been allowed to intervene.[3] Except in extraordinary cases, it has not been the practice in the Second Circuit to allow individual creditors to intervene before a time has been appointed for the proof of their claims.[4]

Where the mortgagor and the mortgage bondholders have arranged for a sale to a purchaser who agreed to give the stockholders an interest in the property without extending that privilege to unsecured creditors, the creditors who have no judgments may be allowed to intervene and set the foreclosure sale aside.[5] "Any plan or scheme threatened or executed whereby the stockholders of the bonds secured by the mortgage and the stockholders secure, or intend or undertake to secure, to the stockholders, by contract, foreclosure sale, or other device, an equal or a greater benefit from the property than is thereby secured to, or offered to and rejected by, the general creditors, is such a breach or threatened breach of trust as entitles any complaining creditor to relief in a court of equity."[6]

Where before the beginning of a foreclosure suit a receiver had been appointed upon a creditor's bill the court, under the Idaho statutes,[7] permitted a judgment creditor, and general creditors who had no judgment, to intervene in the foreclosure suit and test the validity of the mortgage so far as it covered personal property.[8] But after these intervenors had obtained a decree, adjudging that certain personal property claimed by the mortgagee was not subject to the mortgage, another unsecured creditor was denied permission to intervene and share with them in the fund.[9]

When in a suit for a division of community property and for the accounting by the husband, the jurisdiction depending upon the diversity of citizenship of husband and wife, it had

3 Coal v. Philadelphia & E. Ry. Co., 140 Fed. 944, 945.

4 Sands v. E. S. Greeley & Co., 80 Fed. 195; Pa. Steel Co. v. N. Y. City Ry. Co., 160 Fed. 222.

5 Louisville Tr. Co. v. Louisville, N. & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130.

6 Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 549, per Sanborn, J.

7 Idaho Revised Codes, §§ 3418, 111.

8 Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co., C. C. A., 245 Fed. 697, affrming 228 Fed. 516.

9 Ibid.

been determined that the property should be divided and that the wife was entitled to judgment for money separately due her; which was sufficient to exhaust the husband's estate; creditors of the husband, who had died insolvent, were allowed to intervene and present their claims.[10]

When the creditors are entitled to share in a fund to be distributed by the court they are allowed to intervene for that purpose after the amount of the fund has been determined and before its distribution.[11] It is customary for the court to limit the time within which their claims may be presented, after the expiration of the time thus limited.[12]

§ 258e. Interventions of persons entitled to share in a fund held by the court. A person claiming a right to share in a fund in court is usually allowed to intervene.[1] All parties beneficially interested in a fund to be distributed by a court are entitled to come in and prove their claims before the master and to be heard on all those proceedings which may affect their interests or increase or diminish their interests in the fund. It has been held that a party interested in a fund, to recover which an action at law is pending, cannot be allowed to intervene therein, since the court has no jurisdiction to distribute the proceeds of the suit.[2] In a suit for the distribution of a fund, or creditors' suit it is the usual practice for the court to make an order directing that all parties interested present their claims within a time prescribed in the order or by the master; and that the master publish a notice to that effect in certain newspapers.[3]

§ 258f. Intervention by persons interested in property the title to which is in dispute. When a stranger to a suit is in-

10 Johnson v. Johnson, 225 Fed. 413.

11 Canffiel v. Lawrence, 256 Fed. 714.

12 U. S. Trust Co. v. New Mexico, 183 U. S. 537, 46 L. ed. 316; Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642, 646; Penn. Steel Co. v. N. Y. C. Ry. Co., 220 Fed. 312, 316.

§ 258e. 1 Central Tr. Co. v. Marietta & N. Y. R. Co., 63 Fed. 492; Rice v. Durham Water Co., 91 Fed. 433. But see as to non-residents, Sands v. E. S. Greeley & Co., C. C. A., 80 Fed. 195; Tift v. Southern Ry. Co., 159 Fed. 555.

2 McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961.

3 Continental Tr. Co. v. Toledo, St. L. & K. C. Co., 82 Fed. 642, 646. For an order directing a balance to be held ten years, in order to meet unproved claims, see Fowler v. Jarvis Conklin Co., 118 Fed. 1022.

terested in property the title to which is disputed in litigation, where he is not represented, it may permit him to intervene.[1] In a suit by one of two persons having separate but similar interests to enforce a claim charged on land,[2] or to cancel a deed,[3] it has been held that the other has the right to intervene. Where the obligee of bonds has filed a bill to determine who were the owners to whom it should pay interest, a person claiming to hold some of the bonds as collateral security was permitted to intervene.[4]

An administrator, with the will annexed, has been allowed to intervene, to continue a suit brought by an executor who has been removed.[5] A trustee or an ancillary trustee may intervene in the bankrupt's place in any suit in which the bankrupt was a party.[6]

Receivers who by their order of appointment are vested with all the property and choses of action owned by a corporation with the right to sue for its recovery, may intervene and continue a pending suit for infringement of a patent brought by the corporation.[7]

§ 258g. Intervention by persons interested in, or with a lien upon property which is the subject of litigation. A person who has an interest in specific property the subject of litigation in a court which has exclusive control thereof, has an absolute right to intervene in the litigation in such court.[1] An administrator, with the will annexed, has been allowed to intervene, to continue a suit brought by an executor who has been removed.[2] A trustee or an ancillary trustee may intervene in the bankrupt's place in any suit in which the bankrupt was a party.[3] When the ancillary receiver of a corporation, which has been adjudicated bankrupt in another State where it was incorporated, sued for the administration of the estate of another cor-

§ 258f. 1 Billings v. Aspen M. & S. Co., C. C. A., 51 Fed. 338.

2 Mathieson v. Craven, 247 Fed. 223.

3 Billings v. Aspen M. & S. Co., C. C. A., 51 Fed. 338.

4 Federal Cement Co. v. Shaffer, 235 Fed. 912.

5 Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

6 The Alert, 199 Fed. 542.

7 National E. Signaling Co. v. Telefunken W. Tel. Co., 208 Fed. 679.

§ 258g. 1 Western Union Tel. Co. v. U. S. & Mex. Tr. Co., C. C. A., 221 Fed. 545, 552.

2 Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

3 The Alert, 199 Fed. 542.

poration chartered in the State of the forum, in which the bankrupt claimed to be a holder of a large amount of the stock, other claimants of such stock were allowed to intervene and it was held that the latter court rather than the court where the adjudication had been made, was the proper place in which to sue.[4]

Upon a motion to set off one judgment against another, a person claiming an assignment of the second judgment has a right to intervene by a motion which, although made in an action at law, is of an equitable nature.[5]

A telegraph company, claiming the right to use the railroad's right of way, was allowed to intervene in a foreclosure suit.[6] A party claiming the equitable title to land held by a railway company of which the receiver had not taken possession, and which was exempted from the receivership by order, and not otherwise mentioned in the proceedings, was denied leave to intervene in a suit to foreclose a mortgage on the property of the railroad.[7]

Receivers have been authorized to intervene and continue a suit for the infringement of a patent brought by a corporation over the estate of which they were appointed.[8]

§ 258h. Interventions pro interesse suo. At common law, as well as in equity, a person claiming a right to property held by a marshal [1] or receiver,[2] or claiming a right to share in a fund in court,[3] is usually allowed to intervene *pro interesse suo,* provided that he does not resist the prayer of the complainant;[4]

4 West v. Empire License Co., 237 Fed. 303.

5 Cathay Trust v. Brooks, C. C. A., 193 Fed. 973.

6 Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. 513; Union Tr. Co. v. Atchison, T. & S. F. R. Co., 8 N. M. 327, 43 Pac. 701.

7 Cutting v. Florida Ry. & Nav. Co., 45 Fed. 444.

8 Nat. El. Signaling Co. v. Telefunken Wireless Tel. Co., 208 Fed. 679.

§ 258h. 1 Gumbel v. Pitkin, 124 U. S. 131; *supra,* § 52.

2 Lord Pelham v. Duchess of Newcastle, 3 Swanst. 290; Minot v. Mastin, C. C. A., 95 Fed. 734; Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. 513, 517; Foley v. Grand Hotel Co., C. C. A., 121 Fed. 509; Daniell's Ch. Pr. (2d Am. ed.) 1270; *infra,* § 314.

3 Central Tr. Co. v. Marietta & N. G. R. Co., 63 Fed. 492; Rice v. Durham Water Co., 91 Fed. 433. But see as to non-residents, Sands v. E. S. Greeley & Co., C. C. A., 80 Fed. 195; Tift v. Southern Ry. Co., 159 Fed. 555.

4 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642; Krippendorf v. Hyde, 110 U. S. 276, 20 L. ed. 145; Esterbrook Co. v.

but after a sale by a marshal, permission to intervene to set aside the same was denied to an adverse claimant of the property.[5]

§ 258i. Intervention under the pure food and drugs act. In a proceeding under the Pure Food and Drugs Act, the owner of the property may be allowed to intervene.[1]

After permission to intervene and answer had been granted, and subsequently another order was made permitting the answer to be withdrawn and exceptions and a demurrer to the libel and information to be filed; it was held that it was too late for the district attorney to object that there was no proof that the intervenor was a party in interest or that it was the *bona fide* owner of the article seized.[2]

§ 258j. Interventions in patent litigation. Persons interested in disputing the validity of a patent have been allowed to intervene to defend a suit brought against their bailee, to enjoin the use by it of cars belonging to them;[1] and to move to set aside a decree establishing the validity of a patent entered by collusion, in a suit to which they were strangers.[2] But such persons were not allowed to intervene in a suit to restrain the infringement of a patent when they relied upon a distinct defense not raised therein.[3] Nor in any case where they were not employers of the person sued, nor in direct privity with him.[4]

Ahern, 31 N. J. Eq. 3. See Cincinnati Equipment Co. v. Degnan, C. C. A., 184 Fed. 834.

5 *Ex parte* Mensing, 55 Fed. 17.

§ 258i. 1 U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

2 U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642, 644.

§ 258j. 1 Standard Oil Co. v. Southern Pac. R. Co., 54 Fed. 521. But see W. A. Gaines & Co. v. Rock Spring Distilling Co., 179 Fed. 544, a trademark case.

2 Barker v. Todd, 15 Fed. 265. But see Washburn v. Moen Mfg. Co. v. Colwell S. B. F. Co., 1 Fed. 225; Cochrane v. Deener, 95 U. S. 355, 24 L. ed. 514. In Thomson-Houston El. Co. v. Western El. Co., C. C. A., 158 Fed. 813, a stranger was not allowed to intervene upon an appeal for the purpose of having the case remanded for further proofs, when collusion was charged, but the record did not furnish any evidence thereof and the petitioner had full opportunity to intervene in the court below.

3 Page v. Holmes B. A. Tel. Co., 18 Blatchf. 118; s. c., 2 Fed. 330; Cochrane v. Deener, 95 U. S. 355, 24 L. ed. 514; Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. 75.

4 Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. 75. *Contra*, Hurd v. Sein, 189 Fed. 591.

Manufacturers and vendors of the articles charged to constitute an infringement have been allowed to intervene,[5] but not after they had stopped the manufacture and sale of the same.[6]

§ 258k. Intervention in suit under the interstate commerce law. The act creating the Commerce Court provides "that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof."[1] It has been held that this gives the right of intervention to an incorporated grain exchange or a board of trade, a large number of the members of which are engaged in business that will be directly affected by an order which it is sought to enjoin.[2]

§ 258l. Intervention in suits on contractors' bonds. An act of Congress gives creditors and materialmen the right to intervene in any action by the United States on the bond of a contractor for the construction or repair of a public building or for the prosecution and completion of a public work, and also to file his claim and be made a party to any suit by another creditor upon such bond.[1]

It has been held: that, in such an action, the doctrine of subrogation cannot be applied, and that persons other than the contractor cannot enforce security given to indemnify a surety upon the bond who has become insolvent.[2] That an application of credits once having been made to reduce the claim of an intervenor, there is no authority to make any other application thereof.[3] That such intervenors are subject to the ordinary

5 Curran v. St. Charles Car Co., 32 Fed. 835.

6 Ring R. & I. M. Co. v. St. Louis Ice Mfg. Co., 67 Fed. 535.

§ 258k. 1 Act of June 18, 1910, c. 309, § 5, 36 St. at L. 539, 543.

2 Nashville Grain Exch. v. U. S. (Commerce Ct.) 191 Fed. 37. See § 151, *supra*.

§ 258l. 1 Act of August 13, 1894, ch. 280, 28 St. at L. 278, Comp. St. 1901, p. 2523, as amended by Act of February 24, 1905, ch. 778, 33 St. at L. 811, Comp. St. Supp. 1909, p. 948. See *supra*, § 5a.

2 U. S. v. United Surety Co., 192 Fed. 992.

3 U. S. v. Massachusetts Bonding & Ins. Co., 198 Fed. 923, 928.

rules and practice governing interventions, and no creditor can intervene after the action has been dismissed for want of service or has been fully tried and submitted for decision.[4]

§ 258m. Laches barring intervention. A petition of intervention may be filed at any stage of the cause, even after a final decree, provided, at least, that it is filed at the same term.[1] An intervention has been allowed after an order taking the decree as confessed by the original defendant,[2] and after the decree had been signed but not entered.[3] It has been said: that it will only be granted after final decree, in order to preserve some right which cannot otherwise be protected, or to avoid some complication which is likely to arise.[4] Laches may be a reason for denying a stockholder's, bondholder's, or creditor's or other's[5] petition of intervention when equities on the part of the complainant or other parties interested have arisen during the delay.[6] A delay of about three years and a half in presenting a claim for payment in a foreclosure suit was held not to be laches, where the intervenor had in the meantime obtained a judgment against the defendant.[7] Ordinarily the petition will not be denied for laches unless the defendant by reason of the delay has changed his position, so that he would be damaged by the intervention to a greater extent than if the petition had been duly filed.[8] After a friendly suit by a creditor who was also a director of the defendant for a sale of the assets and a continuance of the business of the corporation, had resulted in a sale previously duly advertised and afterwards after another advertisement confirmed; a petition for intervention by a stockholder more

4 U. S. v. McGee, 171 Fed. 209.

§ 258m. 1 New York G. & I. Co. v. Tacoma Ry. & M. Co., C. C. A., 83 Fed. 365; *supra*, § 182.

2 Farmers' L. & Tr. Co. v. Toledo, A. A. & N. Ry. Co., 67 Fed. 49, 53.

3 Guarantee Tr. & S. D. Co. v. Duluth & W. R. Co., 70 Fed. 803.

4 U. S. v. Northern Securities Co., 128 Fed. 808.

5 Thomson-Houston El. Co. v. Western El. Co., C. C. A., 158 Fed. 813; Leary v. U. S., C. C. A., 184 Fed. 433.

6 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642; Boston S. D. & Tr. Co. v. Am. Rapid Tel. Co., 67 Fed. 165; State Trust Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398; U. S. Trust Co. v. Chicago Terminal T. R. Co., C. C. A., 188 Fed. 292; Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269.

7 New York G. & I. Co. v. Tacoma R. & M. Co., C. C. A., 83 Fed. 365. *Cf. supra*, § 258.

8 Rhinehard v. Victor Talking Machine Co., 261 Fed. 646.

than eighteen months after the sale in which he made general charges of collusion in the sale and of misconduct by the directors was denied because of laches.[9] After a decree dismissing a suit for the infringement of a patent a petition of intervention by an assignee of the patent was presented pending a motion by defendants to set aside the decree in order to prove an abatement of the suit by the assignment. Both applications which were made within four months of the decree were denied because of laches.[10] Where general creditors of a corporation had made no objection to the acquisition of the possession of property by receivers appointed in a foreclosure suit, until after the property had been sold under a decree and the sale confirmed; it was held, that they were estopped by their laches from maintaining petitions of intervention to compel the payment of their demands from the proceeds of the sale, upon the ground that part of the property was not subject to the lien of the mortgage.[11] After general creditors had succeeded by litigation in obtaining a decision that certain property was not subject to a mortgage and was applicable to their claims, another creditor was denied permission to intervene and share in the proceeds of its sale.[12] One of the original complainants who had been omitted by amendment in order not to defeat the jurisdiction, was subsequently allowed to intervene after a decision holding that the defendants who were citizens of the intervenor State were unnecessary parties.[13]

§ 258n. Interventions by the United States, States and Cities. The Attorney-General of the United States may intervene for the protection of the Federal government in a suit between two States affecting their boundaries.[1] But not in a suit between two States affecting the right to use the waters of a stream, which is not navigable.[2] A district attorney of the United States was refused permission to intervene in a civil suit brought by a

9 Hutchinson v. Phila. & Gulf S. S. Co., 216 Fed. 795.

10 Turner v. Lauter Piano Co., 239 Fed. 560.

11 State Tr. Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398.

12 Equitable Trust Co. of N. Y. v. Great Shoshone & Twin Falls Water Power Co., C. C. A., 245 Fed. 697, affirming Equitable Trust Co., of N. Y. v. Great Shoshone & Twin Falls Water Power Co., 228 Fed. 516.

13 Mathieson v. Craven, 247 Fed. 223.

§ 258n. 1 Florida v. Georgia, 17 How. 478, 15 L. ed. 181; *supra*, § 3.

2 Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956.

person charged with a crime to obtain possession of certain papers needed as evidence before a grand jury.[3]

The United States[4] or a State[5] may usually intervene in a suit affecting property in which the government claims an interest.

A State cannot intervene in a foreclosure suit affecting property upon which it claims no lien, in order to enjoin the proceedings upon the ground that the plaintiff is forbidden by a State statute from acting as trustee for the mortgage bondholders.[6] But the State was allowed to intervene in a foreclosure suit to enforce its rights under a contract to which it was not a party.[7] A city was allowed to intervene in a street railway foreclosure suit to compel the receiver to pave the street between its tracks, which was required as a condition of the franchise.[8] A taxpayer was allowed in a suit for the foreclosure of a mortgage upon an electric light plant to intervene and obtain an order directing the receiver to make a contract with the city to supply electric light.[9] Where in a suit to enjoin the enforcement of a municipal ordinance reducing charges for the uses of telephones as a condition to a preliminary injunction against the city which was the sole defendant, the telephone company had paid into court a fund consisting of the excess over the new rates which it had collected; it was held that the city was the proper party to represent the telephone subscribers on a reference to determine their share in the fund after the injunction had been dissolved and that a single subscriber had no right to intervene on behalf of all.[10] In a suit against the Attorney General, the Public Service Commission and the District Attorney of New York County, to enjoin the enforcement of an act reducing the price of gas charged private consumers, the court held that it had no power to allow the City of New York to intervene.[11]

3 Potter v. Beal, C. C. A., 50 Fed. 860.

4 Stanley v. Schwalby, 147 U. S. 508, 513, 37 L. ed. 259, 261.

5 Tennessee v. Quintary, 80 Fed. 829; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137; *supra*, § 105.

6 Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 68 Fed. 412, 417.

7 Tennessee v. Quintard, 80 Fed. 829.

8 Faller v. Boisot, 249 Fed. 193.

9 Hodgen v. Met. El. Ry. Co. (C. C., W. D. Mo.), per Phillips, D. J., May, 1894, 31 Am. Law. Rev. 392.

10 *Re* Englehard & Sons Co., 231 U. S. 646.

11 Consolidated Gas Co. v. Newton, 256 Fed. 238, aff'd by C. C. A.,

§ 2580. Effect of State statutes upon intervention. Upon a petition of intervention in a foreclosure suit the court when allowing the intervention said that the California Statute had no application;[1] but a Circuit Court of Appeals when granting an intervention said that it would follow the statutes of Idaho,[2] which provided: that "the right of a mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing,"[3] "any person may, before trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties or an interest against both, where prior to a suit to foreclose a mortgage a receiver had been appointed in a creditors' suit, the court did not err in permitting a judgment creditor and general creditors whose claims had been presented and allowed in the receivership suit to intervene in the foreclosure suit and contest the validity of the mortgage so far as it covered personal property."[4]

with no opinion, 260 Fed. 1022. Reversed for want of jurisdiction, 252 U. S. —.

§ 2580. [1] Mercantile Trust Co. v. Atlantic Pr. Co., 63 Fed. 513, 517.

[2] Equitable Trust Co. v. Great Shoshone & Twin Water Falls Co., 245 Fed. 697. See Mantaya v. Gonzales, 232 U. S. 375.

[3] Idaho R. S., § 3418, 4111.

[4] Ibid. § 4111.

In an instructive essay, Mr. Edward C. Eliot, of St. Louis, classifies cases of intervention as follows (31 Am. Law Rev. 377, 381, 382, 383, 385, 387, 390, 391, 392):

"The intervention of strangers to the original cause which will be entertained and adjudicated by the Federal courts may have as the basis of their institution one of the following matters of interest:

"1. They may be based upon a right or title to the subject-matter paramount in quality to the claims of the original parties to the suit and extending to the whole matter of rightful ownership. Into this class of intervention will fall almost all those proceedings which are permitted by the Federal courts as incidental to suits at law; and they are closely analogous to the ordinary interpleas permitted by statute and in the State courts.

"2. In the second class of interventions may be placed those which are based upon some statutory or contractual lien which the intervenor has by law, independent of the peculiar jurisdiction of the Federal court, and which he seeks to impose upon the property in the charge of the court and to enforce in the Federal court because of his inability to pursue the same right or remedy in the State courts. Into this class of interventions fall the enforcement of statutory or mechanics' liens, charges or liens which may be the result of private contract between the parties, and also judgment liens of later or earlier date obtained in the State courts, and

§ 259. Petition for intervention. Where the original plaintiff had no interest in the relief prayed in a petition of in-

which by State statute are made precedent in right to the complainant's cause of action. * * *

"3. The third class of interventions consists of those which are based, not upon rights or titles in the subject-matter existing in full force by law, irrespective of the action of the Federal tribunal, but such as rest upon equities which are purely the creation of the Federal courts and which in the judgment of such courts justify the preference of the intervenors, owing to such equities, over the rights of the parties to the suit. It is believed that the interventions which are now referred to are peculiar to railroad foreclosures. * * *

"4. The fourth class includes those interventions which rest upon legal rights or equitable liens upon the subject-matter in the hands of the court, but which are deferred in law or equity to the rights of the complainant. They may be superior to the rights of other parties to the suit. Manifestly these interventions, though they may be adjudicated, have no effect to postpone or interfere with the original purpose of the suit. They apply simply to any possible surplus which may be in the hands of the officers of the court after the objects of the original suit have been effected. They are then classified among themselves, but are made liens or charges only upon the remnant of the property which may be in the hands of the court.

"5. In the fifth class are interventions based upon contractual obligations which may be made or incurred by the receiver or other officers of the court in charge of the property during the litigation. * * *

"6. The last class of interventions includes those based upon the torts of the receiver in the management of property in the control of the court. * * *

"Owing to the lack of understanding of the real nature of intervening petitions and the fundamental ground upon which the court acts, attempts are often made to extend the jurisdiction of the Federal court upon petitions of this character to matters or for results which the court ought not to consider or to effect. In a railroad foreclosure suit, a deficiency decree against the defendant corporation for the amount of indebtedness not satisfied out of the proceeds of sale is proper, because such is the original cause of action of the complainant. But effort is sometimes made by individual bondholders through interventions, to enforce some statutory or common-law liability upon the stockholders of the defendant corporation. While there may be no direct adjudication to that effect reported, it is evident that this would be an extension of the jurisdiction of the Federal court beyond reason." But see Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 610. "There may be, of course, causes in which the entire assets of a corporation are taken in charge by the court, as upon creditor's bill, where the individual liability of the stockholders of the corporation may be an asset in the hands of the receiver or other officer of the court. In that event, at

tervention, it was held to be demurrable because of his joinder as a co-petitioner with the person interested.[1] A petition for leave to intervene should describe the proceedings in the cause in which it is filed, so that the court can see the nature and condition of the suit.[2] It may also contain a statement of the petitioner's view of the case, and pray in addition to intervention the final relief which he desires. While a petition of intervention need not be as formal as a bill of complaint, and should be distinguished for brevity, it should exhibit all the material facts which are relied upon for the specific relief asked, embodying, either by recital or by reference, so much of the record of the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petitioner.[3] Where the petition of intervention contained gen-

the suggestion or motion of a creditor, no doubt the object of the principal cause would justify the enforcement of the liability. But it will be seen that this is really the purpose and object of the principal suit. The matter does not arise collaterally. And the personal liability is one of the property interests seized. So in other cases, attempts have been made through interventions to try titles or rights which have been derived through the receiver or by operation of the decrees or judgment of the court. These, also, are not properly subjects of interventions, although the courts have indeed held that a bill or motion may be entertained as ancillary to a decree of judgment, for the interpretation of that judgment or decree at the instance of a person who claims title under it. This is another case of the extreme limit of the principle. Interventions are also attempted and sometimes entertained to force upon the receiver a duty to make some equitable contract in favor of a public interest. Where such an intervention is to be considered, it ought to rest upon the propriety of the court's advising the receiver, and the proceeding should be considered as in the nature of a petition by him for advice. There has been, however, an instance where the intervening petition of a stranger to a suit was entertained to force the receiver to make a contract for the electric lighting, public and private, of a city, which was dependent upon the operation of the property in the hands of the receiver for that purpose. And, in that case, the judge of the United States court said that he would consider the application out of public necessity and because he would not permit his receiver to leave the city in darkness for want of a proper contract.'' Hodgen v. Met. El. Ry. Co., U. S. C. C., W. D. Mo., per Phillips, D. J., May, 1894.

§ 259. 1 Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

2 Ransom v. Davis' Adm'rs, 18 How. 295, 15 L. ed. 388.

3 French v. Gapen, 105 U. S. 509, 519, 520, 26 L. ed. 951, 954, 955.

eral averments showing the petitioner's interest in the litigation and closed with a statement that he referred to all of the allegations in the original complaint, in so far as they were not inconsistent with the foregoing statement and claim, and made the same part of his petition; it was held to be not defective for want of specific allegations of the matter thus incorporated by reference.[4] It must conform to the general rules of pleading and must meet the same tests that are applied to ordinary pleadings to determine whether a cause of action or a defense is stated.[5] It will be construed in connection with the original proceedings in the suit.[6] A petition seeking the payment by a receiver of a claim must specifically allege that he has sufficient funds which are properly applicable to the claim.[7]

A petition to intervene and defend a suit should be accompanied by the answer proposed,[8] or, at least, should show the nature of the defense.[9]

It is the usual practice to verify a petition of intervention by the oath of the petitioner. An affidavit by the petitioner, that the allegations in the petition "are true as he verily believes," was held to be sufficient; and, in the absence of a traverse, they were presumed to be true upon an appeal.[10]

A petition of intervention may be amended by leave of the court.[11] Leave to amend may be denied for laches.[12] Where, subsequently to the filing of the petition of intervention, proceedings have been had under the original bill which would for-

4 U. S. v. Massachusetts Bonding & Ins. Co., 198 Fed. 923, 927.

5 Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 607.

6 Receiver of Cent. R. & B'g Co. v. Macon, D. & S. R. Co., 115 Fed. 926, 927.

7 Empire Dis. Co. v. McNulten, C. C. A., 77 Fed. 700. For allegations in an intervening petition, by the holder of a judgment for death by negligence on the ground that the road was operated by a company acting as the agent of the bondholders, which were held to be too vague and indefinite to sustain a preference, see Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471.

8 Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. 168.

9 Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. 569.

10 Louisville Trust Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 687–689, 43 L. ed. 1130, 1135, 1136; s. c., as Farmers' Loan & Trust Co. v. Louisville, New Albany & C. Ry. Co., 103 Fed. 110, 115.

11 Willcox v. Jories, C. C. A., 177 Fed. 870, 876.

12 Davis v. Virginia Ry. & Power Co., C. C. A., 229 Fed. 633.

tify the right of the intervening petitioner, either to the particular relief demanded or to some other relief, the matter should be incorporated into the petition by amendment.[13] But a petition of intervention cannot cure a fatal defect in the original bill.[14]

A paper described as a cross-bill,[15] or as an original bill,[16] may be sustained as a petition of intervention. A paper described as a petition of intervention if it contains the necessary allegations may be sustained as a cross-bill[17] or as an original bill,[18] or as a bill of review, or as a bill in the nature of a supplemental bill.[19] But in a suit by creditors upon the bond of a government contractor when the original bill had been prematurely filed the court refused to sustain as an original bill a petition of intervention filed within the statutory time.[20] Where relief was granted upon a petition for intervention, which regularly should have been sought by an original bill, since all the parties interested had been brought before the court and had had a hearing, the decree was affirmed.[21] The court will not decide an independent controversy between an intervenor and an original defendant of which it would have no jurisdiction upon an original bill, unless it relates to property in the court's possession.[22] An intervening stockholder acquires no greater right in the property than he had before the suit.[23] Where an intervening petition was filed in a foreclosure suit, asserting a lien superior to that of the mortgage, and the intervenor was found to have no lien; it was held no error to dismiss the petition without awarding

13 Empire Dis. Co. v. McNulta, C. C. A., 77 Fed. 700, 703.

14 U. S. *ex rel* Texas Cement Co. v. McCord, 233 U. S. 157.

15 French v. Gapen, 105 U. S. 509, 519, 26 L. ed. 951, 954; Gregory v. Pike, 67 Fed. 837; Minot v. Mastin, 95 Fed. 734.

16 Central Tr. Co. of N. Y. v. Marietta & N. Ry. Co., 63 Fed. 492.

17 Landon v. Public Utilities Commission, 234 Fed. 152, 167.

18 Central of Ga. Ry. Co. v. Paul, 93 Fed. 878.

19 Toledo Met. Wheel Co. v. Foyer Bros. & Co., C. C. A., 223 Fed. 350.

20 U. S. *ex rel.* Texas Portland Cement Co. v. McCord, 233 U. S. 157, 164.

21 Central of Georgia Ry. Co. v. Paul, 93 Fed. 878.

22 United El. S. Co. v. Louisville El. L. Co., 68 Fed. 673; Clyde v. Richmond & D. R. Co., 65 Fed. 336. See Olds Wagon Works v. Benedict, C. C. A., 67 Fed. 1.

23 Shaffer v. McCulloch, C. C. A., 192 Fed. 801.

him a money judgment.[24] Where the original suit appeared to have been brought by collusion, jurisdiction was retained over intervening petitioners who asserted claims to property held by a receiver therein appointed.[25] Where, at the time of the intervention, the suit is pending in a State court, the intervenors may in a proper case remove it.[26] Unless it expressly reserves their rights,[27] they have the right to appeal from the final decree, and can then object to all interlocutory proceedings taken after their intervention.[28] Where a city had intervened in a creditor's suit and had acquiesced in an order regulating the rate of fares, it was held that it could not object that the court had no jurisdiction to restrain its passing an ordinance affecting such fares.[29]

§ 259a. Notice of application for intervention. All the parties to the suit are presumed to be parties to the petition of intervention, and, under the former practice were presumed to take notice of the same when it was filed, although it was safer to serve them.[1] Notice of an application for intervention may, by leave of the court, be served on the attorneys for the other parties to the suit, who are beyond the jurisdiction of the court, unless the petition sets up new facts not set out in the bill nor germane to the case thereby made, which are made the basis of a prayer for independent affirmative relief, when it has been held that such substituted service cannot be permitted.[2] New parties brought in by the intervenors should be served with a subpœna or some other notice in the same manner as if the petition were an original bill.[3] It has been held that, even where the parties are beyond the territorial jurisdiction they may be

24 U. S. Tr. Co. v. Western Contract Co., C. C. A., 81 Fed. 454.

25 El. Supply Co. v. Port Bay W. L. & Ry. Co., 84 Fed. 740.

26 Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356; Jackson & Sharp Co. v. Pearson, 60 Fed. 113, 123; *infra*, § 384. But see Iowa Homestead Co. v. Des Moines Nav. & R. Co., 8 Fed. 97.

27 Reid v. Judges of Circuit Court of United States for Eastern District of Virginia, C. C. A., 175 Fed. 774.

28 *Ex parte* Jordan, 94 U. S. 248, 252, 24 L. ed. 123, 125; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559.

29 Henry L. Doherty Co. v. Toledo Rys. & Light Co., 254 Fed. 597.

§ 259a. 1 Central Tr. Co. v. Madden, C. C. A., 70 Fed. 451; McLeod v. City of New Albany, 66 Fed. 378; Lombard Inv. Co. v. Seaboard Mfg. Co., 74 Fed. 325. See *supra*, § 257.

2 Fidelity Tr. & S. V. Co. v. Mobile St. Ry. Co., 55 Fed. 850. See *supra*, § 165.

3 Hook v. Mercantile Tr. Co., 95 Fed. 41, 47.

served by mailing to them a copy of an order directing that they demur, plead, or answer to the petition.[4] The proceedings in the suit may be stayed pending the hearing upon a petition of intervention, although such relief is extraordinary.[5]

§ 259b. Opposition to intervention. If any of the original parties wishes to contest the petitioner's right to intervene, he must do so specifically at the hearing upon the petition.[1] Under the former practice, he might file a demurrer, plea, or answer to the petition.[2] Under the Equity Rules of 1912, the objection should be raised by a motion to dismiss,[3] or by a specific defense set up in the answer.[4] In the absence of a specific objection to the omission, affirmative relief may be awarded against the intervenor in favor of a party whose answer to the petition of intervention contains no prayer for such relief.[5] Under the former practice it was held that opposition to the application was waived where the complainant consented to the issue of process on a petition of intervention and demurred thereto, without objecting to the right of intervention[6] and by an answer to the merits of the inventor's claim.[7] The usual practice is to present the objections informally by affidavit or otherwise upon the hearing.[8] It was held that the objection, that the intervenor's claim was barred by his failure to present the same within the time limited by a previous order in the cause, should be raised by plea and not by demurrer.[9] It has been said: that a receiver may be required to plead to the petition.[10]

4 Bache v. Hunt, Thompson, J. C. C., N. D. Ohio, W. Div. Dec. 4, 1901. (Appeal dismissed Bache v. Hunt, 193 U. S. 523, 524, 48 L. ed. 774, 775).

5 Pennsylvania Co. v. Jacksonville, T. & K. Ry. Co., 55 Fed. 131.

§ 259b. 1 French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956; Meyers v. Fenn, 5 Wall. 205, 18 L. ed. 604.

2 Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

3 See Eq. Rule 29; Horn v. Pere Marquette R. Co., 151 Fed. 626; McClellan v. Blackman, 188 Fed. 934.

4 Eq. Rule 29. See Central Tr. Co. of N. Y. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

5 Kansas City So. Ry. Co. v. Guardian Tr. Co., 240 U. S. 166, 178.

6 Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853.

7 Horn v. Pere Marquette R. Co., 151 Fed. 626.

8 Interventions in the Federal Courts, by Edward C. Eliot, 31 Am. Law Rev. 377, quoted *supra*, § 258o.

9 Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

10 Mercantile Trust Co. v. Pitts-

A failure to answer allegations in the petition, or to deny the same by affidavit, is considered to be an admission of the truth of the same.[11] Unless inconsistent with the record of the court [12] there is no presumption in favor of its truth.[13] The filing of a replication to a petition of intervention and the proceeding to a hearing were held to be a waiver of objections to the sufficiency of the petition and to the absence of an order granting leave to intervene.[14]

Where, at the time of the intervention the suit is pending in a State Court the intervenors, may in a proper case remove it.[15]

Unless the decree expressly reserves his rights [16] an intervening defendant has the right to appeal from the final decree and can then object to all interlocutory proceedings taken after his intervention.[17]

§ 259c. Hearing upon application for intervention. The filing of a replication to a petition of intervention and the proceeding to a hearing were held to be a waiver of objections to the sufficiency of the petition and to the absence of an order granting leave to intervene.[1] It is the rule in the Eighth Circuit, that where the petition sets up a cause of action maintainable at common law the issue shall be tried by a jury.[2] At the hearing upon a petition of intervention it is customary for the court to determine the right of the petitioner to intervene; and then, if it decides in his favor in that respect, to refer the case to a master

burg & W. Ry. Co., C. C. A., 115 Fed. 475.

11 Louisville Tr. Co. v. Louisville, New Albany & C. R. Co., 174 U. S. 674, 43 L. ed. 1130.

12 Beaton v. Seaboard Portland Cement Co., C. C. A., 211 Fed. 84.

13 Ibid.

14 Perry v. Godbe, 82 Fed. 141.

15 Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356; Jackson & Sharp Co. v. Pearson, 60 Fed. 113, 123; *infra*, § 384. But see Iowa Homestead Co. v. Des Moines Nav. & R. Co., 8 Fed. 97.

16 Reid v. Judges of the Circuit Court of the United States for Eastern District of Virginia, C. C. A., 175 Fed. 774.

17 *Ex parte* Jordan, 94 U. S. 248, 252, 24 L. ed. 123, 125; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559.

§ 259c. 1 Perry v. Godbe, 82 Fed. 141.

2 Rouse v. Hornsby, C. C. A., 67 Fed. 219. So held in Atkyn v. Wabash Ry. Co., 41 Fed. 193, N. D. Ohio.

to report upon his right to the other relief which he seeks. But the court may decide the whole case without a reference.[3] If he shows a *prima facie* case, his application will ordinarily be granted; although the questions concerning his rights in the premises are doubtful.[4] But the court may determine his rights when denying the application.[5] The intervention may be allowed generally or only for a specific purpose[6] such as in support of the right to be heard upon the settlement of the decree, as to the terms of sale[7] and upon the distribution of the fund,[8] and upon a reference to determine the validity of certain securities and of a pledge of such securities.[9]

An order denying an application for intervention is not *res adjudicata* upon the rights of the petitioner, in another suit.[10] It has been said that a denial of a petition for leave to intervene in an action at law is *res adjudicata* against a bill in equity to enjoin the proceedings and to permit an intervention,[11] but that a denial of leave to intervene in a suit in equity is not *res adjudicata* against an original bill for the same relief.[12] Leave to intervene when granted should be given by order;[13] but, by proceeding without objection, an omission to enter such an order will be waived.[14] Intervening petitions filed without leave have been stricken from the files.[15] Leave has been granted to with-

3 Central Tr. Co. v. Madden, 70 Fed. 450.

4 Brinckerhoff v. Holland Trust Co., 146 Fed. 203.

5 Investment Registry v. Chic. & M. El. R. Co., 213 Fed. 492.

6 Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413, 416, 423.

7 Fidelity Tr. Co. v. Washington-Oregon Corp., 217 Fed. 588, 603.

8 Ibid.

9 Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413, 416, 423.

10 McDonald v. Seligman, 81 Fed. 753.

11 McDonald v. Seligman, 81 Fed. 753.

12 Credits Commutation Co. v. U. S., 177 U. S. 311, 44 L. ed. 782. See Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. 710; Securities Tr. Co. v. Bank of Bernice, C. C. A., 239 Fed. 665.

13 For the form of an order see *Ex parte* Jordan, 94 U. S. 248, 249, 24 L. ed. 123.

14 Meyers v. Fenn, 5 Wall. 205, 18 L. ed. 604; French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956; Ferry v. Godbe, 82 Fed. 141.

15 Continental Trust Co. v. Toledo, St. Louis & K. C. Ry. Co., 82 Fed. 642, 661, s. c., 86 Fed. 929, 951. In the same case, as Toledo, St. Louis & K. C. Ry. Co. v. Continental Trust Co., C. C. A., 95 Fed. 497, 536, it was said, speaking of an answer, and cross-bill filed by a stranger to the suit without permission: "He should have sought admission as an independent defendant. This he did not do; unless the unauthorized

draw an intervention, with the pleading of the intervenor and the testimony in proceedings in relation to his contention.[16]

§ 259d. Practice upon intervention. The filing of a petition of intervention is a voluntary general appearance in the suit, and the petitioner is thereby estopped from claiming that the court has no jurisdiction over him for any purpose or cause which, by proper amendment of the pleadings, can be brought into it.[1] After intervention the new parties are treated to all intents and purposes as if they had been original parties to the suit.[2]

The intervenor may be required to make his petition more definite and certain, or to file a cross bill, in one case styled, a bill of intervenor, or a supplemental bill, specifically setting forth his interest in the litigation,[3] and to include therein his defense to a release or other affirmative defense, set up by defendant.[4] If the time to take testimony has expired, no new depositions can be taken by him without special permission of the court.[5] An order may be made directing that all evidence taken before the intervention shall stand and be read as evidence upon the existence and enforcibility of the intervenor's claim so far as pertinent although some of the witnesses whose testimony may thus be read are no longer living.[6] An intervenor is entitled to the same notice and hearing of subsequent proceedings that must be afforded to an original party.[7] He is bound to ascertain the state of the record as it then exists and is not entitled to notice of a subsequent hearing before a master notice of which has before the intervention been served upon the original parties.[8]

filing of his pleading be regarded as an application for leave to intervene. If so, it was denied him.''

16 Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453, 461, 50 L. ed. 1102, 1108.

§ 259d. 1 Bowdoin College v. Merritt, 59 Fed. 6; Jack v. D. M. & Ft. D. R. Co., 49 Ia. 627; *supra*, §§ 169, 170. But see Laughlin v. Leigh, 107 Ill. App. 476.

2 French v. Gapen, 105 U. S. 509, 52, 26 L. ed. 951, 956.

3 Rhinehard v. Victor Talking Machine Co., 261 Fed. 646.

4 Rhinehard v. Victor Talking Machine Co., 261 Fed. 646, 647, 651.

5 Mathieson v. Craven, 247 Fed. 223.

6 Ibid.

7 Gay v. Hudson River El. Power Co., C. C. A., 169 Fed. 956.

8 *Re* Smith, 232 Fed. 284.

§ 259e. Appeals from orders upon interventions and their review by writs of error. It has been held that, where the issues have been decided by a jury trial, the review should be by writ of error,[1] but that the denial of a motion to intervene, to oppose an application for the set-off of judgment, is a final order and should be reviewed by an appeal.[2] The final order or decree upon a petition of intervention after the intervention has been granted may be reviewed apart from the appeal from the final decree in the whole cause where it is distinct from the same,[3] but where the case is one in which the Circuit Court of Appeals has final jurisdiction of an appeal from the decree in the original cause, its decree upon an appeal from the final decree or order upon the intervenor's claim is likewise final, even though a Federal question is involved therein.[4] Where a pleading of intervention in an action at law was dismissed by the final judgment on the ground that it did not state a cause of action, the intervenor may sue out a writ of error.[5]

It has been said that ordinarily an order denying the right to intervene is not appealable.[6]

After permission has been granted the intervenor is entitled to a determination of his claims by the decree of the court pursuant to the rules of jurisprudence in equity and if aggrieved he has the right to appeal.[7] Where a denial of the right to intervene is a practical denial of all relief to the petitioner, who has no other means of redress, an appeal will lie from an order

§ 259e. 1 Rouse v. Hornsby, C. C. A., 67 Fed. 219. Otherwise it was held where the trial was in another court before the intervention. Shook v. Dozier, C. C. A., 168 Fed. 867.

2 Cathay Trust v. Brooks, C. C. A., 193 Fed. 973.

3 Central Tr. Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97; Pennsylvania R. Co. v. Wabash, St. L. & P. Ry. Co., 155 U. S. 335, 39 L. ed. 176; Rouse v. Hornsby, 67 Fed. 219; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396.

4 Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341; Gregory v. Van Ee, 160 U. S. 643, 40 L. ed. 566; Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 817.

5 U. S. v. N. W. Development Co., C. C. A., 203 Fed. 960.

6 *Ex parte* Cutting, 94 U. S. 14; Credits Commutation Co. v. U. S., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. ed. 782; Thomasson v. Guaranty Tr. Co., C. C. A., 159 Fed. 126; U. S. Tr. Co. v. Chic. Term. Tr. Co., C. C. A., 188 Fed. 292; Farmers' & Merchants' Bank v. Arizona M. S. & L. Ass'n, C. C. A., 220 Fed. 1, 7, and cases cited.

7 Western Union Tel. Co. v. U. S. & Mex. Tr. Co., C. C. A., 221 Fed. 545, 552.

denying an intervention.[8] For example: where a suit is brought by a member of a class, on behalf of the others as well as of himself, any member of that class has the right to appeal from an order denying his application for an intervention.[9] So, where there is a fund in court in the course of administration which will be distributed to others unless the intervenor's claim is forthwith determined,[10] or where proceedings for a reorganization are pending.[11]

But otherwise an order denying leave to intervene is ordinarily not appealable.[12] Where the right of intervention has been allowed by the court, an order striking the petition from the files is the subject of an appeal.[13] Upon an appeal from an order denying an intervention, a previous order striking out parts of the petition may be reviewed.[14] No bill of exceptions and no exception is required for such a review.[15]

It has been held that the proper practice is for the District Court to grant an appeal in every case, leaving the question of the appealability of the order for the decision of the court of review.[16] It may perhaps be reviewed in an extraordinary case, by an application to the court of review for a mandamus.[17]

8 Credits Commutation Co. v. U. S., 91 Fed. 570, 573; s. c., 177 U. S. 311, 44 L. ed. 782; Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853; U. S. Trust Co. of N. Y. v. Chicago Terminal Transfer R. Co., C. C. A., 188 Fed. 292; Cathay Trust v. Brooks, C. C. A., 193 Fed. 973; Farmers' & Merchants' Bank v. Arizona M. S. & L. Ass'n, C. C. A., 220 Fed. 1; Billings v. Aspen M. & S Co., C. C. A., 51 Fed. 338; Central Tr. Co. v. Chic. R. I. & Pac. R. Co., C. C. A., 218 Fed. 336.

9 Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853, 863.

10 Credits Commutation Co. v. U. S., C. C. A., 91 Fed. 570, 573, aff'd. 177 U. S. 311, 44 L. ed. 782; W. U. Tel. Co. v. U. S. & Mex. Tr. Co., C. C. A., 221 Fed 545.

11 Central Tr. Co. v. Chic. R. I. & P. R. Co., C. C. A., 218 Fed. 336.

12 *Ex parte* Cutting, 94 U. S. 14, 24 L. ed. 49; Jones & Laughlin's L'd v. Sands, 79 Fed. 913; Credits Commutation Co. v. U. S., 91 Fed. 570, 573; s. c., 177 U. S. 311, 44 L. ed. 782; Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., 95 Fed. 497, 536. *Ex parte* In the Matter of Leaf Tobacco Board of Trade of the City of New York, Petitioner, 222 U. S. 578, 56 L. ed. 323.

13 Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853; Western Un. Tel. Co. v. U. S. & M. T. Co., 221 Fed. 545.

14 W. U. Tel. Co. v. U. S. & M. T. Co., 221 Fed. 545.

15 Ibid.

16 U. S. v. Phillips, C. C. A., 107 Fed. 824.

17 *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403 (in which the author was counsel); Fink v. Bay Shore Terminal Co., C. C. A., 128 Fed. 209.

§ 260. Rights of intervening complainants. Under ordinary circumstances, a person who intervenes as plaintiff will not be allowed to be represented by a different solicitor from the one who represents the original complainant at the time of the former's intervention.[1] The person who brought the suit remains *dominus litis*. The court may, however, direct that the intervenor be notified in the event of any proposal to dispose of the cause, otherwise, than in the usual way at final hearing of pleadings and proof, in which case an application to allow him to continue the litigation by his own attorney will be considered.[2]

In case of laches by the attorneys for the original complainant, an intervening plaintiff may be allowed to continue the case by his own attorney.[3] Permission to do this may be conditioned upon his giving security to pay whatever the court may find to be due the latter as his ratable proportionate share of the expense of the litigation.[4]

When the intervening plaintiff moved to bring in a new defendant, to which the original plaintiff objected, a New York court granted the motion, upon condition that the moving party give a bond to indemnify the plaintiff against any costs that such defendant might recover.[5]

It has been held that, where a creditor delays his intervention until after a decision in favor of the plaintiff, the payment of his claim may be postponed until after those who have conducted the litigation have received full satisfaction.[6]

The Equity Rules expressly provide: "The intervention shall be in subornation to, and recognition of, the propriety of the

§ 260. 1 Bowker v. Haight & Freese Co., 140 Fed. 794, in which the author was counsel. Manning v. Mercantile Tr. Co., 37 Misc. N. Y. 215, 75 N. Y. Supp. 168.

2 Bowker v. Haight & Freese Co., 140 Fed. 794.

3 Manning v. Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Supp. 168; Edwards v. Bay State Gas Co., 120 Fed. 585.

4 Manning v. Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Supp. 168.

5 Weed v. First National Bank, 117 App. Div. (N. Y.) 340. But see Edwards v. Bay State Gas Co., 120 Fed. 585.

6 Smith v. Kraft, 11 Biss. 340; Jones v. Davenport, 45 N. J. Eq. 77, 87. *Cf.* McDermott v. Strong, 4 J. Ch. (N. Y.) 687; Edmiston v. Lyde, 1 Paige (N. Y.), 639, 19 Am. Dec. 454. But see Wilder v. Keeler, 3 Paige (N. Y.), 164, 23 Am. Dec. 781; Strike's Case, 1 Bland (Md.).

main proceeding."[7] An intervening complainant cannot contest the general object of the suit,[8] nor the jurisdiction of the court.[9] It has been held: that bondholders, who intervene in a creditors' suit, may enforce a guarantee of their bonds, although the trustee of their mortgage is not made a party.[10] That, where no collusion was charged, the jurisdiction of the court in equity and its power to appoint a receiver could not be attacked by an intervenor after a receiver's appointment.[11] It has been held that he has no right to serve a new bill of complaint;[12] nor in a foreclosure suit to introduce collateral issues such as the liability of other stockholders for non-payment of their stock,[13] or the liability of others in connection with the reorganization;[14] nor, when the intervention was granted after a decree of foreclosure, amend the petition, or serve an answer, so as to attack the validity of the mortgage.[15] The stockholder,

7 Eq. Rule 37. See Knickerbocker Tr. Co. v. Tarrytown, W. P. & M. Ry. Co., 139 App. Div. 305.

8 Forbes v. Memphis, El. P. & Pac. Ry. Co., 2 Woods, 323, 324. See *supra*, § 258.

9 Horn v. Pere Marquette R. R. Co., 151 Fed. 626, 634.

10 Penn. Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 721, 753.

11 Cincinnati Equipment Co. v. Degnan, C. C. A., 184 Fed. 834, where the objection was not raised in the petition of intervention, nor until after property had been surrendered to the intervenor under a stipulation.

Where an order permitting a lessee to redeem from a foreclosure decree and to be subrogated to the rights of the mortgagor complaint was made by the consent of a stockholders' committee, which appeared by counsel, and recited that it was without prejudice to the right of the mortgagor or its stockholders to contest the validity of the lease and should not determine such validity, but that no subsequent decree between the parties should affect or impair the subrogation or the right of the lessee to collect the amount of the decree "in the same manner and with the same rights as the original bondholders would have had;" it was held that, under the provisions of the order, the stockholders could not intervene and attack the decree as well as the lease, because the latter was fraudulent, but that they were limited to a proceeding in some proper forum to hold the lessee liable in damages. U. S. Trust Co. v. Chicago Terminal T. R. Co., C. C. A., 188 Fed. 292.

12 Clauss v. Palmer Un. Oil Co., 213 Fed. 286; Drew v. Clark & Woodin, N. Y. Sup. Ct., Sp. Tm., Greenbaum, J., N. Y. L. J., Dec. 13, 1916.

13 Fidelity Tr. Co. v. Elberton & E. Ry. Co., 235 Fed. 1009.

14 Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413, 423.

15 First Tr. Co. v. Illinois Cent. R. Co., C. C. A., 252 Fed. 965.

although the holder of preferred stock, who has intervened in a creditor's suit against a corporation, after insolvency has been charged and admitted and a receiver appointed, cannot oppose a dismissal of the bill and a restoration of the property to the company which consents to the same.[16]

But where the intervenor has presented a claim against property in the hands of a receiver the original bill cannot be dismissed until this has been disposed of, on the merits,[17] and, if the property proves to be worthless, the court may give the intervenor relief against parties to the suit.[18]

§ 261. Rights of intervening defendants. In the absence of fraud or collusion,[1] an intervening defendant can ordinarily set up no defense of which the original defendant could not have availed itself.[2] This is so in the case of intervening stockholders,[3] and creditors.[4] An intervenor, whether a stockholder or creditor, cannot raise the objections: that the court has no jurisdiction;[5] that the defendant corporation, which is a mortgagor, has no legal existence;[6] or, in the case of a creditor's bill, that the complainant has not obtained judgment and execution returned unsatisfied;[7] when these have been waived by the original defendant; nor any other defense which such de-

16 Shaffer v. McCulloch, C. C. A., 192 Fed. 801.

17 Weir v. McKechney, C. C. A., 252 Fed. 403.

18 Ibid.

§ 261. 1 Louisville Trust Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130; Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co., 43 Fed. 223, 225; Bartlett v. Gates, 118 Fed. 66.

2 Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Powell v. Leicester Mills, 92 Fed. 115.

3 Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Dickerman v. Northern Trust Co., 176 U. S. 181, 188, 44 L. ed. 423, 429; Big Creek, G. C. & I. Co. v. Am. L. & Tr. Co., 127 Fed. 625, 633; Forbes v. Memphis, El Paso & Pac. Ry. Co., 2 Woods, 323; Fed. Cas. No. 4,926; Land Title & Tr. Co. v. Asphalt Co., 114 Fed. 484.

4 Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Horn v. Pere Marquette R. Co., 151 Fed. 625.

5 Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Horn v. Pere Marquette R. Co., 151 Fed. 626, 633.

6 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 8 Fed. 642.

7 *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Horn v. Pere Marquette R. Co., 151 Fed. 626, 633; Grand Trunk Ry. Co. v. Central Vt. Ry. Co., 85 Fed. 87.

fendant is estopped from interposing.[8] But a lienor, who intervenes in a foreclosure suit can contest the validity of bonds secured by the mortgage.[9]

It has been said: that in a creditor's bill, the intervening creditors are not concluded by collateral averments which concede the validity of certain bonds and mortgages affecting the property; and that they may attack the validity of the same.[10] A stockholder, who has intervened as such in a stockholders' suit and received a dividend, cannot subsequently repudiate his subscription as obtained by fraud and claim, as a creditor, a priority over other stockholders.[11]

Under a general creditor's bill, any creditor who intervenes may attack the claim of any other creditor,[12] except, perhaps, that of the complainant.[13] If the complainant prays a preference, an intervenor may attack his claim.[14] When a creditor's suit has been consolidated with a subsequent foreclosure suit, he can attack the mortgage or the right of any bondholder to share in the proceeds of the sale.[15]

A manufacturer, who intervened to defend a patent case brought against one of his customers, was held to be bound by

8 Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 68 Fed. 412; Consol. Rubber Tire Co. v. Finley Rubber Tire Co., 119 Fed. 705. But see Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 379, 37 L. ed. 1113.

9 Farmers' Loan & Tr. Co. v. Toledo & S. H. R. Co., 43 Fed. 223, 225; Severens, J.: "In my opinion, the court would assert its dignity with a needlessly high hand if it rejected an application to come in and prevent the same from being the agent of wrong by persons acting collusively upon purely artificial reasons." (The final decree was reversed upon another point S. C., C. C. A., 51 Fed. 338.)

10 Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 647.

11 Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 97.

12 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 647; Shewen v. Vanderhorst, 1 Russ. & M. 347; Owens v. Dickerson, Craig & P. 48, 56; Woodgate v. Field, 2 Hare, 211, 213; Graves v. Wright, 2 Dru. & War. 77, 79.

13 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 647; Fuller v. Redman, 26 Beav. 614; Briggs v. Wilson, 5 De Gex, M. & G. 12.

14 Ogilvie v. Knox Ins. Co., 2 Black, 539, 17 L. ed. 349; Carter v. New Orleans, 19 Fed. 659; Campau v. Detroit Driving Club, 130 Mich. 147.

15 Continental Tr. Co. v. Toledo, St. L. & K. C. Ry. Co., 82 Fed. 642, 647.

an estoppel which affected the original defendant.[16] When an intervenor wishes to avail himself of a defense peculiar to him or to assert his individual right before a receiver has been appointed or property is in the custody of the court, the safer practice for him is to file a cross-bill.[17]

16 Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 119 Fed. 705.

17 See Bartlett v. Gates, 118 Fed. 66. *Supra*, § 197.

CHAPTER XVIII.

INJUNCTIONS.

§ 262. Definition, classification, and objects of injunctions. An injunction is a writ issued from a court of equity commanding a person to do an act or acts other than the payment to the complainant of a sum of money, or not to do an act or acts specified therein. According to the different aspects from which they are considered, injunctions are classified as judicial writs, and writs remedial; as mandatory and prohibitory; as provisional and perpetual; or as common and special. Before describing the different characteristics of each of these classes, it may be well to refer briefly to the different occasions for the issue of the writ. Injunctions may be obtained to enforce a trust or other purely equitable right, to compel obedience to a covenant or other contract affecting land, to compel the obedience of corporations to their charters, to prevent a multiplicity of suits, generally to prevent an irreparable injury for which damages at law would be no adequate remedy, and also in cases in which they are expressly authorized by statute.

An injunction is granted for the protection of a right to property. It is not issued to protect a right which is purely political,[1] nor the right to personal property,[2] nor the right to reputation,[3] unless the complainant's property and business would be irreparably injured by the rights sought to be restrained.

Whether a Federal court of equity will grant an injunction authorized by State statutes in a case not of equitable cognizance, is a disputed question.[4]

§ 263. Injunctions to enforce trusts and other purely equitable rights. Equity will always interfere to protect them by

§ 262. [1] Mississippi v. Johnson, 4 Wallace 475, 18 L. ed. 437, *infra*, § 283a.

[2] Bonifaci v. Thompson, 252 Fed. 878, *infra*. §§ 281, 282.

[3] Francis v. Flynn, 118 U. S. 385, 30 L. ed. 165, *infra*. § 284a.

[4] See § 82, *supra*.

injunction when they are threatened with infringement.[1] The most usual examples of this class of cases are injunctions to prevent misconduct by directors and officers of corporations.[2] Upon this ground a court took jurisdiction of a suit by the holders of irrigation bonds: to compel payment of coupons by the district officers who had collected assessments for the payment of interest and who contended that some of the bonds had been issued without adequate consideration; and to decree that the bonds were valid obligations.[3]

On this account an injunction may be obtained to prevent the revelation or use of a secret of manufacture by a workman who has learned it under an express or implied promise of secrecy, or one to whom such a person has disclosed it;[4] and to restrain the publication of lectures,[5] manuscripts[6] or works of art[7] heard or obtained under an express or implied agreement not to publish or reproduce them. Whether or not the publication of private letters which have no value as literary productions can be restrained at the prayer of their writer, upon the ground that this would be a breach of an implied trust, is, under the authorities, an open question.[8]

§ 263. 1 Scott v. Becher, 4 Price, 346; *In re* Chertsy Market, 6 Price, 261; Sloo v. Law, 3 Blatchf. 459; Draper v. Davis, 104 U. S. 347, 26 L. ed. 783; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Bispham's Eq., § 425.

2 Granite Brick Co. v. Titus, C. C. A., 203 Fed. 659; Shera v. Carbon Street Co., 245 Fed. 589; Monte Rico Min. & Mill. Co. v. Fleming, C. C. A., 258 Fed. 106, 108; *infra*, § 264.

3 Thompson v. Emmett Irr. Dist., C. C. A., 227 Fed. 560.

4 Yovatt v. Winyard, 1 Jac. & Walk. 394; Morison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Vulcan Detinning Co. v. Assmann, 185 App. Div. (N. Y.) 399, 425; S. W. Scott Co. v. S. W. Scott & Scott Fire Offices, 186 App. Div. (N. Y.) 518; Union Switch and Signal Co. v. Sperry, 169 Fed. 926. See *infra*, § 281. But see Newbery v. James, 2 Meriv. 446.

5 Abernethy v. Hutchinson, 3 L. J. Ch. 209.

6 Stapleton v. Foreign V. Ass'n, 12 W. R. 976; Scheile v. Brakell, 11 W. R. 796. See, however, Southy v. Sherwood, 2 Meriv. 435.

7 Prince Albert v. Strange, 1 Macn. & G. 25, 42.

8 Woolsey v. Judd, 4 Duer (N. Y.) 379, and Eyre v. Higbee, 35 Barb. (N. Y.) 502; Baker v. Libbie, 210 Mass. 539; King v. King (Wyoming, Nov. 1917) 168 Pac. 730, hold that they can, and Judge Story concurs in this view. Folsom v. Marsh, 2 Story, 100, 109, 110; Story's Eq. Jur., §§ 946-948. But the opposite view is maintained in Gee v. Pritchard, 2 Swanst. 402;

§ 264. Injunctions to restrain corporations from violating their charters. The charters of corporations are considered in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them.[1] On account of the irreparable injury that would otherwise ensue, and in the case of corporations to whom the State's right of eminent domain is delegated, because they are trustees,[2] the disobedience of a corporation to its charter may be restrained by injunction, at the suit either of the Attorney-General[3] of the State to which it owes its existence, or of any individual who suffers special injury thereby.[4]

This rule applies whether the act complained of has been forbidden expressly, or merely by implication as not included within the powers expressly given to the corporation and those which are necessary for their proper exercise.[5] "It is," said Lord Hatherley, "a principle of public policy that where Parliament has authorized a company to raise a large capital for a specified purpose, the privilege confers no right upon the company to employ their capital in competition with the general public upon speculations of a different character."[6]

Injunctions to restrain corporations, public[7] and private,[8] from wasting their funds, belong to this class. "It is because these companies, being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command

Wetmore v. Scovell, 3 Edw. Ch. (N. Y.) 515; Hoyt v. Mackenzie, 3 Barb. Ch. (N. Y.) 320; Brandreth v. Lance, 8 Paige (N. Y.), 24, 28, 34 Am. Dec. 368.

§ 264. [1] Blakemore v. Glamorganshire Canal Nav., 1 Myl. & K. 154, 162.

[2] M'Coy v. Chicago, I., St. L. & C. R. Co., 13 Fed. 3.

[3] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154; Atty. Gen. v. Railroad Cos., 35 Wis. 425. But see Atty. Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

[4] Bostock v. North Staffordshire Ry. Co., 3 Sm. & Giff. 283; Colman v. Eastern Counties Ry. Co., 10 Beav. 1.

[5] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154.

[6] Cited in Kerr on Injunctions, p. 473.

[7] Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. ed. 1071, *supra*, § 79; High on Injunctions (4th ed.) §§ 1236-1307.

[8] Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466; *supra*, § 145; High on Injunctions, (4th ed.) § 1184.

over some particular branch of trade or commerce, as would enable them to drive the ordinary private trader from the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured."[9] When the corporation violates its charter by refusing to perform an act thereby expressly or implicitly commanded, it has been held that the Attorney-General cannot compel its obedience by a mandatory injunction, but should in such a case apply for a mandamus.[10] A private individual suing to enjoin a corporation from violating its charter must show some special damage caused to himself by the breach.[11] A shareholder in a company is considered to incur special damage by the diversion of its funds to other purposes than its charter authorizes, and can obtain an injunction to restrain it from so doing,[12] even, it has been held, if he bought shares in the company for the very object of preventing it;[13] provided that he sues in good faith, and does not act as the mere puppet of a rival corporation;[14] and that the suit is not brought against the corporation and other parties, founded on rights which may properly be asserted by the corporation, in which latter case the right is restricted as previously explained.[15] The holder of a lien to secure an indebtedness of a corporation is also, it seems, entitled to an injunction in a similar case,[16] provided that he shows that the act sought to be prevented will impair the value of his secur-

9 Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154, 159, 160.

10 Atty. Gen. v. B. & O. J. Ry. Co., 15 Jur. 1024; People v. Albany & Vt. R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

11 Chamberlaine v. Chester & B. Ry. Co., 1 Exch. 869, 877; Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174, 26 L. ed. 1015, 1017, 1018.

12 Colman v. Eastern Counties Ry. Co. 10 Beav. 1. *Supra*, § 145; High on Injunctions, (4th ed.) §§ 1224-1229.

13 Colman v. Eastern Counties Ry. Co., 10 Beav. 1; Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154; Bloxam v. Met. Ry. Co., L. R. 3 Ch. 337; Graselli Chemical Co. v. Ætna Explosives Co., Inc., C. C. A., 252 Fed. 456. But see *supra*, § 145.

14 Forrest v. Manchester, S. & L. Ry. Co., 4 De G., F. & J. 126; Filder v. London, B. & S. C. Ry. Co., 1 H. & M. 489; Robson v. Dodds, L. R. 8 Eq. 301; Rogers v. Oxford, W. & W. Ry. Co., 2 De. G. & J. 662.

15 Eq. Rule 27; Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827. See *supra*, §§ 79, 145, 156.

16 Bagshaw v. Eastern U. Ry. Co., 2 Macn. & G. 389; Herrick v. Grand T. Ry. Co., 7 Up. Can. L. J. 240; Farmers' Loan & Trust Co. v. City of Sioux Falls, 131 Fed. 890.

ity;[17] but not otherwise.[18] It has been held that such a bondholder need not show that the corporation is not in collusion. An unsecured creditor cannot bring such a suit,[19] except under very extraordinary circumstances.[20]

A suit may be brought by stockholders to prevent a consolidation or combination which is in violation of the Federal Anti Trust Law;[21] but not when the proceedings sought to be enjoined will not make any practical change in the *status quo* which has existed for a number of years with the government's acquiescence.[22] Nor it has been said in the case of a State Anti Trust Law where the stockholder shows no special injury.[23]

One whose land has been taken from him for the use of a corporation by the exercise of the State's right of eminent domain can obtain an injunction to restrain the use of the land for any other purpose than is allowed by the company's charter,[24] provided at least that he can show that he is thereby injured.[25] Citizens lawfully engaged in the sale of liquor within a State were granted an injunction forbidding a foreign corporation for accepting for transportation thither liquors illegally sold to buyers who competed with the complainants.[26]

An English judge has said: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove, that the doing of the act prohibited has caused him some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects, by an infringement of the law. But

17 Central Trust Co. v. Denver & R. G. Co., 219 Fed. 110.

18 Mercantile T. Co. v. Texas & P. Ry. Co., 51 Fed. 529, 536.

19 Syers v. Brighton B. Co., 11 L. T. (N.S.) 560; Mills v. Northern Ry. of Buenos Ayres Co., 23 L. T. (N.S.) 719.

20 Evans v. Coventry, 5 De G., M. & G. 911.

21 De Koven v. Lake Shore & M. S. Ry. Co., 216 Fed. 955.

22 Ibid.

23 Continental Securities Co. v. Interborough R. T. Co., 207 Fed. 467.

24 Bostock v. North S. Ry. Co., 3 Sm. & Giff. 283.

25 East & W. India Docks & B. J. Ry. Co. v. Dawes, 11 Hare, 363; Lee v. Milner, 2 Y. & C. 611; Ware v. Regents Canal Co., 3 De-G. & J. 212.

26 Long v. Southern Express Co., 201 Fed. 441.

where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage.'' [27] It is no proper ground for complaint by an individual that a corporation by exercising powers not conferred upon it by its charter enters into competition with him, and thereby diminishes the profits of his trade or calling.[28]

In the absence of statutory authority a private individual cannot file a bill to obtain the forfeiture of a corporate franchise,[29] nor a stockholder a bill to dissolve a corporation under the statute of the country which chartered it.[30] Nor in the absence of a State [31] or Federal [32] Statute, can a bill for the dissolution of a State corporation be maintained.[33] A Federal court sustained a bill to set aside an executed contract for the dissolution of a partnership and the transfer of the assets to a corporation which had been organized in pursuance of the contract.[34]

Where the assets of the corporation are in the custody of a receiver, the court which appointed him may enjoin action at a stockholder's meeting upon a plan of reorganization.[35] It seems that in an extraordinary case a decree might be entered directing the inspection of the books of a corporation by a stockholder.[36]

§ 264a. Injunctions to protect corporate franchises. Injunctions to protect corporate franchises may be conveniently here

27 Pollock, C. B. in Chamberlaine v. Chester & B. Ry. Co., 1 Exchequer, 869, 877. See Blakemore v. Glamorganshire Canal Nav., 1 Mylne & Keen, 154, 162.

28 Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174, 26 L. ed. 1015, 1017, 1018. But see Brady v. South Shore Traction Co., 197 Fed. 669.

29 Gaylord v. Fort Wayne M. & C. R. Co., 6 Biss. 286.

30 Republican Silver Mine v. Brown, 24 L.R.A. 776, 58 Fed. 644.

31 Jacob v. Mexican Sugar Co., 130 Fed. 589, 592 (where the court said that the New Jersey Statute, authorizing a dissolution of the corporation by the State Court of Chancery might be followed by the Federal Court). *Contra* Conklin v U. S. Ship Building Co., 140 Fed. 219 (holding that such statute could not be followed by the Federal Court).

32 See Northern Securities Co. v. U. S., 193 U. S., 197, 48 L. ed. 679.

33 Conklin v. U. S. Ship Building Co., 140 Fed. 219.

34 Tevander v. Ruysdael, C. C. A., 253 Fed. 918.

35 Graselli Chem. Co. v. Aetna Explosives Co., Inc., C. C. A., 252 Fed. 456.

36 Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. ed. 130, 4 Ann. Cas. 433; Monte Rico Min. & Mill. Co. v. Fleming, C. C. A., 258 Fed. 106, 108.

considered. They are usually justified by the desire of equity to prevent a multiplicity of suits. In some cases they are granted to prevent irreparable injury. Corporate franchises are usually attacked by attempts to repeal them or by imposing conditions upon their exercise. In the latter case, ordinarily by reductions in the charges they are authorized to make to the public for the services which they render, technically described as rates. Unless a reservation is contained in its charter or in a previous general statute or in an ordinance in the State Constitution,[1] the charter of a corporation cannot be amended or repealed without its consent.[2] Such reservations of power in their legislatures are now contained in the Constitutions or general statutes of all or almost all the States of the Union.

Litigation upon this subject ordinarily arises in connection with the attempts by municipalities to repeal franchises to operate street railroads, to furnish gas and electric light, power, water, or telephone service, or to reduce the charges to the public made by the holders of such a franchise.

No injunction will be granted to restrain the enactment of a statute by Congress or a State Legislature, for this is beyond the power of the courts, and a judge who signed the same would be in contempt of the legislative body with which he interfered.[3] Since municipal ordinances within the power vested in municipalities have the force of laws passed by the State legislatures, except perhaps under very extraordinary circumstances, no injunction can be issued to enjoin the passage of a municipal ordinance which affects a franchise.[4]

Injunctions have been issued to restrain the enforcement of such ordinances immediately upon the adoption of the latter and before any threat to enforce them was made;[5] but a court refused to interfere where the only action by a municipality of which complaint was made consisted in the adoption by the City

§ 264a. [1] Miller v. New York, 15 Wall. 478, 21 L. ed. 78; Greenwood v. Union Freight R. R. Co., 105 U. S. 13, 26 L. ed. 6, 961.

[2] Dartmouth College v. Woodard, 4 Wheaton 518, 4 L. ed. 629.

[3] See Foster on the Constitution, § 145, and legislative precedents there cited.

[4] New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 481, 41 L. ed. 518; Murphy v. East Portland, 42 Fed. 308; DesMoines Gas Co. v. Des Moines, 44 Iowa 505, *infra*, § 271a.

[5] Portland Ry. Light & Power Co. v. City of Portland, 201 Fed. 119.

Council of a report of a committee finding that a street railway franchise would expire at a certain time contrary to the contention of the company owning this and recommending that the Council take measures to dispossess the corporation upon such expiration unless there should be a previous renewal.[6] In the same litigation where in addition to these facts it also appeared that the receivers of the corporation had received a notice from the Superintendent of Streets that all permits authorizing the company to work and make repairs upon the streets would be revoked at a specified time, the Supreme Court in order to remove the cloud upon the title to the franchises decreed that they existed for a longer period and enjoined the city from asserting that they had expired at the time stated in the report and from interfering with the enjoyment of the franchise.[7]

Speaking of the remedies of public service corporations, it has been said: "It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the Governmental authority which establish them or is charged with the duty of enforcing them." [8]

When the ordinance was passed in accordance with the legal forms and under color of statutory authority even though the same is not authorized by the statutes of the State, or, it has been held, where its validity depends upon a statute, which the complainant contends in good faith to be in violation of the Federal Constitution, and there is ground for a reasonable doubt as to the soundness of the contention; the suit arises under the Constitution of the United States and is for that reason within the jurisdiction of the Federal court.[9] The Federal courts have no jurisdiction except when the necessary diversity of citizenship exists to enjoin the enforcement of a municipal ordinance not passed in accordance with legislative authority,[10] nor to restrain trespasses which impair the value of a franchise committed by public officers or agents professedly acting under authority of a State law but which are by a fair construction of the

6 Elkins v. Chicago, 119 Fed. 957.

7 Blair v. Chicago, 201 U. S. 401, 407, 449.

8 *Re* Englehard & Sons Co., 231 U. S. 646, 651, per McKenna, J.

9 Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198, *supra*, § 25.

10 Mayor, etc., of Savannah v. Holst, C. C. A., 132 Fed. 901, *supra*, § 25.

law prohibited; unless the conduct of which complaint is made amounts to a destruction of property without due process of law.[11] A suit may be brought to enjoin the enforcement of an ordinance which impairs the violation of a contract without waiting until proceedings are instituted for such enforcement.[12] A suit to enjoin interference with a franchise may be brought by the corporation itself;[13] by its receivers;[14] under special circumstances, by its stockholders;[15] or by its mortgagee.[16] When the object of the suit is to enjoin the enforcement of an unconstitutional statute or ordinance the State and local officers charged with its enforcement may be made parties defendant.[17]

A city may be a party defendant to represent its citizens who are customers of the complainant.[18] Injunctions have been issued forbidding the customers of the complainants from bringing suits founded upon the ordinance enjoined,[19] but unless these are made parties and served so that they have their day in court, such an injunction would as against them be void, as not due process of the law. The Clayton Law now expressly forbids an injunction against a person not a party to the suit.[20] It had been previously held that the Federal courts have no power to enjoin customers of a public service corporation from suing in the State courts to collect excessive charges for public service which they have paid pending an injunction, reversed by the Supreme Court of the United States, which prevented the proper authority from compelling a reduction of such

11 Barney v. New York, 193 U. S. 430, 48 L. ed. 737, *supra*, § 25.

12 Portland Ry. Light & Power Co. v. City of Portland, 201 Fed. 119.

13 Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341.

14 Blair v. Chicago, 201 U. S. 400, 405, 449, 50 L. ed. 801, 821.

15 Smyth v. Ames, 169 U. S. 466, 42 L. ed. 810; Dinsmore v. Southern Exp. Co., 92 Fed. 714.

16 Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014; Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. 529, 535; City & County of Denver v. N. Y. Tr. Co., C. C. A., 187 Fed. 890.

17 Smyth v. Ames, 169 U. S. 466, 42 L. ed. 810, *supra*, § 100c.

18 *Re* Englehard & Sons Co., 231 U. S. 646, San Francisco Gas & Elec. Co. v. City & County of San Francisco, 164 Fed. 884, 887.

19 San Francisco Gas & El. Co. v. City & County of San Francisco, 164 Fed. 884, 887; see Bellaney v. St. Louis L. M. & S. R. Co., C. C. A., 220 Fed. 876, reversing 211 Fed. 172.

20 38 St. at L. 738, ch. 323, Comp. St. § 1243e, *supra*, § 19.

charges.[21] Accordingly, it has been held when such an injunction by the Federal court to a suit which the municipality was a party had restrained the enforcement of a State statute reducing the price of gas pending an adjudication covering its validity; that this did not deprive the State courts of power to restrain the gas company from cutting off the supply of gas to a consumer for his refusal to pay more than the reduced rate.[22] But in order to observe comity the State court will usually stay the trial of such a case until the termination in the Federal court of the issues there raised.[23]

When a suit to test the validity of the statute or ordinance has been previously brought in a State court, the Federal court cannot grant an injunction until the final determination of the State suit.[24] Before this rule had been established by statute it had been adopted by a rule of comity by some Federal courts.[25] Where bills to enjoin the enforcement of the State law had been previously presented to the Federal court subsequent suits in the State courts by the defendant were enjoined.[26] But, it was held: that the pendency in the Federal court of a suit by a gas company against a city to set aside, as an impairment of the contract contained in the company's franchise, an ordinance regulating the pressure in its mains, did not justify an injunction against a subsequent suit by the city against the company in a State court for an accounting under the original ordinance granting the franchise upon the ground that the contract rates were excessive because of insufficient pressure although the bill prayed an injunction against the further collection of such rates.[27]

In suits to enjoin the enforcement of statutes, orders, or ordinances reducing the rates charged for public service, it is customary not to grant a preliminary injunction forbidding the institution by the defendants of suits in State courts or elsewhere to enforce the order or ordinances of which complaint is

21 Bellamey v. St. Louis L. M. S. Ry. Co., C. C. A., 220 Fed. 876.

22 Ritchman v. Consol. Gas Co., 186 N. Y. 209.

23 Ibid.

24 36 St. at L. 557, 1162, 37 St. at L. 1013, Comp. St. § 1213, see § 105d, *supra*.

25 Morse & Co. v. McCarthy, 191 Fed. 202; Peoples Gas Light & Coke Co. v. City of Chicago, 192 Fed. 398. See § 57, *supra*.

26 St. Louis & L. F. R. Co. v. Handly, 155 Fed. 220.

27 Kansas City Gas Co. v. Kansas City, 178 Fed. 500.

made; except upon the condition that the difference between the former rate and that the enforcement of which is restrained be deposited in court or a trust company subject to the court's order.[28]

If the suit is brought by a mortgagee or bondholder the complaint should show that the act sought to be prevented will impair the value of the security.[29] It is no defense that the corporation is in sympathy with the complainants.[30] The mortgagor is not an indispensable party.[31]

§ 265. Injunctions to enforce the specific performance of covenants and other contracts affecting land. As no two pieces of land are exactly alike, equity considers that in no case can damages in money be adequate compensation for the breach of a covenant or other contract affecting land.[1] Accordingly, the specific performance of contracts for the purchase or sale of land and of covenants affecting the same, will be specifically enforced with the aid of an injunction, whenever they are mutual,[2] certain,[3] not unconscionable,[4] and their enforcement would be practicable.[5] The rule concerning the enforcement of covenants affecting land has been thus stated: "If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by in-

28 See *infra*, § 297.

29 Mercantile Tr. Co. v. Texas & P Ry. Co., 51 Fed. 529, 536; Central Tr. Co. v. Denver & R. S. Co., 219 Fed. 110.

30 Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Dinsmore v. Southern Express Co., 92 Fed. 714; City & County of Denver v. N. Y. Trust Co., C. C. A., 187 Fed. 890; Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865; City and County of Denver v. N. Y. Tr. Co., C. C. A., 187 Fed. 890.

31 Denver v. Mercantile Trust Co., C. C. A., 201 Fed. 790. But see Consol. Water Co. v. City of San Diego, 89 Fed. 272; s. c., C. C. A., 93 Fed. 849. *Supra*, § 119.

§ 265. 1 Adderley v. Dixon, 1 Sim. & Stu. 607; Bispham's Eq., § 375.

2 Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; Bispham's Eq., § 377.

3 Colson v. Thompson, 2 Wheat. 336, 4 L. ed. 253; Bispham's Eq., § 377.

4 Surget v. Byers, Hempst. 715; Roundtree v. McLain, Hempst. 245; Miss. & Mo. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367; Bispham's Eq., § 376. See Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 34 L. ed. 200.

5 Ross v. Union Pac. R. Co., 1 Woolw. 26; Fallon v. Railroad Co., 1 Dill. 121; Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385; Bispham's Eq., § 377.

junction."[6] This is, however, subject to the exception that if it would be against public policy to enforce the covenant,—for example, if a change of circumstances has rendered it improper to use land in accordance with the terms of a covenant regulating its use,—or if, on account of such a change, the object of the parties to the covenant would not be accomplished by its enforcement, equity will not interfere.[7] The Federal courts have refused injunctions: against interference by a railroad company with telegraph lines constructed on the defendant's right of way under a license which had been revoked where the complainant sought relief because the government had assumed control of the railroads; when the defendant agreed to take no action interfering with the telegraph system without the approval of the government,[8] and against the obstruction by the railroad company of the telegraph company's use of the right of way of which it was in possession pending an application to condemn the right to maintain its line there.[9]

§ 266. Injunctions to prevent a multiplicity of suits. Injunctions are granted in order to prevent a multiplicity of suits under bills of peace. Bills of peace are bills to restrain a number of persons from endeavoring to enforce in different suits the same or similar claims;[1] or to prevent a single person from reiterating in several successive suits the same unsuccessful claim;[2] or to prevent a person from levying a tax, the payment of which will subject the plaintiff to the hazard of a number of suits from other parties;[3] bills of interpleader[4] and in

6 V. C. Wood in Tipping v. Eckersley, 2 K. & J. 264. See also Lord Manners v. Johnson, L. R. 1 Ch. D. 673; Lloyd v. London, C. & D. Ry. Co., 2 De G., J. & S. 568; T. of Columbia College v. Lynch, 70 N. Y. 404. See High on Injunctions, (4th ed.) § 330.

7 Duke of Bedford v. British Museum, 2 M. & K. 552; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Leake's Digest of the Law of Contracts, 1152. But see Lloyd v. London, Ch. & D. Ry. Co., 11 Jur. (N. S.) 380.

8 Louisville & N. R. Co. v. Western Union Tel. Co., C. C. A., 252 Fed. 29.

9 Western Union Tel. Co. v. Louisville & N. R. Co., C. C. A., 250 Fed. 199; s. c., 243 Fed. 687.

§ 266. 1 Sheffield Water Works v. Yeomans, L. R. 2 Ch. App. 8. See Scottish Union, etc., Ins. Co. v. J. H. Hohlmann & Co., 73 Fed. 66; *supra*, §§ 140, 141. But see Kansas City Southern Ry. Co. v. Quigley, 181 Fed. 190.

2 Earl of Bath v. Sherwin, 4 Brown Parliamentary Cases, 373. But see United Cigarette Mach. Co. v Winston Cigarette Mach. Co., C. C. A., 194 Fed. 947.

3 Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903,

the nature of interpleader;[5] bills to enjoin a continuing trespass,[6] nuisance,[7] infringement of patents,[8] copyrights[9] and trade-marks;[10] and bills to quiet possession.[11] Injunctions to restrain a continuing trespass, nuisance and the infringement of patents, copyrights and trade-marks, are more often said to be granted to prevent irreparable injury, and will, therefore, be considered under that head. An injunction to quiet the possession before the hearing formerly issued to restrain the party to whom it was directed from taking forcible possession of lands pending litigation concerning them. It was issued at the request of either a plaintiff or a defendant to a suit, if the applicant had had peaceable possession of the premises for the three years preceding the filing of the bill, and his interest therein had not been determined by forfeiture, surrender, or other lawful means. He was required to swear to these facts in his bill, and according to the practice before Lord Bacon's time to give a bond to the amount of £10 as a security that the information so given was true.[12] Such injunctions were formerly very common; but have now fallen into disuse. The last reported instance was in Lord Hardwicke's time.[13]

§ 267. Injunctions to prevent irreparable injury for which the remedy at law is inadequate; in general. The most ordinary ground upon which an injunction issues, and the one, indeed, which includes all but the first of those previously mentioned, is that, otherwise, the plaintiff would suffer an irreparable injury, for which damages at law would be no adequate remedy. It would be impossible specifically to mention here all the different instances in which an injunction issues for this

904; Pelton v. National Bank, 101 U. S. 143, 148, 25 L. ed. 901, 902; Hills v. Exchange Bank, 105 U. S. 319, 26 L. ed. 1052; *supra*, § 79.

4 Louisiana State Lottery Co. v. Clark, 16 Fed. 30; s. c., 4 Woods, 169; McLaughlin v. Swann, 18 How. 217, 15 L. ed. 357; City Bank v. Skelton, 2 Blatchf. 14; *supra*, § 157.

5 Dorn v. Fox, 61 N. Y. 264; *supra*, § 158.

6 Northern Pac. R. Co. v. Burlington & Missouri R. Co., 2 McCrary, 203; *infra*, § 275.

7 Woodruff v. North Bloomfield G. M. Co., 18 Fed. 753. See *infra*, § 274.

8 U. S. R. S., § 4921; *supra*, § 277.

9 U. S. R. S., § 4970; *supra*, § 146; *infra*, § 278.

10 Shaw Stocking Co. v. Mack, 12 Fed. 707; *supra*, § 148, *infra*, § 279.

11 Hughes v. Morden College, 1 Ves. Sen. 188. See *supra*, § 82.

12 Eden on Injunctions, ch. xvi, p. 240.

13 Hughes v. Morden College, 1 Ves. Sen. 188.

reason; but the following is an enumeration of those of more frequent occurrence which have not been previously described. An injunction will issue on account of the inadequacy of the remedy at common law; to stay proceedings in other courts, either of law, equity, or admiralty;[1] to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specified chattel;[2] to restrain the commission of every species of waste or act in the nature of waste;[3] to suppress the continuance of a public or private nuisance;[4] to prevent a threatened destructive trespass;[5] to prevent the infringement of patents;[6] to prevent the violation of copyright, whether by printed publications, or theatrical representation, or otherwise;[7] to prevent the unauthorized use of trade-marks,[8] and the opening of private letters;[9] to compel the performance or prevent the breach of contracts other than those for the payment of money only;[10] under very extraordinary circumstances, to compel the delivery of personal property wrongfully withheld,[11] to enjoin the revocation of a license permitting a foreign corporation to do business within the State.[12] An injunction has been granted to restrain the sale by scalpers of return railroad tickets, which by their terms were not transferable, when the use of such tickets could only be made by fraud;[13] and to prevent the creation of a cloud on a title.[14]

§ 268. Injunctions to stay proceedings in other courts. In general. Injunctions to stay proceedings in other courts are of much less frequent occurrence now that discovery and the inspection of documents can be obtained at common law without the aid of equity than they were formerly; but they are still

§ 267. 1 §§ 268, 271.
2 § 272.
3 § 273.
4 § 274.
5 § 275.
6 § 277.
7 § 278.
8 § 279.
9 § 280.
10 § 281.
11 § 282.
12 Ludwig v. Western Union Tel. Co., 216 U. S. 146, 152.
13 Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 52 L. ed. 171; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; *supra*, §§ 79, 141.
14 Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599.

often issued, especially in bankruptcy.[1] Such injunctions must not be confounded with writs of prohibition, which are addressed to the judge of a court, whereas injunctions are directed to the parties to the proceedings which it is desired to restrain.[2] Ordinarily, when two courts have a concurrent jurisdiction over the same thing, whichever court was first possessed of the cause has a right to proceed with the same, and proceedings in it will not be prohibited or restrained by another.[3] An injunction against an application for an injunction should not be granted; since the equities of the complainant can be amply protected in the suit sought to be enjoined.[4] It was at first held that a court had no power to restrain a defendant from suing in a foreign court;[5] but it is now established that it can do so,[6] although such a power is exercised with great caution. A State Court may enjoin one of its citizens from suing another citizen in another State or in another jurisdiction for the purpose of obtaining the benefit of such decisions in the other jurisdiction as differ from those of the State courts in which the injunction is granted.[7]

Where the parties to a suit, and the greater part of the property which is the subject of the litigation, are within the jurisdiction of a court, where a suit affecting the same was first instituted and complete relief can there be afforded; an injunction

§ 268. [1] McLean v. Lafayette Bank, 3 McLean, 185; in re Schwartz, 14 Fed. 787.

[2] See Eden on Injunctions, ch. ii; Peck v. Jenness, 7 How. 624, 12 L. ed. 846; Dillion v. K. C. S. B. Ry. Co., 43 Fed. 109, 111; *infra*, § 456.

[3] Nicholas v. Nicholas, Prec. in Ch. 546; Daniell's Ch. Pr. (2d Am. ed.) 1845; *supra*, §§ 52-60. But see Erie Ry. Co. v. Ramsey, 45 N. Y. 637.

[4] Robertson v. Montgomery Baseball Ass'n, 141 Ala. 348, 109 Am. St. Rep. 30, 37 So. 388, 3 Ann. Cas. 965.

[5] Love v. Baker, 1 Ch. Cas. 67 decided by Lord Clarendon; but the reporter added, "*sed quære*, for all the bar was of another opinion."

[6] Bunbury v. Bunbury, 1 Beav. 318; Portarlington v. Soulby, 3 Myl. & K. 104; Dehon v. Foster, 4 Allen (Mass.) 545; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538.

[7] Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538 (administration of insolvent's estate); Dinsmore v. Nreisheimer, 39 Hun (N. Y.) 204, (liability for loss of package by express company.) Weaver v. Alabama Grape So. R. R. Co., Ala. June 1917. 76 So. 364. But see Fed. Trust Co. v. Conklin, N. J. (administration of insolvent's estate.) N. J. Eq. 98 Atl. 109.

against the institution of a suit for the same object, in a foreign jurisdiction, may be granted.[8]

The Constitution does not forbid a State court from enjoining in a proper case a person within its jurisdiction from prosecuting a suit in a court of another State.[9]

An injunction order providing "that all suits and proceedings on the part of" certain persons "against the said bankrupt, to collect the debt set forth, be, and the same are hereby stayed, to await the determination of the court in bankruptcy on the question of the discharge therein," was held violated by those who after discontinuing a suit then pending, subsequently instituted another to recover the same claim, with new allegations charging fraud.[10]

§ 269. Injunctions to stay proceedings in Federal courts. In a proper case a Federal court will enjoin proceedings in the same [1] or another court of the United States.[2] Before the Act of March 3, 1915, which authorized equitable defenses to be interposed in action at common law [3] such injunctions were the proper method of enforcing defense which were purely equitable.[4] Since this Act of Congress such an injunction before judgment at law seems to be unnecessary.[5]

It was at first doubted whether a Circuit Court of the United States had the power to enjoin the prosecution of a suit in a Federal court in another circuit; [6] although the power to enjoin the prosecution of a suit in another district of the same circuit was early exercised.[7] It is now settled, however, that a District Court of the United States can, in a proper case, enjoin the prosecution of a suit in any other court of the United States.[8]

8 United Cigarette Mach. Co. v. Wright, 156 Fed. 244. See *supra*, § 57, *infra*, § 270a.

9 Vail v. Knapp, 49 Barb. (N. Y.) 299; Story's Eq. Jur. §§ 899, 900; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538.

10 In the matter of Schwartz, 14 Fed. 787. For the construction of an order forbidding the use of a certain defense, see Wakelee v. Davis. 50 Fed. 522.

§ 269. 1 Whitecomb v. Schultze, C. C. A., Fed. 268.

2 Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

3 Amending Judicial Code, § 274b, 38 St. at L. 956, Comp. St. § 1251b.

4 Whitcomb v. Schultze, C. C. A., 223 Fed. 268, 273.

5 United Timber Corp. v. Bivens, 248 Fed. 554.

6 Kelley v. Ypsilanti, D. S. Mfg. Co., 44 Fed. 19, 20, per Brown, J.

7 Monumental Sav. Ass'n v. Fentress, 125 Fed. 812.

8 Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

An injunction in a Federal court in another circuit, forbidding the collection of a judgment, was followed and held to bind the parties; but not to prevent the collection by the attorneys of one of them of so much thereof as they had a lien upon.[9] It has been said: that a Federal court of equity cannot enter a decree directing the entry of a satisfaction of a judgment at law in the same court; since a court on its common-law side has the power to direct such entry.[10] A District Court of the United States cannot enjoin a party to a judgment at common law therein, from suing out a writ of error from the Circuit Court of Appeals to review the same.[11]

When a suit in a State court between the same parties has been begun prior to the institution of a suit for the same relief in Federal court it is usually the duty of the latter court to stay[12] proceedings until the conclusion of the prior litigation, but the defendant has no absolute right to that relief which is in the discretion of the Federal court.[13] A stay of the trial of a suit of a carrier under Federal control, notwithstanding the order upon the subject by the Director General of Railroads,[14] was discretionary with the court and the burden rested upon the defendant to show that the interest of the government would be prejudiced by an immediate trial.[15] A State court has no power to stay, by injunction, a proceeding in a court of the United States.[16] A State court cannot direct that a claim involved in a suit there pending shall be excluded from, and in no ways be affected by any order, rule, or decree of a Federal court.[17] A Federal court will not interfere by injunction to control the

9 W. A. Chapman & Co. v. Montgomery W. P. Co., 127 Fed. 839.

10 Macrum v. U. S., C. C. A., 154 Fed. 653. See Holt v. Dorsey, Fed. Cas. No. 6,647; Medford v. Dorsey, Fed. Cas. Nos. 9,389, 9,390.

11 Macrum v. U. S., C. C. A., 154 Fed. 653.

12 Zimmerman v. Soelle, C. C. A., 80 Fed. 417; Weber v. Hertzell, C. C. A., 230 Fed. 965. See *supra*, § 57.

13 Woren v. Witherbee, Sherman & Co., C. C. A., 240 Fed. 1013; City of Ironton v. Harrison Const. Co., C. C. A., 212 Fed. 353; Venner v. Graves, C. C. A., 255 Fed. 686.

14 Act of May 23, 1918.

15 Harnick v. Pennsylvania R. Co., 254 Fed. 748.

16 McKim v. Voorhies, 7 Cranch, 279, 3 L. ed. 342; Duncan v. Darst, 1 How. 301-306, 11 L. ed. 139, 141; City Bank of N. Y. v. Skelton, 2 Blatchf. 14; Beardslee v. Ingraham, 183 N. Y. 411, 3 L.R.A. (N.S.) 1073.

17 Clark v. Bankers' Trust Co., 177 App. Div. D., N. Y. 627.

action of public officers such as a draft board,[18] or a board of steamboat inspectors [19] who act in a *quasi* judicial capacity, when proceeding within their jurisdictions. The only remedy is an application for the writ of *certiorari*.[20]

§ 269a. Injunctions against patent litigation. A manufacturer, who has obtained a decree in his favor, which has been affirmed by the Circuit Court of Appeals in one circuit, can enjoin the complainant, who is defeated, from bringing similar suits based on the same patent against the customers of the former in any circuit of the United States,[1] or in a foreign country.[2] Even in a Circuit where the Circuit Court of Appeals has held under similar facts in favor of the patentee;[3] a suit previously brought may be thus enjoined.[4] The same relief may be obtained by a manufacturer, who, although not a party of record to the suit resulting in the adjudication, had filed there a stipulation that it was defending the case.[5] Where the patentee sues the manufacturer praying for profits and damages, the court may enjoin the prosecution or institution of suits against the latter's vendees until final decree.[6] Where suits have been already begun against the vendees, the application should be made to the courts where they are pending.[7] Where the invention consists in a combination of elements previously known, the vendee of an element by a manufacturer, who has obtained a decree in his favor authorizing him to use the whole combination, has no defense founded upon such purchase to a suit to enjoin him from using the combination nor can he obtain a stay or an injunction against such suit against him.[8]

18 Anglus v. Sullivan, C. C. A., 246 Fed. 54.

19 Williams v. Potter, C. C. A., 223 Fed. 423.

20 See *infra*, § 460.

§ 269a. 1 Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

2 Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 Fed. 869.

3 Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

4 Kessler v. Eldred, 206 U. S. 285, 286, 51 L. ed. 1065, 1066.

5 Marshall v. Bryant Electric Co., C. C. A., 185 Fed. 499.

6 Allis v. Stowell, 16 Fed. 783; In National Cash Register Co. v. Boston Cash I. & R. Co., 41 Fed. 51; Kelley v. Ypsilanti Mfg. Co., 44 Fed. 19, 10 L. R. A., 686; Stebler v. Riverside Heights Orange Growers' Ass'n, 211 Fed. 985, aff'd, C. C. A., 214 Fed. 550.

7 Kelley v. Ypsilanti Mfg. Co., 44 Fed. 19, 10 L. R. A., 686; Am. Seeding Mach. Co. v. Dowagiac Mfg. Co., C. C. A., 241 Fed. 875.

8 Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co., 232 U. S.

An injunction in one circuit against a suit by the owner of a patent for its infringement is no defense to a suit by the prior holder of an exclusive license to sell in a limited part of another circuit;[9] and in such suit he has the right to join the owner of the legal title as a complainant without the latter's consent.[10] Where the licensor obtained in the Federal Court a decree that the licensee had violated the conditions of his license and was in contempt of an injunction against infringement antedating the license, the court enjoined the prosecution of a subsequent suit in a State court where the licensee had obtained an interlocutory injunction enjoining the termination of the license upon the ground that it had not been violated.[11] A suit for infringement brought during the pendency of a suit to determine the right to a patent may be stayed a reasonable time to await the determination of the earlier suit.[12] Ordinarily, suits previously,[13] or subsequently,[14] instituted to enjoin the infringement of a patent, will not be enjoined; the defendant being allowed to assert, in such a suit, any equitable defense that he may have; but when there is a multiplicity of suits, involving the same defenses, the courts in which any of such cases are pending may stay proceedings therein, until the suit between the patentee and the principal infringer is decided.[15]

A bill filed by the defendant in five actions at law brought by different territorial licensees for infringement of the same patent, praying that all be stayed, except one which should be selected and tried as a test case, was dismissed; when it contained no allegation that the several plaintiffs had refused to join in making a test case, there being no showing that the court could

413; Seim v. Hurd, 232 U. S. 420; Woodworth Co., v. Hurd, 232 U. S. 428.

9 Hurd v. J. Goold Co., C. C. A., 203 Fed. 998.

10 Ibid.; see *supra*, § 112.

11 Libbey Glass Co. v. McKee Glass Co., 216 Fed. 172.

12 Steinberger v. General El. Co., 207 Fed. 114.

13 Kelley v. Ypsilanti D. S. Mfg. Co., 44 Fed. 19; Am. School Furniture Co. v. J. M. Sauder Co., 106 Fed. 731; Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642; Kryptok Co. v. Stearns Lens Co., 190 Fed. 767; Gamwell Fire Alarm Telegraph Co. v. Star Electric Co., 199 Fed. 188.

14 Clip Bar Mfg. Co. v. Steel Protected Concrete Co., 209 Fed. 874.

15 Rumford Chem. Works v. Hecker, 5 Off. Gaz. 644; Allis v. Stowell, 16 Fed 783; Nat. Cash Reg. Co. v. Boston Cash I. & R. Co., 41 Fed. 51; Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642.

not on motion regulate the hearing of the questions so as to prevent oppression.[16]

Where some of the defendants set up different defenses, it was held that the court "could not restrain in part and permit in part the prosecution of the cases. It would have no right to issue an injunction which should [*sic*] have the effect to split up the cases, enjoining their prosecution as to some branches of the controversy and permitting it as to the others."[17] A bill to enjoin defendant from prosecuting an action at law for an infringement cannot be sustained when the only grounds alleged are that complainant will be put to great expense for attorney's fees and other costs, and that he is informed that defendant will be unable to pay the same.[18] The subsequent commencement of suits upon the same patent, against the customers of the original defendant, may be enjoined pending the suit against the manufacturer in a proper case,[19] but not, at least in another circuit, suits against strangers.[20] It has been held: that in a suit by the United States to vacate a patent for an invention, a preliminary injunction will not be granted to restrain the prosecution by the defendant of suits for the infringement of the patent.[21]

§ 270. Injunctions to stay proceedings in State courts. The Judicial Code re-enacting a section of the Revised Statutes [1] provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy."[2]

16 Galvin Iron Works Co. v. Ohio Corrugated Culvert Co. C. C. A., 244 Fed. 427.

17 Germain v. Wilgus, C. C. A., 67 Fed. 597.

18 Dyer J., in Allis v. Stowell, 16 Fed. 783, 790.

19 Birdsell v. Hagerstown Agr. Imp. Mfg. Co., 1 Hughes, 64 Fed. Cas. No. 1,437; Ide v. Ball Engine Co., 31 Fed. 901; Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642; Lovell-M'Connell Mfg. Co. v. Automobile S. Mfg. Co., 193 Fed. 658, 659, 663.

20 Clip Bar Mfg. Co. v. Steel Protected Concrete Co., 209 Fed. 874.

21 U. S. v. Colgate, 21 Fed. 318.

§ 270. 1 U. S. R. S., § 720.

2 Jud. Code, § 265, 36 St. at L. 1087. See Slaughter House Cases, 10 Wall. 273, 19 L. ed. 915; Haines v. Carpenter, 91 U. S. 254, 23 L. ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Rensselaer & S. R. Co. v. Bennington & R. R. Co., 18 Fed. 617; M., K. & T. Ry. Co. v. Scott, 13 Fed. 793; s. c., 4 Woods, 386; Hamilton v. Walsh, 23 Fed. 420; Tifft v. Iron Clad Mfg. Co., 16 Blatchf. 48; Yick Wo v. Crowley,

"This prohibition of the statute extends to all cases over which the State court first obtains jurisdiction, and applies not only to injunctions aimed at the State court itself, but also to injunctions aimed at parties before the court, its officers or litigants therein."[3]

It applies to suits removed from a State court as well as to suits originally instituted in the Federal forum.[4]

Accordingly a Federal court has refused to enjoin: a railway company from taking possession of land upon the termination of condemnation proceedings in a State court, to which the applicant for the injunction was a party;[5] the plaintiff in a foreclosure suit from selling property under a decree of the State court therein, although the Federal complainant was not a party to such suit, and claimed a lien upon such property, which was in the hands of a receiver appointed by such court;[6] a town from selling property to pay an assessment the collection of which had been ordered by a State court directing the laying out of a highway;[7] public officers from enforcing an assessment made by a county court which was appealable to a higher court of the State,[8] a State receiver from issuing receiver's certificates;[9] parties to a suit in a State court from carrying out an agreement sanctioned by it,[10] and an administrator from distributing the estate in his hands.[11] But an injunction has been

26 Fed. 207; Scruggs & Echols v. Am. Cent. Ins. Co. of St. Louis, C. C A., 176 Fed. 224; Quinton v. Equitable Inv. Co., C. C. A., 196 Fed. 314; Maxwell v. McDaniels, C. C. A., 184 Fed. 311.

3 Toulmin, D. J., in Whitney v. Wilder, C. C. A., 54 Fed. 554, 555; Chicago Trust & Sav. Bank v. Bentz, C. C. A., 59 Fed. 645, 647; Western Union Tel. Co. v. U. S. & M. T. Co., 221 Fed. 545.

4 Diggs v. Walcott, 4 Cranch, 179; Bandurent v. Watson, 103 U. S. 288; Lawrence v. Morgan's Ry. Co., 121 Fed. 636; Simon v. Southern Ry. Co., 236 U. S. 115, 127, 35 Sup. Ct., 255; Union Ry. Co. v. Illinois Cent. Tr. Co., C. C. A., 207 Fed. 745, see St. Louis & S. F. R. Co. v. City of Tulsa, 213 Fed. 87.

5 Dillon v. Kansas City S. B. Ry. Co., 43 Fed. 109; Western Union Tel. Co. v. Louisville & N. Ry. Co., C. C. A., 218 Fed. 628.

6 Security Trust Co. v. Union Trust Co., 134 Fed. 301.

7 Fenwick Hall Co. v. Old Colony brook, 66 Fed. 389.

8 McLaughlin v. St. Louis Southwestern Ry. Co., C. C. A., 232 Fed. 579.

9 Reinach v. Atlantic & G. W. R. Co., 58 Fed. 33.

10 Ibid.

11 Whitney v. Wilder, C. C. A., 54 Fed. 554.

granted forbidding an ancillary administrator from receiving any portion of the estate under any order of distribution, by either the local probate court or the court of original probate jurisdiction; although the court refused to enjoin him from removing any part of the estate beyond its jurisdiction.[12] It has been held: that the statute forbids any injunction to stay proceedings in a suit where the State court has no jurisdiction; at least where no Federal right has been invaded;[13] and no final judgment has been entered;[14] nor, because of local prejudice against a citizen of another state.[15] In the last case the remedy is an application for removal to the Federal court.[16] Where a bill prays an injunction or stay of proceedings in a State court, and also other relief which would be useless without such an injunction, the whole bill will be dismissed on demurrer.[17]

A county commissioners' court in Texas, when declaring the result of an election,[18] and a public service commission,[19] were said not to be within the statute. So were held not to be officers seizing intoxicating liquors under search and seizure warrants.[20] But where an appeal to a State court had been taken from the decision of a board, and the proceeding remanded after affirmance with directions to extend the time for the performance of the order, it was held that the proceedings in the State court were not terminated and that no Federal injunction could be granted.[21]

The statute forbids an injunction against the taking of depositions[22] and against any proceeding in the State Court,[23] in-

12 Ingersoll v. Coram, 132 Fed. 168; aff'd, Coram v. Ingersoll, C. C. A., 133 Fed. 126.

13 Senior v. Pierce, 31 Fed. 625, 631; Phelps v. Mut. Reserve Fund Life Ass'n, C. C. A., 61 L.R.A. 717, 112 Fed. 453. *Contra*, Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, affirming, C. C. A., 195 Fed. 556, D. C., 153 Fed. 234 (after final judgment); Carl Laemmle Music Co. v. Stern, 209 Fed. 129. See Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981.

14 Essanay Film Mfg. Co. v. Kane, 256 Fed. 271.

15 Robinson v. Wemmer, 253 Fed. 790.

16 See *infra*, § 549.

17 Molony v. Massachusetts Loan Ass'n, 53 Fed. 209.

18 August Busch & Co. v. Webb, 122 Fed. 655.

19 Central Vermont Ry. Co. v. Redmond, 189 Fed. 683.

20 Danciger v. Stone, 188 Fed. 510.

21 Central Vermont Ry. Co. v. Redmond, 189 Fed. 683.

22 Am. Shipbuilding Co. v. Whitney, 190 Fed. 109.

23 Amusement Syndicate Co. v.

cluding an injunction at the suit of a beneficiary of a trust to compel the defendant to remove a structure with which the State Court had forbidden complainant's trustee to interfere.[24]

The statute does not forbid an injunction against the commencement of a criminal,[25] or a civil suit, not already brought.[26]

The statute does not forbid a Federal injunction, obtained by a person not a party to a suit in the State court, which enjoins the complainant in the latter from committing acts, which, in the State court, he has enjoined a defendant to the Federal suit from preventing.[27] Nor, it has been held, a suit to enjoin a person from setting up a claim to the right to use a railroad switch, which the court has held that he was entitled to use, where, since the decision, the corporation has sold the switch to the plaintiff to the injunction suit.[28] Nor it was held a suit to prevent a railroad company from obtaining the benefit of a judgment authorizing it to construct a grade crossing over complainant's railroad.[29] Nor it has been held an injunction against proceedings to condemn property held for another public purpose.[30] It has been held that a Federal court can prevent by injunction the levy by a State sheriff under State process against a State judgment-debtor upon the property of a stranger to the suit and process;[31] but not the sale by the sheriff of the property of sureties on a sale bond under the execution of a State court.[32] Nor, it seems, can it enjoin the sale by the sheriff of property in his possession and in the custody of the State court,[33] although the sale of land, levied upon by the

El Paso Land Improvement Co., 251 Fed. 345.

24 Ibid.

25 *Infra*, § 271; Minneapolis General E. Co. v. City of Minneapolis, 194 Fed. 215; Jewel Tea Co. v. Lee's Summit, Mo., 198 Fed. 532.

26 Texas & Pac. Ry. Co. v. Kutemen, C. C. A., 54 Fed. 547; Laighton v. City of Carthage, Mo., 175 Fed. 145; Western Union Tel. Co. v. Cooper, 182 Fed. 710; Kansas City Gas Co. v. Kansas City, 198 Fed. 500.

27 New York Cotton Exch. v. Hunt, 144 Fed. 511. *Contra*, Amusement Syndicate Co. v. El Paso Land Improvement Co., 251 Fed. 345.

28 Oman v. Bedford-Bowling Green Stone Co., C. C. A., 134 Fed. 64.

29 Union Ry. Co. v. Illinois Cent. Ry. Co., C. C. A., 207 Fed. 745.

30 St. Louis & S. F. Ry. Co. v. City of Tulsa, 213 Fed. 87.

31 Cropper v. Coburn, 2 Curt. 465.

32 American Ass'n Ld. v. Hurst, 59 Fed. 1.

33 Daly v. Sheriff, 1 Woods, 175, Fed. Cas. No. 3,553; Southern Bank & Tr. Co. v. Folsom, C. C. A., 75 Fed. 929; Watson v. Bondurant, 2

sheriff, but not in the hands of a receiver, was enjoined at the suit of the owner, who was not a party to the judgment.[34] It has been held that a Federal court may enjoin: the entry upon land, under a title acquired by condemnation proceedings in the State court, when the application for the injunction is made by a person claiming an interest in the land, who was not made a party to those proceedings.[35]

In suits against public officers to enjoin the enforcement of an order or statute reducing the rates to be charged by public service corporations, injunctions against suits by them and also by members of the public pending litigation and preliminary injunctions have been issued.[36] After the dismissal of the bill, it was held that persons not parties to such a suit could not be enjoined from suing the public service company for damages to them individually, because of the excessive charges pending the litigation although they might be enjoined from suing upon the bond given to secure the injunction when a special master had been appointed to determine the amount of the liability, thereupon.[37]

The statute does not forbid an injunction restraining the enforcement of a final judgment.[37a] In a number of cases, the courts have refused to apply the inhibition to suits to restrain the enforcement of judgments for want of jurisdiction over the subject-matter,[38] or over the person of the defendant,[39] or because they have been unconscionably obtained,[40] but not,

Woods, 166; Perry v. Sharpe, 8 Fed. 23; *supra*, § 56.

34 Julian v. Central Trust Co., C. C. A., 115 Fed. 956.

35 Colorado Eastern R. Co. v. Chicago B. & Q. R. Co., C. C. A., 141 Fed. 898; Schultz v. Highland Gold Mines Co., 158 Fed. 337.

36 *Re* Arkansas R. Rates, 163 Fed 141 as explained; Bellamy v. St. Louis, I. M. & S. Ry. Co., C. C. A., 220 Fed. 876; reversed upon another ground Allen v. St. Louis Iron Mt. & So. Ry. Co., 230 U. S. 553, 53 Sup. Ct. 1030, 57 L. ed. 1625; Union R. R. Co. v. Illinois Cent. R. Co., C. C. A., 207 Fed. 745.

37 Bellamy v. St. Louis, I. M. & S. Ry. Co., C. C. A., 220 Fed. 876, reversing 211 Fed. 172, see *supra*, §§ 113, 258g.

37a Simon v. Southern Ry. Co., 236 U. S. 115, 124, 35 Sup. Ct. 255, 258, 59 L. ed. 492.

38 Simon v. Southern Ry. Co., 236 U. S. 115, 130, 35 Sup. Ct. 255, affirming C. C. A., 195 Fed. 556, D. C., 153 Fed. 234; McFarland v. Curtin, C. C. A., 233 Fed. 728 (wh disclaimer was filed without authority). *Re* Long Island N. S. P. & F. Co., 5 Fed. 599, The Revear, 191 Fed. 253. See *infra*, § 599.

39 Simon v. Southern Ry. Co., 236 U. S. 115, 132.

40 Marshall v. Holmes, 141 U. S. 589; Luton v. Safe Deposit & Title

in the absence of other equities, because of a defense which might have been raised in the original suit.[41] Thus they have restrained: the use of a judgment of a State court when the validity of the judgment was not thereby impaired;[42] the issue of execution upon a judgment of a State court, entered against a party who was not served with process;[43] a defendant from selling, encumbering, or in any way disposing of, lands bought at a sheriff's sale;[44] and the wrongful or an inequitable use of an execution on a judgment of a State court.[45] It has been held: that a District or Circuit Judge or District Court has no power to enjoin the enforcement of a judgment in a State court after a writ of error issued from the Supreme Court of the United States accompanied by a *supersedeas*;[46] and that this can be done, if at all, only by a Justice of the Supreme Court.[47] The proper remedy is a contempt proceeding.[48] Pending such a writ of error the plaintiff in error cannot secure relief against the judgment for want of jurisdiction by a suit in a District Court of the United States.[49] But where the judgment was against a surety on a bond and the claims exceeded the penalty, the District Court enjoined its collection until it was determined what proportion of the penalty was due the judgment creditor.[50]

When the complainants, the day a writ of error was dismissed

Guaranty Co., 147 Fed. 824; see Intermela v. Perkins, 213 Fed. 106.

41 McKinnon v. New York Assets Realization Co., 217 Fed. 339; Western Union Tel. Co., v. Louisville Ry. Co., C. C. A., 218 Fed. 628; Eggers v. Krueger, C. C. A., 236 Fed. 852; Du Pont v. Gardiner, C. C. A., 238 Fed. 755; Pell v. McCabe, 254 Fed. 356, 357; General Film Co. v. Sampliner, C. C. A., 252 Fed. 443.

42 Linton v. Mosgrove, 14 Fed. 543, criticised in Am. Ass'n Ld. v. Hurst, 59 Fed. 1, 4, but supported by Provident L. & Tr. Co. v. Mills, 91 Fed. 435; Lehman v. L. ed. 657; *infra*, § 428.

Graham, C. C. A., 135 Fed. 39; see *supra*, § 51.

43 Southern R. Co. v. Simon, 153 Fed. 234; Simon v. Southern Ry. Co., 236 U. S., 115, 127, 35 Sup. Ct. 255.

44 Massie v. Buck, C. C. A., 128 Fed. 27. See *supra*, § 51.

45 Linton v. Safe Deposit & Title Guaranty Co., 147 Fed. 824.

46 Murray v. Overstoltz, 8 Fed. 110.

47 Ibid.

48 *Re* McKenzie, 180 U. S. 536, 45

49 American Surety Co. v. Mills, C. C. A., 232 Fed. 841.

50 Ibid.

for want of prosecution, deposited in the court's register the amount due under the judgment; it was held that they were entitled to an injunction, restraining its collection pending final disposition of their suit for specific performance of a contract of settlement upon condition that the deposit remain as security for the amount due the defendant upon the decree in such suit.[51]

§ 270a. Injunctions to protect jurisdiction of Federal courts. The inhibition does not apply to injunctions granted to protect the jurisdiction of the Federal courts. A Federal court has power to issue an injunction to stay proceedings in a State court which interfere with the enforcement of one of its own judgments, and to stay proceedings which have been instituted or continued after the beginning of or removal of the suit into the Federal jurisdiction.[1] "It is now so thoroughly settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a Federal court for other purposes than that of enjoining proceedings in a State court, that the proposition needs no discussion."[2] Such an injunction should rarely be issued.[3]

If the plaintiff threatens to proceed in the State court after a removal,[4] or if he refuses to file his pleadings so that a transcript can be obtained,[5] he may be enjoined from taking any further steps therein. But an injunction was refused where, although a

51 McSweeney Packing Co. v. Bashlin, C. C. A., 211 Fed. 922.

§ 270a. 1 French v. Hay, 22 Wall. 230, 22 L. ed. 857; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462; s. c., 130 Fed. 794; Fisk v. Union Pac. R. Co., 10 Blatchf. 518; Sharon v. Terry, 1 L.R.A. 572, 36 Fed. 337; Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. 663, 664, 667; Abeel v. Culberson, 56 Fed. 329; Baltimore & O. R. Co. v. Ford, 85 Fed. 170; Bowdoin College v. Merritt, 59 Fed. 86; Central Trust Co. v. St. Louis, A. & T. Ry. Co., 59 Fed. 385; Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24; Garner v. Second Nat. Bank, 67 Fed. 833; Lanning v. Osborne, 79 Fed. 657; Stewart v. Wisconsin Cent. Ry. Co., 117 Fed. 782; Massie v. Buck, C. C. A., 128 Fed. 27; Miller & Lux v. Rickey, 146 Fed. 574; Gay v. Hudson River El. Power Co., 182 Fed. 279; Nelson v. Camp, C. C. A., 191 Fed. 712; Libbey Glass Co. v. McKee Glass Co., 216 Fed. 172; Waldo v. Wilson, C. C. A., 4th Ct., 231 Fed. 655; *supra*, § 52; *infra*, §§ 284, 313.

2 Gregory v. Pike, 67 Fed. 835, 836, per Putnam, J.

3 Frishman v. Insurance Co., 41 Fed. 449; Sinclair v. Pierce, 50 Fed. 851.

4 Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239. See *infra*, §§ 554, 555.

5 Atlantic Coast Ry. Co. v. Feaster, 260 Fed. 881.

petition for removal with a bond had been filed in the State court, no action had been taken upon them and no copy of the record had been filed in the Federal court.[6] Where the Federal court after an attempted removal has refused to assume jurisdiction upon the ground that the case was not removable, the judgment cannot be reviewed by a bill in equity to enjoin the State court from further proceedings.[7] In a possessory suit where jurisdiction of the Federal court has first attached, it may forbid proceedings from the State court, which affect the title or possession of the subject matter.[8] It has been held: that where property is in the possession of a receiver of a Federal court, such court may forbid a suit in the State court which attempts to establish an easement thereupon,[9] but not an action *in personam* against the receiver.[10] That where property has been sold under a decree directing that the purchaser pay all claims against the receiver, the court will restrain a suit against the purchaser [11] in the State court, but that this rule does not apply where property in the possession of a receiver is returned to the original owners on the same conditions.[12]

In a proper case after the appointment of a receiver the Federal court may restrain suits previously or subsequently brought which interfere with the administration of the assets.[13] Such injunctions have been granted to restrain the continuance of a suit previously begun to enforce a lien on the property, in which the plaintiff had been guilty of laches; [14] to restrain a separate action against a party to the foreclosure suit to enforce an

6 Coeur d'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280. See Missouri, K. & T. Ry. Co. v. Scott, 13 Fed. 793.

7 Pacific Live Stock Co. v. Lewis, 217 Fed. 95.

8 Western Union Tel. Co. v. U. S. & Min. Tr. Co., C. C. A., 221 Fed. 545; Shereman Nat. Bank v. Shubert Theatrical Co., 224 Fed. 225, *supra*, § 52-56.

9 Holmes v. Dowie, C. C. A., 177 Fed. 182.

10 Smith v. Jones Lumber & Mercantile Co., 200 Fed. 647.

11 Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. 663, 664, 667; Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 59 Fed. 385. See § 394, *infra*.

12 Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81.

13 Equitable Trust Co. of New York v. Western Pac. Ry. Co., 231 Fed. 478; Jackson v. Parkersburg & Ohio Valley Elec. Ry. Co., 233 Fed. 784; Security Inv. Co. of Pitts. v. First Nat. Bank of Beaumont, Tex., C. C. A., 203 Fed. 632.

14 Jackson v. Parkersburg & Ohio Valley Elec. Ry. Co., 233 Fed. 784, but see *supra*, §§ 52, 55.

agreement to make advances for interest and a sinking fund.[15] To restrain a suit to collect an extension note which matured before other extension notes, all issued under a scheme of extensions to which the note in suit referred, the early maturity of the note in suit, having been concealed from the other creditors when its collection would have given its holder an unconscionable preference in the distribution of property in the hands of the receiver.[16]

It has been held that the Federal courts should not restrain suits against the owners of property in their possession which will not interfere with the possession [17] nor restrain an action to foreclose a mortgage upon property in the hands of its receiver.[18]

Following the analogy of an action authorized by statute in admiralty and bankruptcy, the Federal courts sometimes, include in the order for the appointment of a receiver of the property of a corporation an injunction against the commencement or continuance of any suit against the company in a State court by any one. This practice is not justified by precedent. It is in conflict with the public policy of the United States as expressed in the Act of Congress authorizing suits against Federal receivers without the consent of the courts that appointed them.[19]

That such an order cannot forbid without special reason, suits previously instituted has been held by a Circuit Court of Appeals.[20] A clause in an order appointing a receiver of property of a corporation which restrains the defendant and other persons from interfering with or assuming control of the claims and causes of action of the company, does not prevent the prosecution of a previous suit by stockholders against the defendant and its directors to enforce a cause of action held by the company against the latter.[21] When a creditor of a corporation has begun

15 Equitable Trust Co. v. Western Pac. Ry. Co., 231 Fed. 478.

16 Security Inv. Co. of Pitts. v. First Nat. Bank of Beaumont, Tex. C. C. A., 203 Fed. 632.

17 Equitable Trust Co. of N. Y. v. Pollitz, C. C. A., 207 Fed. 74.

18 Westinghouse Elec. & Mfg. Co. v. Binghamton Ry. Co., 255 Fed. 378.

19 Judicial Code § 66; see § 314 *infra*.

20 Central Trust Co. v. Chicago Ry. & Tr. Co., C. C. A., 224 Fed. 706, in which the author was counsel.

21 Am. Steel Foundries v. Chicago Ry. & Tr. Co., 231 Fed. 1003, in which the author was counsel.

proceedings in a Federal court to enforce his claim against the corporation, the defendant corporation may be enjoined "from taking proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders and any other persons, and from making any distribution or transfer of any of its effects."[22] Where suits were pending in the State and Federal courts by the same plaintiff against several insurers, whose liability was proportionate to the amount the insurance of each bore to the whole loss, and the same defenses had been interposed on behalf of all, it was held: that a Federal court could not grant an injunction to restrain the actions in the State courts, as well as those in the Federal courts, upon a bill seeking an adjustment of their liability in a single suit.[23]

§ 271. Injunctions against criminal proceedings. As a general rule, a court of equity cannot grant an injunction to forbid the prosecution in any court, State or Federal, of criminal proceedings, whether then pending,[1] or subsequently begun;[2] nor against a removal from office, State[3] or Federal.[4] A Federal court has the power to enjoin a State Attorney-General or other prosecuting officer,[5] or a District Attorney of the United States[6]

[22] Fisk v. Railroad Co., 10 Blatchf. 518. But see Kessler v. Continental C. & I. Co., 42 Fed. 258; Window Glass Mach. Co. v. New Bethlehem Window Glass Co., C. C. A., 264 Fed. 822.

[23] Rochester German Ins. Co. v. Schmidt, C. C. A., 175 Fed. 720; reversing 126 Fed. 998.

§ 271. [1] Lord Montagne v. Dudman, 2 Ves. Sr. 396; In re Sawyer, 124 U. S. 200, 31 L. ed. 402; Harkrader v. Wadley, 172 U. S. 148, 169, 43 L. ed. 399, 406; Fitts v. McGhee, 172 U. S. 516, 517, 43 L. ed. 535, 536; Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362; City of Bainbridge v. Reynolds (Georgia), 36 S. E. 935.

[2] Harkrader v. Wadley, 172 U. S. 148, 169, 43 L. ed. 399, 406; Fitts v. McGhee, 172 U. S. 516, 517, 43 L. ed. 535, 536; Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362; City of Bainbridge v. Reynolds, 11 Georgia, 758, 36 S. E. 935.

[3] In re Sawyer, 124 U. S. 2 31 L. ed. 402; People ex rel. Corsea den v. Howe, 177 N. Y. 499.

[4] White v. Berry, 171 U. S. 366 43 L. ed. 199; White v. Butler, 1 U. S. 379, 43 L. ed. 204.

[5] *Ex parte* Young, 209 U. S. 12 161-163, 52 L. ed. 714, 729, 735 *supra*, § 105b; Little v. Tanner, 208 Fed. 605; Grand Union Tea Co. v. Evans, 216 Fed. 791; Van Deman & Lewis Co. v. Rostm, 21 Fed. 827; Raich v. Truax, 219 Fed 273, aff'd 239 U. S. 33; Wiseman v. Tanner, 221 Fed. 694; Evansville Brewing Ass'n v. Excise Commission of Jefferson County, 225 Fed.

from enforcing a statute which is unconstitutional or from acting under color of a valid statute in an unauthorized manner which is injurious to the property rights of the complainant.[7] But it cannot enjoin from proceeding under an erroneous construction of a valid statute.[8] When a criminal indictment or criminal proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court; the latter court, having first obtained jurisdiction over the subject-matter, has the right, even in a criminal case, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed; and it may enjoin the State Attorney-General or other prosecuting officers,[9] from instituting a criminal proceeding in such a case, especially when the injunction is necessary to prevent irreparable injury to the complainant's business or property; but it cannot enjoin any investigation of action by a grand jury, nor restrain a State court from acting in any case brought before it, either of a civil or criminal nature.[10] The same rule applies to criminal proceedings instituted under an invalid municipal ordinance.[11]

204; American Sugar Refining Co. v. M'Farland, 229 Fed. 284.

6 Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101; Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525, 527, *supra*, §§ 100, 105c; Weyman-Brutan Cl. v. Ladd, C. C. A., 231 Fed 898.

7 Ibid.

8 Arbuckle v. Blackburn, C. A., 113 Fed. 616; Central Conservers' Co. v. Austin, 238 Fed. 616; Jacob Hoffman Brewing Co. v. McElligott, C. C. A., 259 Fed. 525.

9 Ibid, *Ex parte* Young, 209 U. S. 123, 161-163, 52 L. ed. 714, 729 730 and cases cited.

10 McNeill v. Southern Ry. Co., 202 U. S. 543, 50 L. ed. 1142; Mississippi Railroad Commission v. Illinois Cent. R. R. Co., 203 U. S. 335 51 L. ed. 209; *Ex parte* Young, 209 U. S. 123, 161-163, 52 L. ed. 714 729, 730; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747. See also Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169; Pabst Brewing Co. v. Crenshaw, 120 Fed. 144.

11 Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177; Hutchinson v. Beckham, C. C. A., 118 Fed. 399; Palatka Water Works v. Palatka, 127 Fed. 161; Glucose Refining Co. v. Chicago, 138 Fed. 209. See §§ 25, 105, *supra*. Injunctions were granted when the enforcement of the ordinance tended to destroy plaintiff's business. Jewel Tea Co. v. Lee's Summit, Mo., 198 Fed. 532. *Contra*, Christian Moerlein Brewing Co. v. Hill, 166 Fed. 140; Moss & Co. v. McCarthy, 191 Fed. 202, a bucket-shop case;

Where the State law gives an opportunity to test the validity of an order of a State board by appeal or other proceedings in the State tribunals, a Federal court of equity will usually not interfere.[12]

It has been held: that where no irreparable injury is shown, an injunction may issue against proceedings to impose a fine for the non-payment of a tax, in order to prevent a multiplicity of suits.[13]

"A court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law."[14]

"This court," said Lord Hardwicke, speaking of the Court of Chancery, "has no jurisdiction to stay proceedings on a mandamus; nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of."[15] But it has been held that a Federal court may enjoin a State officer from an act, although an application is then pending for a mandamus to compel him to perform it, and it was said that the injunction would be a defense to the mandamus proceedings.[16]

§ 271a. Injunction against the enforcement of municipal ordinances. Ordinarily a Federal court will not enjoin the passage of a municipal ordinance except perhaps under extraordinary circumstances;[1] even though the enactment would be an impairment of the obligation of a contract.[2] For this would be

Yee-Gee v. City & County of San Francisco, 235 Fed. 757.

12 Gulf, Colorado, &c. Ry. v. Texas, 246 U. S. 59, *supra*, §§ 105c, d. But see Post Printing & Pub. Co. v. Brewster, 246 Fed. 321.

13 Chicago v. Collins, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224. But see *supra*, §§ 11, 12; *infra*, § 271b.

14 Brown, J., in Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 47 L. ed. 778, 780.

15 Lord Montague v. Dudham, 2 Vesey Sr. 396, 398.

16 Bank of Kentucky v. Stone, 88 Fed. 383, 398.

§ 271a. 1 Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp., C. C. A., 2nd Ct. A. D. 1920, —— Fed. ——.

2 Ibid.; New Orleans Water Works Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518; Murphy v. East Portland, 42 Fed. 308; Mo. & K. I. Ry. Co. v. Olathe, 156 Fed. 624; Stevens v. St. Mary's Training School, 144 Ill. 336; Des Moines Gas Co. v. Des Moines, 44 Iowa 505, *supra*, § 263a.

an interference with legislative discretion.[3] Moreover, the invalidity of the ordinance will prevent its passage unaccompanied by an attempt to carry it into execution by giving to the complainant a legal grievance.[4]

A Federal court of equity will in a proper case enjoin a city from enforcing an unconstitutional ordinance: reducing the charges made by a person acting in a public employment, such as a street railroad company or a water company; even when there is no impairment of the obligation of a contract if a violation subjects the complainant to a penalty at the suit of each of its customers and the rates are so low as to take its property without due process of law.[5] It may set aside and declare null and void a municipal ordinance which impairs the operation of a contract with the complainants, when the invalidity of the ordinance does not appear upon its face, but must be proved by evidence *aliunde*, and is a cloud upon the title of the complainants to a franchise,[6] or restrain the removal of a railroad from a street which is directed by an illegal ordinance.[7] The danger of a multiplicity of criminal proceedings, combined with irreparable injury to business, may sustain jurisdiction over a bill to enjoin the enforcement of an ordinance imposing a license tax,[8] or a penalty for an act that is not unlawful.[9] If an ordinance is within the power of the enacting body and not obnoxious to the State or Federal Constitution, its wisdom or propriety cannot be questioned by the courts.[10]

§ 271b. Injunctions against assessments and collection of taxes and betterments. A Federal court of equity may enjoin the assessment [1] or collection [2] of a tax [3] or of an assessment for a betterment [4] when the assessment of either would constitute

3 Ibid.

4 Ibid.

5 Knoxville Gas Co. v. City of Knoxville, C. C. A., 261 Fed. 283.

6 Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 568, 580, 44 L. ed. 886, 890, 896.

7 Seaboard Airline Ry. Co. v. City of Raleigh, 219 Fed. 573.

8 McCormack Bros. Co. v. City of Tacoma, 201 Fed. 374; Seaboard Airline Co. v. City of Raleigh, 219 Fed. 573.

9 Borden's Condensed Milk Co. v. Baker, C. C. A., 177 Fed. 906.

10 Seaboard Airline Co. v. City of Raleigh, 219 Fed. 573.

§ 271b. 1 Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599.

2 Union Pac. Ry. Co. v. Cheyenne, 113 U. S. 516, 28 L. ed. 1098.

3 Raymond v. Chicago Union Traction Co., 207 U. S. 20, 39, 52 L. ed. 78, 88.

4 Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599.

a cloud on the title to real estate in which the complainant has an interest,[5] or the collection would lead to a multiplicity of suits,[6] or would produce irreparable injury for which a court of law could afford no adequate remedy[7] or when the assess-

[5] Ohio Tax cases, 232 U. S. 576; Greene v. Louis. & Interurban R. R. Co., 244 U. S. 499; Sanford v. Gregg, 58 Fed. 620; Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 358; Kansas City, Ft. S. & M. R. Co. v. King, C. C. A., 120 Fed. 611; Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. ed. 78; Taylor v. Louisville & N. R. Co., 88 Fed. 350; Hutchinson v. Beckham, C. C. A., 118 Fed. 399. In Shelton v. Platt, 139 U. S. 591, 596, 597, 35 L. ed. 273, 276, 277.

[6] Union Pac. Ry. Co. v. Cheyenne, 113 U. S. 516, 28 L. ed. 1098. Pac. Exp. Co. v. Seibert, 44 Fed. 310, 313, per Caldwell, J. Except under extraordinary circumstances. It has been said: "It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each day's penalty" for failure to pay a tax, "the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with lawsuits. Whatever the rule may be in the case of natural persons, the court will presume that a State is incapable of such a vulgar passion and, until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights." Dundee Mtg. T. Ins. Co. v. School District, 29 Fed. 359; Cummings v. National Bank, 101 U. S. 153, 156, 25 L. ed. 903, 904; Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499; Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 357; Sanford v. Poe, C. C. A., 60 L. R. A. 641, 69 Fed. 546; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 39, 52 L. ed. 78, 88. But see City Council of Augusta v. Timmerman, C. C. A., 233 Fed. 216.

[7] Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 766, 767; Union Pac. R. R. Co. v. Weld County, 247 U. S. 283. Nevada-California Power Co. v. Hamilton, 235 Fed. 317, 319. Lancaster v. Police Jury, 254 Fed. 179.

In Shelton v. Platt, 139 U. S. 591, 596, 597, 35 L. ed. 273, where the only jurisdictional averments were "that the property of the United States Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business, and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience" and

ment as made by a fraud of which equity might take cognizance [8] such as an intentional and systematic under valuation of other taxable property,[9] but not if the over valuation of the complainant's property was made in good faith;[10] or where after the collection of a tax has been enjoined because its assessment violates constitutional rights a similar assessment is made for the succeeding year.[11] It has been held that, injunctions in such cases also lie when authorized by State statutes.[12] Where a corporation is under a legal obligation to pay taxes assessed upon its stockholders that may be a sufficient reason for its obtaining equitable relief.[13] Otherwise an injunction will not be granted to restrain the collection of taxes except under extraordinary circumstances.

"that your orator and the United States Express Company are without adequate remedy at law in the premises;" it was held that no injunction should issue. There, however, the State law authorized the recovery of the taxes after payment if their illegality was established. See Allen v. Pullman's Palace Car Co., 139 U. S. 658, 35 L. ed. 303. See also Keithsburg Bridge Co. v. McKay, 42 Fed. 427; Pacific Exp. Co. v. Seibert, 44 Fed. 310; Hoey v. Coleman, 46 Fed. 221, 223.

[8] Johnson v. Wells Fargo & Co., 239 U. S. 234; First Nat. Bank v. Douglass County, 3 Dill. 298; Union Pac. R. Co. v. McShane, 3 Dill. 303, 312; Atchison, T. & S. F. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456, but see Nye, Jenks & Co. v. Washburn, 125 Fed. 817. But see Union Pac. R. Co. v. Board of Com'rs, C. C. A., 217 Fed. 540.

[9] Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499; Atchinson, T. & S. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456.

[10] Lacy v. McCafferty, C. C. A., 215 Fed. 352; Illinois Cent. R. Co. v. Mississippi Railroad Commission, 229 Fed. 249.

[11] Johnson v. Wells Fargo & Co., 239 U. S. 234; affirming Wells Fargo & Co. v. Johnson, C. C. A., 214 Fed. 180.

[12] Mudge v. McDougall, 220 Fed. 563. *Contra,* Illinois License Co. v. Newman, 141 Fed. 449. See Stonebracker v. Hunter, C. C. A., 215 Fed. 67. See *supra,* § 82.

[13] Detroit, G. H. & M. Ry. Co. v. Fuller, 205 Fed. 86; Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 75, 113, 49 L. ed. 669, 672, 688; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 39, 52 L. ed. 78, 88; Atchison, T. & S. F. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456; Hannewinkle v. Georgetown, 15 Wall. 457, 21 L. ed. 231; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 669; Milwaukee v. Koeffler, 116 U. S. 219, 29 L. ed. 612; Pittsburg, etc., Ry. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354; Indiana Mfg. Co. v. Koehne, 23 S. Ct. 452,

When the ground of the injunction is, that otherwise a cloud would be cast on the title, that bill must contain a specific averment that the complainant owns or holds an interest in real estate.[15] Where the complainant's property was by law exempt, since the invalidity of the assessment was consequently apparent on its face, an injunction was denied.[16]

Where the tax illegally assessed was divided along different local subdivisions so that thirty-five suits would be required to obtain relief at common law, equity granted the relief.[17] So, where part of the money was paid to the State which could not be sued, and to recover the rest required suits against three or four officers.[18] So, in the case of discrimination, in valuation, where the assessments upon the property under value could not be increased without making more than a thousand owners parties.[19]

Where a suit in a State court is necessary to collect the tax, its defense by the tax payer gives him an adequate remedy,[20] unless the penalties for delay in payment are so great to afford independent ground of equitable relief.[21] Where there was an ample remedy in the State law, by an action against a single officer to recover an illegal tax after its payment[22] or by cer-

188 U. S. 681, 47 L. ed. 651; Mudge v. McDougall, 222 Fed. 563.

15 Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Risley v. City of Utica, 173 Fed. 502.

16 City Council of Augusta v. Timmerman, C. C. A., 233 Fed. 216.

17 Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 356, 358; Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 356, 358. *Cf.* Sanford v. Poe, C. C. A., 69 Fed. 546, 60 L.R.A. 641; Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444. See § 25, *supra*.

18 Raymond v. Chicago Union Traction Co., 207 U. S. 20, 39, 52 L. ed. 78, 88; *Cf.* Atchison, T. & S. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456; Union Pac. Ry. Co. v. Weld County, 247 U. S. 282; Mayor, etc., of Jersey City v. Central R. Co. of N. J., C. C. A., 212 Fed. 76.

19 Mayor, etc., of Jersey City v. Central R. Co. of N. J., C. C. A., 212 Fed. 76.

20 Union Sulphur Co. v. Bird, 249 U. S. 172.

21 U. S. R. S., § 3224; Snyder v. Marks, 109 U. S. 189, 27 L. ed. 901. But see Pollock v. Farmers' L. & T. Co., 157 U. S. 429, 39 L. ed. 759; *infra*, §§ 105, 284.

22 Dalton Adding Machine Company v. State Corporation Commission, 236 U. S. 699; Union Pac. R. Co. v. Board of Com'rs, C. C. A., 217 Fed. 540.

tiorari,[23] or appeal to a State board;[24] the court refused to interfere.

No injunction will lie against the assessment or collection of an internal revenue tax imposed by the United States.[25]

Delay pending litigation in the State courts to set aside the assessment upon other grounds and subsequent negotiate for a settlement of the controversy is a sufficient excuse for delay in seeking the injunction.[26]

§ 272. Injunctions to restrain the alienation of property. Injunctions may be obtained to prevent the alienation of property "where it would work irremediable or gross injustice."[1] An injunction will, therefore, issue to prevent the transfer of notes, bills of exchange, and other documents, whether negotiable or not, whose possession gives their holder a presumptive title to the rights which they evidence,[2] when obtained from the plaintiff by the defendant through duress, fraud, or other iniquity; or when forged;[3] or when, though the holder may have properly obtained them, he threatens or is about to use them in an inequitable manner.[4] To restrain a receiver of a national bank, pending a determination of a preferential claim to a fund, from transmitting the same to the treasurer of the United States; whence it could not be recovered by compulsory process.[5] An injunction may be granted to prevent a party from making vexatious alienations of land pending a suit concerning the title to the same.[6] For it was said that, otherwise, the plaintiff might be put to the expense of making each vendee or grantor a

23 Spencer v. Babylon R. Co., C. C. A., 250 Fed. 24.

24 Puffer Mfg. Co. v. Robertson, C. C. A., 248 Fed. 463, for a case where such an appeal was held not to afford an adequate remedy see Grene v. Louisville & Interurban R. R. Co., 244 U. S. 499.

25 U. S. R. S., § 3224, Comp. St., § 1901, *supra*, § 100a.

26 Mayor, etc., of Jersey City v. Central R. Co. of N. J., C. C. A., 212 Fed. 76 (a delay of 15 years).

§ 272. 1 Story's Eq. Jur., § 953.

2 Osborn v. U. S. Bank, 9 Wheat. 738, 845, 6 L. ed. 204, 229; Lloyd v. Gurdon, 2 Swanst. 180; Hood v. Aston, 1 Russ. 412; Lord Chedworth v. Edwards, 7 Ves. 46; Reeve v. Perkins, 2 J. & W. 390; Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415.

3 Esdaile v. La Nauze, 1 Y. & C. 394.

4 Anon., 6 Madd. 10.

5 American Can Co. v. Williams, C. C. A., 149 Fed. 200.

6 Daly v. Kelly, 4 Dow. 417; Echliff v. Baldwin, 16 Ves. 267. But see Turner v. Wight, 4 Beav. 40.

party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by the new outstanding claims of title under the threatened transfer;[7] but where the filing of the bill constituted notice of *lis pendens* such an injunction was denied although the plaintiff had failed to record a notice under the State law.[8]

The sale or transfer,[9] or removal beyond the jurisdiction of the court,[10] of a chattel, the loss of which could not be compensated in damages may also be thus restrained; and so has been the sale of other personal property,[11] including a patent,[12] and ore from a mine[13] pending a suit affecting the same. An injunction was granted forbidding the defendants from buying ore taken from the complainants mines.[14] Injunctions have also been granted at the suit of a part-owner to prevent the sailing of a ship until his share could be ascertained, and a bond given to secure him against loss upon the voyage;[15] to prevent the removal of timber wrongfully cut down;[16] and to prevent the trustees of a dissenting chapel from appointing as a minister a person not duly qualified according to its constitution.[17]

§ 273. Injunctions to prevent waste. An injunction will issue to prevent waste, whether legal or purely equitable.[1] Waste is a permanent injury to real estate committed by a per-

7 Daniell's Ch. Pr. (2d Am. ed.) 1873.

8 Zander v. Phillips, C. C. A., 213 Fed. 29.

9 Gibson v. Lewis, 11 Phila. (Pa.) 476; Lady Arundell v. Phipps, 10 Ves. 139; Daniell's Ch. Pr. (2d Am. ed.) 1872.

10 Green v. Hanberry, 2 Brock. 403; Haly v. Goodson, 2 Mer. 77; Christie v. Craig, 2 Mer. 137.

11 Bateau v. Bernard, 3 Blatchf. 244; Higgins v. Jenks, 3 Ware, 17; High on Injunctions, (4th ed.) § 1499.

12 United Wireless Tel. Co. v. Nat. El. Signaling Co., C. C. A., 198 Fed. 385.

13 Montana Min. Co. v. St. Louis Min. & Mill. Co. of Montana, C. C. A., 168 Fed. 514.

14 Goldfield Consol. Mines Co. v. Richardson, 194 Fed. 109. But see Daniels v. Portland Mining Co., C. C. A., 202 Fed. 637.

15 Haly v. Goodson, 2 Mer. 77; Christie v. Craig, 2 Mer. 137. But see Wilkinson v. Dobbie, 12 Blatchf. 298.

16 Bradley v. Reed, 2 Pittsb. (Pa.) 519; Anon., 1 Ves. Sr. 93; Daniell's Ch. Pr. (2d Am. ed.) 1874.

17 Milligan v. Mitchell, 1 M. & K. 446.

§ 273. 1 Garth v. Cotton, 1 Dick. 183; Thruston v. Mustin, 3 Cranch, C. C. 335; U. S. v. Gear, 3 How. 120, 11 L. ed. 523; Fletcher v. N. O. N. E. R. Co., 20 Fed. 345; Lanier v. Alison, 31 Fed. 100; Bispham's Eq., §§ 429-432.

son in possession with a limited interest in the same. Legal waste consists of such acts as would be considered waste at common law; equitable waste, of such acts as at law would not, under the circumstances of the case, be considered waste, but which are so esteemed in the view of a court of equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.[2] Such is wilful and wanton injury to land committed by a tenant without impeachment for waste.[3] The interference of equity in cases of this kind is justified, not only by the fear of irremediable injury, but also because the tenant for life or years is considered to stand in a trust relation toward the remainderman. So anxious is equity to prevent waste, that it has sustained a bill praying such an injunction filed in behalf of a child in its mother's womb.[4]

An injunction will be granted to restrain acts in the nature of waste committed by one in possession of land the title to which is in litigation.[5] It has been held that an applicant for the purchase of government land whose claim is disputed in the land office cannot obtain an injunction to prevent acts of waste by county officers.[6]

Upon a bill for an injunction against waste, a dispute as to the title may be decided.[7]

A bill for an injunction against waste, which is ancillary to an action for ejectment, should be dismissed upon the entry of judgment in favor of the defendant in the action at common law.[8]

2 Daniell's Ch. Pr. (2d Am. ed.) 1854, 1855.

3 Vane v. Lord Barnard, 2 Vern. 738; Garth v. Sir John Hind Cotton, 1 Dick. 183; s. c., 1 White & Tudor's Lead. Cas. in Eq. (6th ed.) 806; Bispham's Eq. § 134.

4 Musgrave v. Parry, 2 Vern. 710; Lutterel's Case, cited Prec. Ch. 50; Scatterwood v. Edge, 1 Salk. 229.

5 Lancaster v. Kathleen Oil Co., 241, U. S. 551; U. S. Parrott, 1 McAll. 271; Lanier v. Alison, 31 Fed. 100; U. S. v. Honolulu Consol. Oil Co., 249 Fed. 167; United States v. Hodges, 218 Fed. 87; El Dora Oil Co. v. United States, 229 Fed. 946; Beatty Oil & Gas Co. v. Blanton, 245 Fed. 979; Lindlay v. Raydur, 239 Fed. 928.

6 McBride v. Pierce County, 44 Fed. 17.

7 Peck v. Ayers & Lord Tie Co., C. C. A., 116 Fed. 273; Douglas Co. v. Tennessee Lumber Mfg. Co., C. C. A., 118 Fed. 438.

8 West v. East Coast Cedar Co., C. C. A., 113 Fed. 742.

§ 274. Injunctions to prevent the continuance of a nuisance. The interference of equity to enjoin the continuance of a nuisance is not only due to the fact that the acts complained of produce irreparable injury, but also is allowed to prevent the multiplicity of suits that would be necessary were the plaintiff confined to his remedy at common law.[1] Nuisances are of two kinds: those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.[2] The use of this remedy to suppress a public nuisance is of very ancient date.[3] It was applicable in England, both to nuisances strictly so called and to *purprestures*. "By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, ports, or streets; and the difference between *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture*, but where the *jus publicum* is violated it is a *nuisance*. In cases of *purprestures* the remedy is either by information for an intrusion at the common law, or by information in equity at the suit of the attorney-general. The consequence of a judgment at common law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance, whilst upon an information in equity, where the trespass does not produce any public injury, the court may direct an inquiry whether it is most beneficial to the Crown to abate the *purprestures*, or to suffer the erection to remain and be assessed as a part of the legal revenue."[4] Cases of public nuisance may be enjoined at the suit of the attorney-general, who in England sues by information.[5] It has been held that the United States may sue to enjoin acts in pursuance of an unlawful conspiracy forcibly to obstruct interstate commerce and the transport of the mails;[6] and to enjoin a nuisance which threatens injury to works in aid of commerce constructed under the authority of the national

§ 274. [1] Fishmongers' Co. v. East India Co., 1 Dick. 163; Atty. Gen. v. Nichol, 16 Ves. 338, 343.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1857.

[3] Ibid.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1857, citing Atty. Gen. v. Richards, 2 Anst. 603; Atty. Gen. v. Johnson, 2 J. Wil. 87. See also U. S. v. Gear, 3 How. 120, 11 L. ed. 523.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1858.

[6] In re Debs, 158 U. S. 581, 39 L. ed. 1101; In re Lennon, 166 U. S. 548, 41 L. ed. 1110.

government.[7] A public nuisance may be restrained at the suit of any who have suffered by it special damage distinct from that which it causes to the public at large; but not otherwise.[8] A bill, for example, may be filed by a State to enjoin the erection of a bridge across a navigable stream which will injure her commerce;[9] but not by a city for a similar reason,[10] unless its property, for example, a wharf, is thereby injured.[11]

A private nuisance is an act, or series of acts, unaccompanied by an act of trespass, which causes a substantial injury to a person's property, health, or comfort. It will always be restrained when it would otherwise cause an irreparable injury or a multiplicity of suits.[12] It includes the blocking of the entrance to a railroad station by hackmen,[13] or of a railroad siding by wagons.[14]

"It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. This, however, is not the law now."[15] Formerly, an injunction was rarely issued to restrain a nuisance until the plaintiff's right of action had been established at law; "but now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the

7 U. S. v. Miss. & R. R. Boom Co., 3 Fed. 548; s. c., 1 McCrary, 601.

8 Baines v. Baker, Amb. 158; Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Irwin v. Dixion, 9 How. 10, 13 L. ed. 25; Spooner v. McConnell, 1 McLean, 337; Works v. Junction R. Co., 5 McLean, 425.

9 Pennsylvania v. W. & B. B. Co., 13 How. 518, 14 L. ed. 249.

10 Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012.

11 St. Louis v. Knapp Co., 104 U. S. 658, 26 L. 883. A railroad company cannot have an injunction against the keeping of a saloon where its workmen buy liquors. Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 37 L. ed. 686.

12 Osborne v. Barter & Goddins, anno. 26 Eliz. Choyce Cas. in Ch. (ed. of 1870), p. 176; Parker v. Winnipiseogee Lake C. & W. Co., 2 Black, 545, 17 L. ed. 333; Woodruff v. North Bloomfield G. M. Co., 18 Fed. 753; St. Helen's S. Co. v. Tipping, 11 H. L. C. 642.

13 Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192; Talbot v. Independent Order of Owls, C. C. A., 219 Fed. 660.

14 Robinson v. Baltimore & O. R. Co., C. C. A., 129 Fed. 753.

15 Byles, J., in Hole v. Barlow, 4 C. B. (N.S.) 334. See St. Helen's So. Co. v. Tipping, 11 H. L. C. 642; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

States, is just as fixed and certain as the right to any other provisional remedy.'' [16]

Formerly, it was a fundamental objection to an order for an injunction to restrain a nuisance to land when the legal title was disputed, that the order contained no provision for putting the question in a course of legal investigation.[17]

§ 274a. Injunctions to enforce prohibition of use of intoxicating liquors. The Eighteenth amendment to the Federal Constitution, ordains: ''After one year from the ratification of this article of manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

''The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

''This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.''

The act of October 28, 1919, to enforce Prohibition amongst other things provides:

''Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such

[16] Judge Earl in Campbell v. Seaman, 63 N. Y. 568, 582. See, however, Irwin v. Dixion, 9 How. 10, 13 L. ed. 25; Murtagh v. Philadelphia, 1 Weekly Notes of Cases, 37. But see McBride v. Board of Com'rs of Pierce County, 44 Fed. 17.

[17] Harman v. Jones, Cr. & Ph. 299; Sanxter v. Foster, Cr. & Ph. 302.

room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction." [1]

"An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manu-

§ 274a. [1] Ch. 83, p. 314. Comp. St., § 10138½ jj.

factured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property." [2]

"Any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, or himself, or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of such acts or things. In such proceeding it shall not be necessary to show any intention on the part of the accused to continue such violation if the action is brought within 60 days following any such violation of the law." [3]

The Act of March 3, 1917, for the abatement of liquor nuisances, provides:

"The United States district attorney for the District of Columbia, or any citizen of the District of Columbia, may maintain an action in equity in the name of the United States to abate and perpetually enjoin such a nuisance as defined in the preceding section. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt by a fine of not less than $100 nor more than $500 and by imprisonment in the District jail or workhouse for not less than thirty days nor more than six months, in the discretion of the court." [4]

"When any violation of this Act is threatened, or shall have occurred, or is occurring, the doing of, or the continuance or repetition of the unlawful act, or any of like kind by the offending party may be prevented by a writ of injunction out of a court of equity upon a bill filed in all respects as in cases of liquor nuisances; in like manner the writ of injunction may be employed to compel obedience to any provision of this Act." [5]

[2] Title II. § 22. p. 314. Comp. St. § 10138½ k.

[3] Title II. § 23. p. 314. Comp. St. § 10138½ kk.

[4] Act of March 3, 1917, Ch. 165, § 14. Comp. St., § 3369 kk.

[5] Act of March 3, 1917, Ch. 165, § 15, Comp. St. 3369 l.

§ 275. Injunctions to restrain trespass. Injunctions to restrain trespass are of comparatively recent origin. The first that is to be found in the books was granted by Lord Thurlow.[1] They are only granted when the trespass is destructive or continuous. Where the plaintiff is in possession and the person doing the acts complained of is a stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; although, where the acts tend to the destruction of the estate, the court will grant it.[2] But where the party in possession seeks to restrain one who claims by adverse title, then the tendency is to grant the injunction, where the acts done either did or might tend to the destruction of the estate.[3]

It was held: That a suit by the lessee of gas and oil to enjoin the removal of those substances from the premises by a subsequent lessee was maintainable as a suit to prevent trespass and waste, and not one for specific performance of the lease in which the equities between the lessor and the lessee might be considered.[4]

§ 275. 1 Flamang's Case, cited by Lord Eldon in Hansom v. Gardiner, 7 Ves. 305. For injunctions against the collection of an illegal tax, see *supra*, § 271b.

2 See Jerome v. Ross, 7 J. Ch. (N. Y.) 315; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Erhart v. Boaro, 113 U. S. 537, 28 L. ed. 1116; St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. 129.

3 Lowndes v. Bettle, 33 L. J. Ch. 461. Archer v. Greenville Gravel Co., 233 U. S. 60 (continuous dredging of gravel from bed of stream); Bettes v. Brower, 184 Fed. 342 (felling trees); Eastern Oregon Land Co. v. Willow River Land & Irr. Co., C. C. A., 201 Fed. 203 (damming a stream); West Virginia Pulp & Paper Co. v. Cheat Mountain Club, C. C. A., 212 Fed. 373 (polluting streams and felling shade trees); Denver & R. G. R. Co. v. Mills, C. C. A., 222 Fed. 481 (constructing a railroad track when value of the right of way was decreed as the alternative to an injunction). Where an electric railway company was destroying, by its return current, the pipes of a water company by electrolysis; it was *held* that the court had no power to enjoin the use by the former of any particular system of circuit or negative return, although it might be shown that the system in use necessarily resulted in the injury of which complaint was made; but that all which the court could do was to restrain the continuance of the injury, leaving the means to be adopted to prevent the same entirely to the discretion of the defendant. Peoria Waterworks Co. v. Peoria Ry. Co., 181 Fed. 990. See High on Injunctions, (4th ed.) §§ 697-722b.

The destruction of credit by an illegal seizure of one's stock in trade,[5] and the injury to a farm done by the illegal taking of all the stock and tools upon it, have been held instances of such irreparable injury.[6] An attempt by a railroad company to build its road upon private property without payment of compensation, may be thus prevented.[7] It is not certain, whether the fact that a person who threatens to commit a wrong is insolvent and unable to pay any damages which could be recovered at law, is in itself a sufficient ground for the interference of equity by injunction; but the weight of authority seems to hold that it is.[8]

It was held, where there was a dispute as to the possession and as to the right to the possession of a railroad track, that the court would not interfere by injunction to assist in "a scramble for possession."[9]

A number of cases decided in the courts of different States hold that an injunction cannot be obtained to restrain an illegal arrest; since it is said that the writ of *habeas corpus* followed by an action for damages always affords an adequate remedy for any injury resulting therefrom;[10] but if the result of the

4 Lindlay v. Raydure, 239 Fed. 928.

5 Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; Cropper v. Coburn, 2 Curt. 465; North v. Peters, 138 U. S. 271, 34 L. ed. 936.

6 Breeden v. Lee, 2 Hughes, 484.

7 N. P. R. Co. v. Burlington & M. R. Co., 2 McCrary, 203; s. c., 4 Fed. 298. See also Mo. K. & T. Ry. Co. v. T. & St. L. Ry. Co., 10 Fed. 497. But see D. M. Osborne Co. v. Mo. Pac. R. Co., 147 U. S. 248, 37 L. ed. 155; Burlington G. L. Co. v. Burlington, C. R. & N. Co., 165 U. S. 370, 41 L. ed. 749.

8 Connolly v. Belt, 5 Cranch, C. C. 405; M'Elroy v. Kansas City, 21 Fed. 257, 262; Coeur d'Alene Cons. & Mining Co. v. Miners' Union of Wardner, 19 L.R.A. 382, 51 Fed. 260; Agar v. Regent's Canal Co., cited in 1 Swanst. 250; Musselman v. Marquis, 1 Bush. (Ky.) 463, 89 Am. Dec. 637; Hicks v. Compton, 18 Cal. 206; Britton v. Hill, 12 C. E. Green (N. J.), 389; Lloyd v. Heath, Busb. Eq. (N. C.) 39; Gause v. Perkins, 3 Jones' Eq. (N. C.) 177, 69 Am. Dec. 728; Ches. & O. R. Co. v. Patton, 5 W. Va. 234; Bisham's Eq., § 436; Caro v. Met. El. Ry. Co., 46 N. Y. Super. Ct. 138. *Contra*, Heilman v. Union Canal Co., 37 Pa. St. 100; Thompson v. Williams, 1 Jones' Eq. (N. C.) 176; Nessle v. Reese, 19 Abb. Pr. (N. Y.) 240; High on Injunctions, § 18.

9 St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. 691. See Latham v. Northern Pac. R. Co., 45 Fed. 721.

10 Cohen v. Com'rs of Goldsboro, 77 N. C. 2; Burnett v. Craig, 30 Ala. 135, 68 Am. Dec. 115; Burch v. Cavanaugh, 12 Abb. Pr. (N. S.) (N. Y.) 410; Davis v. Am. Soc. for P. of C. to A., 6 Daly (N. Y.), 81; s. c., on appeal, 75 N. Y. 362. See also Yick Wo v. Crowley, 26 Fed. 207; Electric N. & M. T. Co. v.

arrests would be an irreparable injury to the business of the complainant, an injunction might perhaps be issued.[11]

In one case the court directed: that an injunction to restrain trespass be dissolved, unless an action of ejectment to try a claim of title by a defendant in possession is begun within ten days, and unless issues raised by defendants are framed for trial by jury within twenty days.[12]

A continuing trespass may be enjoined by the final decree although it has ceased pending the suit.[13] When the plaintiff is in possession, the trespasser cannot attack his title unless he sets up a grant from the true owner.[14] When the complainant has acquired his title after a continuous trespass has begun and continued for a considerable period of time the bill should allege that his grantor was ignorant of the trespass and had not settled with the defendant.[15] Since most injunctions against strikers forbid trespassing, this subject will be next considered.

§ 276. Injunctions against strikers. The English judges have held that at common law every trade union was formed to combine laborers in order to increase their wage, was an illegal conspiracy, and that all strikes were unlawful.[1] An act of Congress expressly provides: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organiza-

Perry, 75 Fed. 698; Burns v. McAdoo, 113 App. Div. 165; Eden Musee Am. Co. v. Bingham, 125 App. Div. 780.

11 Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169; *Ex parte* Young, 209 U. S. 123, 52 L. ed. 714; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747; Louisiana S. L. Co. v. Fitzpatrick, 3 Woods, 222; Dinsmore v. New York B. of P., 12 Abb. N. Cas. (N. Y.) 436; Manhattan I. W. Co. v. French, 12 Abb. N. Cas. (N. Y.) 446; *supra*, § 79.

12 N. J. & N. C. Land & Lumber Co. v. Gardner-Lacey Lumber Co., 113 Fed. 395.

13 Archer v. Greenville Sand & Gravel Co., 233 U. S. 60.

14 Crown Orchard Co. v. Dennis, C. C. A., 229 Fed. 652.

15 Kamper v. City of Chicago, C. C. A., 215 Fed. 706.

§ 276. 1 Rex v. Journeymen Tailors of Cambridge, Rex v. Mauley, 6 Tr. 619, 636; 8 Modern 10. The journeymen shoemakers' case *per* Kenyon, C. J.: Hammond, A. D. 1799; Hilton v. Ekersley, 6 El. & B. 47, 53, *per* Compton, J.: Walsby v. Croley, 30 L. J. Mc. 1, *per* Crompton and Hill, JJ. See Gompers v. Buck Stove & Range Co., 221 U. S. 418, 439; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 253, reversing upon another point, Mitchell v. Hitchman Coal & Coke Co., C. C. A., 214 Fed. 685, where the history of the doctrine is set forth; Arthur v. Oakes, C. C. A., 63 Fed. 310, 317, 318.

tions instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust law."[2]

The previous statute of July 13, 1913, which is less generally known, providing for arbitration between carriers and their employees provides: "Nothing in the act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance of any labor or service.[3] The Federal courts have, however, in certain cases, sustained injunctions to prevent strikes and boycotts. A majority of the Supreme Court has directed the issue of an injunction forbidding officers of a labor union from persuading the plaintiff's employees to strike, because the employer refused to employ any union men.[4] As the decision was upon ground that is debatable, the question may be considered a still *sub judice*.

Before this it was the general rule, that a court should not enjoin laborers from striking, nor from advising others to strike,[5]

[2] Act of Oct. 15, 1914, ch. 323, § 6, 38 St. at L. 731, Comp. St., § 8835f. See *infra*, § 296a.

[3] 38 St. at L. 107, ch. 6, § 8, Comp. St., § 8673, subd. 5.

[4] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 261, see Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275; Mortineau v. Folley, Mass., Oct., 1918, 120 N. E. 445; Quinn v. Leathem, 1901 [appeal cases 495]; Pratt v. British Med. Ass'n [1918], K. B. D.

[5] Arthur v. Oakes, C. C. A., 63 Fed. 310, 318; L.R.A. 414, 4 Inters. Com. Rep. 744 (reversing Farmers' L. & Tr. Co. v. N. Pac. R. Co., 25 L.R.A. 414, note, 4 Inters. Com. Rep. 774, note, 60 Fed. 803, by Jenkins, J.: who was threatened with impeachment for this decision); *per* Mr. Justice Harlan: "But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction." Delaware L. & W. R. Co. v. Switchers' Union,

although it had been held that it might enjoin them from combining to quit work in order to cripple their employer's property and embarrass his business;[6] and from refusing to handle or operate cars while remaining in the employ of a railroad company.[7]

Injunctions against strikes and boycotts have been granted under the Antitrust Law,[8] under the Act for the Conservation of Food, Fuel, and Necessaries,[9] in aid of the power of the President to prevent obstruction to Interstate Commerce and the carriage of the mail,[10] and to restrain the combining or conspiring to quit, with or without notice, the service of railroad receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of the railroad.[11] Injunctions have been granted forbidding strikers from trespass[12] and acts of violence,[13] against their employer's property; and from acts of violence,[14] or express or implied threats

51 Fed. 260; Wabash R. Co. v. Hannahan, 121 Fed. 563; Del. & W. R. Co. v. Switchman's Union, 158 Fed. 541; Aluminum Castings Co. v. Local No. 84, I. M. U., 197 Fed. 221; Tri-City Cent. Trade Council v. American Steel Foundries, C. C. A., 238 Fed. 728. *Contra*, A. R. Barnes & Co. v. Berry, 156 Fed. 72.

6 Arthur v. Oakes, C. C. A., 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 63 Fed. 310, 324, 329; Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512, reversed by C. C. A., 214 Fed. 685, but affirmed on this point 245 U. S. 229. *Cf.* Allen v. Flood [1898], Appeal Cases, 1.

7 So. Cal. Ry. Co. v. Rutherford, 62 Fed. 796; In re Lennon, 166 U. S. 548, 555, 41 L. ed. 1110, 1113.

8 U. S. v. Workingmen's Amalgamated Council of New Orleans, 54 Fed. 994; Commerce v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803, 821, *infra*, § 276b.

9 Act of Aug. 10, 1917, § 1, as amended Act of Oct. 22, 1919, § 2 Comp. St., § 3115, 1/8 ff., U. S. v. Hayes, D. C., D. Ind., Nov. 8, 1919; *infra*, § 276d.

10 *Re* Debs, 158 U. S. 564, 39 L. ed. 1092; *infra*, § 276e.

11 Arthur v. Oakes, C. C. A., 63 Fed. 310, 319, rev'g Farmer's Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803, which enjoined the employees from so quitting the service of the said receivers with or without notice, as to cripple the property or prevent or hinder the operation of said railroad. *Infra*, § 311. U. S. v. Weber, 114 Fed. 950; Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L.R.A. (N.S.), 1067, 116 Am. St. Rep. 278, 7 Ann. Cas. 638, are more nearly in accord with the decision which was reversed.

12 Illinois Cent. R. Co. v. International Ass'n of Machinists, 190 Fed. 910.

13 Consol. S. & W. Co. v. Murray, 80 Fed. 811; Gulf Bag Co. v. Suttner, 124 Fed. 467.

14 Consol. S. & W. Co. v. Murray, 80 Fed. 811; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 608; Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49;

of violence,[15] against persons employed to take their places; and even forbidding the gathering or marching in procession upon the highway near the employer's premises.[16] The weight of authority denies the right to grant injunctions against picketing, by stationing watchers outside to request travelers on the highway not to buy of the employer or not to enter his service.[17]

Reinecke Coal Min. Co. v. Wood, 112 Fed. 477; Atchison, T. & S. F. Ry. Co. v. Gee, 140 Fed. 153; Alaska S. S. Co. v. International Longshoremen's Ass'n, C. C. A., 236 Fed. 964; Springfield S. Co. v. Riley, L. R. 6 Eq. 551; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622; s. c., 32 S. W. 1106; Master Horseshoers' Protective Ass'n v. Quinlivan, 83 App. Div. (N. Y.), 459. But see Richter v. Journeymen T. Union, 24 Ohio L. Bull. 189.

15 Ibid.; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Aluminum Castings Co. v. Local No. 84 of International Molders' Union of North America, 197 Fed. 221; Iron Molders' Union v. Allis-Chalmers Co., C. C. A., 166 Fed. 45; Alaska S. S. Co. v. International Longshoremen's Ass'n, C. C. A., 236 Fed. 964; Montgomery v. Pac. Elec. Ry. Co., C. C. A., 258 Fed. 382. See High on Injunctions, § 1415d.

16 Mackall v. Ratchford, 82 Fed. 41; Consol. S. & W. Co. v. Murray, 80 Fed. 811; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 608; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689; Bruce Bros. v. Evans, 5 Pa. Co. Ct. R. 163; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Aluminum Castings Co. v. Local No. 84 of International Molders' Union of North America, 197 Fed. 221.

17 Pope Motor Car Co. v. Keegan, 150 Fed. 148; Allis-Chalmers Co. v. Iron Molders' Union No. 125, C. C. A., 166 Fed. 45, modifying 150 Fed. 155; Iron Molders' Union v. Allis-Chalmers Co., C. C. A., 166 Fed. 45; Tri-City Cent. Trade Council v. America Steel Foundries, C. C. A., 238 Fed. 728; Duplex Printing Press Co. v. Deering, C. C. A., 252 Fed. 722; Atkins v. W. & A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074; W. & A. Fletcher Co. v. International Association of Machinists, N. J. Eq. 55 Atl. 1077; *cf.* Charnock v. Court, [1899] 2 Ch. 35; Trollupe v. London B. T. Fed'n, 72 Law Times, 342; Lyons v. Wilkins, [1899] 1 Ch. 255. *Contra*, Vegelahn v. Gunther, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443; s. c., 44 N. E. 1077, with a strong dissent by Field, C. J., and Holmes, J.; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 608; Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49; Union Pac. R. Co. v. Ruef, 120 Fed. 102, 129; Knudson v. Benn, 123 Fed. 636; Goldberg, Bowen & Co. v. Stablemans' Union, 8 L.R.A. (N. S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806. See Allen v. Flood [1898], Appeal Cases, 1. High on "Injunctions," § 1415e. "Interference by Combinations of Labor with Employer's Business" by Geoffrey Konta of the New York bar in Columbia Law Rev., X., p. 652; Sona v. Aluminum Castings Co., C. C. A., 214 Fed. 936; Kroger Grocery and Baking Co. v. Retail Clerks' Internation Protective Ass'n, 250 Fed. 890, 895.

A few decisions have gone so far as to enjoin strikes[18] and boycotts.[19] Picketing accompanied by threats of violence has been enjoined;[20] but the commission of unlawful acts therewith

[18] Farmers' L. & Tr. Co. v. N. Pac. R. Co., 25 L.R.A. 414, note, 4 Inters. Com. Rep. 774, note, 60 Fed. 803, *per* Jenkins, J., reversed in Arthur v. Oakes, C. C. A., 63 Fed. 310, *infra*, §§ 276, b, c, d. In Delaware L. & W. P. Co. v. Switchers' Union, 51 Fed. 260; Wabash R. Co. v. Hannahan, 121 Fed. 563, preliminary injunctions to this effect were dissolved. But see § 283, *infra*, *Cf.* *Re* Lennon, 166 U. S. 548, 41 L. ed. 1110; U. S. v. Cassidy, 67 Fed. 698; U. S. v. Weber, 114 Fed. 950, where the strikers were employees of a receiver; Pickett v. Walsh, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *infra*, § 311. That an injunction should not issue against a strike was held in Aluminum Castings Co. v. Local No. 84, I. M. U., 197 Fed. 221.

[19] Casey v. Cincinnati Typ. Union, 45 Fed. 135; Thomas v. Cincinnati, N. O. & T. Ry. Co., 62 Fed. 803; Oxley Stave Co. v. Coopers' I. Union, C. C. A., 72 Fed. 695, s. c., Hopkins v. Oxley Stave Co., 83 Fed. 912, Caldwell, J., dissenting; Barr v. Essex Trades Council, 53 N. J. Eq. 101; s. c., 30 Atl. 881; Beck v. Ry. Teamsters' Pr. Union, 118 Mich. 497; s. c., 43 L.R.A. 406, with note; Carroll v. Ches. & O. Coal Agency Co., C. C. A., 124 Fed. 305; s. c., as Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942; Loewe v. California State Federation of Labor, 139 Fed. 71; Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363; Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011; Jensen v. Cooks' & Waiters' Union of Seattle (Wash. 1905), 81 Pac. 1069. *Cf.* Hagan v. Blindell, C. C. A., 56 Fed. 696; Arthur v. Oakes, C. C. A., 63 Fed. 310; Elder v. Whitesides, 72 Fed. 724; Davis v. Zimmerman, 91 Hun (N. Y.) 489; Sinsheimer v. United G. W. of Am., 77 Hun (N. Y.) 215; U. S. v. Cassidy, 67 Fed. 698; Graham v. St. Charles St. R. Co., 47 La. Ann. 215; Quinn v. Leathem [1901], Appeal Cases, 495; Am. Law Review, Nov., 1899. See Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488. *Contra*, Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 633, 1 Ann. Cas. 172; Nat. Protective Ass'n v. Cumming, 53 App. Div. (N. Y.) 227; Marx & Haas Jeans Clothing Co. v. Watson (Mo.), 56 L.R.A. 951. *Cf.* Reynolds v. Everett, 144 N. Y. 189; Allen v. Flood [1898], Appeal Cases, 1; Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598; s. c. [1892], Appeal Cases, 25; Mayer v. Journeymen S. C. Ass'n, 47 N. J. Eq. 519; Bohn Mfg. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. 1119; Sweeny v. Torrence, 11 Pa. Co. Ct. R. 497; Francis v. Flinn, 118 U. S. 385, 30 L. ed. 165; Worthington v. Waring, 157 Mass. 421; Pr. & Pub. Co. v. Howell, 26 Ore. 527; s. c., 28 L.R.A. 464; De Pear v. Cook's Union, 27 Chi. Leg. N. 387; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797. See High on "Injunctions," § 1415e.

[20] Stephens v. Ohio State Telephone Co., 240 Fed. 759, 773, *per*

connected does not justify an injunction against picketing peacefully conducted.[21]

When the citizenship of the employer, if a plaintiff, would have defeated the jurisdiction, injunctions against intimidation by strikers have been granted at the suit of trustees of mortgages [22] and of bond holders,[23] at the suit of subscribers to a telephone company,[24] of a contractor for the product of a mine,[25] and of contractors for the manufacture of machinery.[26] It has been held: that in the determination of the diversity of citizenship between the parties to such a controversy the employer who is not made a defendant need not be aligned on the plaintiff's side of the controversy.[27] That where a telephone company was sued by its subscribers to compel the company to repair its ap-

Killits, J.; "No picketing which is conducted in a manner to attract and retain the presence of crowds can be said to be peaceful or within the law." See the language of Trieber, J., in Groger Grocery and Baking Co. v. Retail Clerks' International Protective Ass'n, 250 Fed. 890, 895. Different judges have regulated picketing by limiting the number who are permitted to be on duty at one time. In the Keith Hippodrome Case, limiting the number on duty outside a theatre to two, U. S. D. C. E. D. Ohio, not reported, cited, 261 Fed. 804. In the case of a hotel, to two. Hotel Stattler case not reported, cited, 261 Fed. 804. In Dail-Overland Co. v. Overland-Willys, 263 Fed. 171, 190, *per* Killits, J., the case of a large factory building with several entrances, limiting the number on duty at any one time to fifty, and those on duty at a single gate to six. The court also required pickets to wear badges conspicuously numbered that in case of misconduct they might be easily identified. Ibid. And later prevent picketing altogether. Ibid. See *infra*, § 276a.

21 Iron Molders' Union v. Allis-Chalmers Co., C. C. A., 166 Fed. 45; Tri-City Cent. Trade Council v. America Steel Foundries, C. C. A., 238 Fed. 728, 734.

22 *Ex parte*, Haggerty, 124 Fed. 441.

23 Carter v. Fortney, 170 Fed. 463.

24 Stephen v. Ohio State Tel. Co., 240 Fed. 759.

25 Carroll v. Ches. & O. Coal Agency Co., C. C. A., 124 Fed. 305; s. c., as Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942.

26 Niles Bement Pond Co. v. Iron Molders' Union, 246 Fed. 851.

27 Carroll v. Ches. & Ohio Coal Agency Co., C. C. A., 124 Fed. 305, s. c., 119 Fed. 942; Dail-Overland Co. v. Willys-Overland, 263 Fed. 171; Vonnegut Mach. Co. v. Toledo Mach. & Tool Co., 263 Fed. 192, 197. See West v. U. S., C. C. A., 258 Fed. 413, 417, 418. *Contra*, Niles Bement Pond Co. v. Iron Molders' Union, C. C. A., 258 Fed. 498, reversing 246 Fed. 851.

pliances and to keep them in good repair and in condition for operation, an injunction granted against the members of a labor union who had been induced to intervene the suits should not be dismissed because of collusion although the company did not oppose the relief, sought by the plaintiff.[28]

It has been held: in such a suit by bond holders, they need not show a demand on the mortgagor or on their trustee before beginning such a suit,[29] and that the mortgagor which is the employer is not a necessary party.[30] But in such a suit by the trustee of a mortgage which had not matured the injunction was denied when the mortgagee was not joined and had not refused to sue;[31] it may be doubted whether such decisions would have been made in any case in which trade unions were not unfavorably effected.[32]

There has been said to be more justification for an injunction against a sympathetic strike or secondary boycott, than against strikers directly injured by the acts which they seek to prevent.[33]

An injunction against intimidation by strikers was granted, at the suit of a contractor with the party against whom the strike was instituted, when the citizenship of the latter would not have sustained the jurisdiction;[34] but one was denied in a suit by the trustee of an unmatured mortgage upon the employer's property, when the mortgagor was not joined and had not refused to sue.[35]

The importance of this class of injunctions is very great. For the acts forbidden are in most cases offenses punishable by the criminal law, those charged with which would, in the absence

28 Stephens v. Ohio State Telephone Co., 240 Fed. 759; Niles Bement Pond Co. v. Iron Molders' Union, 246 Fed. 851.

29 Carter v. Fortney, 170 Fed. 463.

30 Carter v. Fortney, 170 Fed. 463, aff'd C. C. A., 203 Fed. 454, s. c., 172 Fed. 722.

31 Ill. Trust & Savings Bank v. Minton, 120 Fed. 187.

32 Niles Bement Pond Co. v. Iron Molders' Union, 246 Fed. 851.

33 See Geoffrey Konta in Columbia Law Rev., X., p. 652, approving Schlang v. Ladies' Waist Makers' Union, 124 N. Y. Supp. 289; Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters, 180 Fed. 896; Tunstall v. Stearns Coal Co., C. C. A., 192 Fed. 808.

34 Carroll v. Ches. & O. Coal Agency Co., C. C. A., 124 Fed. 305; s. c., as Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942.

35 Illinois Trust & Sav. Bank v. Minton, 120 Fed. 187.

36 *Re* Debs, 158 U. S. 564, 581,

of an injunction, have the right to a trial by jury; and the object of an injunction is to deprive them of that right.[36] This so-called "government by injunction" has been sharply criticized. The jurisdiction of courts of equity to entertain a suit for such an injunction has been sustained by the Supreme Court of the United States;[37] but the propriety of many which have been issued has not yet been decided by that tribunal.

§ 276a. Restriction upon such injunctions by the Clayton Act. Complaints of the use of injunction orders by the courts of the United States caused the passage of the law of Oct. 15, 1914, known as the Clayton Act. This, after requiring security and making new regulations concerning the practice before motions for temporary restraining orders and preliminary injunctions, which are subsequently quoted,[1] continues, "No restraining order or injunction shall be granted by the courts of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from termi-

582, 39 L. ed. 1092, 1101, 1102; U. S. v. Debs, 64 Fed. 724; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A. (N.S) 162, 84 N. E. 457. The application of Debs for a writ of error to review the proceedings upon his trial for contempt was denied. *Re* Debs, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. ed. 1092. Assistant Attorney General Whitney told the author that, if the writ of error had not been dismissed, the Department of Justice would have confessed error. See U. S. v. Cassidy, 67 Fed. 698, 783, for a refusal of a jury to convict in a similar case, upon much stronger evidence than that offered against Debs.

[36] *Re* Debs, 158 U. S. 564, 581, 39 L. ed. 1092, 1101; In re Lennon, 166 U. S. 548, 41 L. ed. 1110.

[37] But see In re Debs, 58 U. S. 564, 581, 592, 597, 39 L. ed. 1092, 1101, 1105, 1107.

§ 276a. [1] See *infra*, §§ 291-297, Act of Oct. 15; 1914, ch. 323, § 19, 38 St. at L. 738, Comp. St., § 1243e.

nating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."[2]

The Act of July 13, 1913, providing for arbitration between carriers and employees, provides: "Nothing in the Act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance of any labor or service."[3]

It has been held by a single judge that no part of this section of the Clayton Act regulating and restraining orders and injunctions and applies to an injunction issued to the suit of the United States.[4] It has been suggested that it may not apply to a suit by a customer of the employer.[5] It has been held: to apply to a suit between the employer and the officers of a trade union who have ordered a strike but who are not employed by him when it affects the conditions of employment;[6] but not to employees who have quit to enforce a secondary boycott;[6a] nor to employees all of whose positions have been filled.[6b]

[2] Ibid., § 20, 38 St. at L. 738, Comp. St., § 1243d.

[3] 38 S. at L. 107, ch. 6, § 8, Comp. St., § 8673, subd. 5.

[4] U. S. v. Hayes, D. C., D. Ind., Anderson, J.—Nov., 1919, *infra*, § 276e.

[5] Stephens v. Ohio State Telephone Co., 240 Fed. 759, 770.

[6] Duplex Printing Press Co. v. Deering, C. C. A., 252 Fed. 722, 747, 748.

[6a] Vonnegut Mach. Co. v. Toledo Mach. & Tool Co., 263 Fed. 192, 204, a case of doubtful authority.

[6b] Dail-Overland Co. v. Willys-

It has been said that the words "peaceful" and "lawful" in the statute signify what would be lawful if no strike existed.[7]

Overland, 263 Fed. 171, 188, 190; a case of doubtful authority.

7 Stephens v. Ohio State Telephone Co., 240 Fed. 759, 771, 773, 774, per Killits, J.: "It is well to note, and not to lose sight of, the fact that the words 'lawfully,' 'peacefully,' 'lawful,' 'peaceful,' dominate the thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was 'unlawful' or provocative of a disturbed peace. The challenge to the court is to define 'peaceful picketing' within the limits of this section. This does not seem to be an occasion for an attempt at an academic formula, which, in any detail, would meet all exigencies possible in labor controversies, if one could be drawn up.

"Each case presents its own peculiar questions. An act may be lawful and peaceful, or just the opposite, according to its setting. It is easier, and far more practicable, therefore, to deal in prohibitions than in affirmations. Broad generalizations, however, are easily framed, because, if we just keep in mind the prevalence in the statute of the qualifying idea of 'peaceful' and 'lawful' action, we cannot be misled. The best we have seen is one lately appearing in a newspaper devoted to labor interests. It is:

"What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked, 'Would this be lawful if no strike existed?'"

"We accept this as a very good test, and apply it to the concrete questions of fact arising in this case, as propounded in the several informations, with conclusions certain to come to every 'fair-minded man.' * * *

"It must be borne in mind that not every act is lawful against which no positive provision of law exists. Many acts are unlawful for which no affirmative penalty is enacted, or against which no redress at law is possible; and some while within the prohibitions of positive law, may not offer a practicable occasion for redress at law, yet a court of equity may be asked to protect the intended sufferer from the annoyance and damage they may create, and such a court may enforce its prohibitions. No legislation yet exists to the contrary, if legislation depriving courts of such power is possible. Some acts, lawful when but once performed, may become unlawful when repeated for the purpose of annoyance or damage, and may be restrained when that purpose becomes plain.

"The right of free speech does not give anyone the privilege to force his views upon others, to compel others to listen. The right of

It has been held that the statute does not forbid an injunction

the others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

"Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner. Again, the right of one to the privacy of his features, to the end that he may not be photographed without his consent, is manifest. It has been sustained by the courts in actions for damages. Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

"Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employee to refuse to work. Again, the right of an employer to have access to and from his place of business, and his right to have the streets and public highways in front of his place of business, kept clear of crowds, bystanders, and curiosity seekers, is as strong as the right to picket, and no picketing which is conducted in a manner to attract and retain the presence of crowds can be said to be peaceful or within the law.

"It is safe and proper generalization that any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act, of speech, of gesture, or of conduct, which 'any fair-minded man' may reasonably judge to be intended to convey insult, threat or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable—such must be the verdict of 'any fair-minded man'—nothing can be said in justification.

"These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character."

against a secondary boycott,[8] or a strike to compel the employer to maintain a closed shop excluding persons not members of a union.[9]

The act does not forbid an injunction against trespass, on an employer's property,[10] or threats, abusive language, and insults addressed to those who remain or enter into his employment or deal with him.[11]

It has been held that the act does not forbid the inclusion in the injunction of a prohibition in general language such as a provision restraining the doing of "any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."[12] Prior to the passage of this law it was held to be too

8 Duplex Printing Press Co. v. Deering, C. C. A., 252 Fed. 722, 746, 748; U. S. v. Norris, 255 Fed. 423. See Vonnegut Mach. Co. v. Toledo Mach. & Tool Co., 263 Fed. 192.

9 Ibid.

10 Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 262. Alaska S. S. Co. v. International Longshoremen's Ass'n, C. C. A., 236 Fed. 964; Kroger Grocery and Baking Co. v. Retail Clerks' International Protective Ass'n, 250 Fed. 890, 895.

11 Montgomery v. Pac. El. Ry. Co., C. C. A., 258 Fed. 382; Alaska S. S. Co. v. International Longshoremen's Ass'n, C. C. A., 236 Fed. 964; Stephens v. Ohio State Telephone Co., 240 Fed. 759.

12 Stephens v. Ohio State Telephone Co., 240 Fed. 759, 776, *per* Killets, J.: "That portion most vigorously attacked as too broad and indefinite is the provision restraining the doing of 'any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier.' This provision is as definite as it is possible to make it. It is this paramount interest in the public which may not suffer interference as the result of the controversy, and it is impossible to set out every act or line of conduct which might work interference. Labor controversies are not unexpected or unusual; courts recognize that they are possible; courts also notice that the existence of one produces some embarrassment to the employer affected in the management of his business. Whether that embarrassment arises to a state of 'interference,' as that term means in cases of this sort, depends upon how the controversy is conducted on either or both sides. A total cessation of the employer's business, even of that of a public utility, might not indicate an illegal interference under some circumstances. A strike *lawfully* conducted is not an illegal interference, although it might effect even a total paralysis of a public utility's activities, resulting in great public suffering and loss. The right to abandon employment, by individuals singly or in association, is unques-

indefinite to grant an injunction forbidding employees of a railroad "from so quitting the service of the said receivers with or without notice so as to cripple the property or prevent or hinder the operation of said railroad." [13]

§ 276b. Injunctions under the Antitrust Law against strikers. The first Antitrust Law of July 2, 1890 provides "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal." [1]

"Every contract combination in form of trust or otherwise, or conspiracy in restrain of trade or commerce in any territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such Territory or Territories or between any such Territory and another, and any State or States or the District of Columbia, or with foreign nations, or with the District of Columbia and any State or States or foreign nations, is hereby declared illegal." [2]

tioned, and the law maintains the right of such late employees, commonly known as strikers, to 'peacefully' persuade others to abandon the same employment, or to refrain from engaging in employment, and to that end 'peaceful picketing' is permitted for purposes of observation and information and 'peaceful persuasion.' But no single act, to which we have alluded above, can be possibly considered to be a necessary, and hence an excusable, accompaniment of peaceful picketing. Such acts tend inevitably to that 'interference' which the law condemns."

[13] Arthur v. Oakes, C. C. A., 63 Fed. 310, 313, 327, per Mr. Justice Harlan: "In our opinion the order should describe more distinctly than it does the strikes which the injunction was intended to restrain. That employees and their associates may not unwittingly place themselves in antagonism to the court's authority, and become subject to fine and imprisonment as for contempt, the order should indicate more clearly than has been done that the strikers intended to be restrained were those designed to physically in the operation of the road, or to interfere with their employees who do not wish to quit, or to prevent, by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employees in peaceable ways of rights clearly belonging to them, and were not designed to embarrass or injure others, or to interfere with the actual possession and management of the property by the receivers."

§ 276b. [1] Act of July 2, 1890, ch. 647, § 1, 26 St. at L. 209, Comp. St., § 8820.

[2] Ibid, § 3, 26 St. at L. 209, Comp. St., § 8822.

The Clayton Act of Oct. 15, 1914 provides "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."[3]

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue; Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."[4]

Under the Act of July 2, 1890 it was held at circuit that an injunction might issue under this statute to restrain a strike which caused an obstruction to the mail or an obstruction to Interstate Commerce.[5]

§ 276c. Injunctions to prevent obstructions to interstate commerce. The United States may sue to enjoin an obstruc-

3 Act of Oct. 15, 1914, ch. 323, § 15, 38 St. at L. 736, Comp. St., § 8835n. Re-enacting in substance the first sentence of § 4 of the Act of July 2, 1890.

4 Ibid, § 16, ch. 323, 38 St. at L. 737, Comp. St., § 8835o. See *supra*, § 77a.

5 U. S. v. Debs, 64 Fed. 724, 746, writ of error dismissed *Re* Debs, 158 U. S. 564, 573, 39 L. ed. 1092. The Supreme Court reserved its decision on this point. See Thompson v. Cincinnati N. O. & T. P. Ry. Co., 62 Fed. 803.

tion to Interstate Commerce and to the carriage of the mail caused by a strike of railroad employees.[1]

The prior law provided "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect, whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic, between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business."[2] It was held at circuit that an injunction might be issued against a strike or boycott by the employee of a railroad company who refused to receive, handle, or haul interstate freight from another railroad company which was the complainant, their employer being joined with them as a party to the suit;[3] and against men who, while remaining in the employ of a railway company refused to haul pullman cars.[4]

Before and since the amendment injunctions have been granted against obstructions to the interstate operations of telephone companies by their employees. In the former case[5] by conduct

§ 276c. [1] *Re* Debs, 158 U. S. 564, 573; s. c., U. S. v. Debs, 61 Fed. 724; Chicago B. & Q. Ry. Co. v. Burlington C. R. & N. Ry. Co., 34 Fed. 481; Per Love, J.; see *Re* Lennan, 166 U. S. 548, 41 L. Ed. 1110; Southern California Ry. Co. v. Rutherford, 62 Fed. 796; see U. S. v. Cassidy, 67 **Fed. 698.**

[2] Act of Feb. 4, 1887, ch. 104, § 3, 24 St. at L. 380, Comp. St., § 8565.

[3] Chicago B. & Q. Ry. Co. v. Burlington C. R. & N. Ry. Co., 34 Fed. 481; Toledo A. A. & M. R. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

[4] Southern California R. Co. v. Rutherford, 62 Fed. 96.

[5] Stevens v. Ohio State Tel. Co., 240 Fed. 759.

otherwise unlawful. In the latter,[6] the injunction forbade calling of strikes, holding that such conduct is a criminal offense; but the jury failed to convict.

The Act of August 10, 1917, provides, "That on and after the approval of this Act, any person or persons who shall, during the war in which the United States is now engaged, knowingly and willfully, by physical force or intimidation by threats of physical force obstruct or retard or aid in obstructing or retarding, the orderly conduct or movement in the United States of interstate of foreign commerce, or the orderly make-up or movement or disposition of any train or the movement or disposition of any locomotive, car, or other vehicle on any railroad or elsewhere in the United States engaged in interstate or foreign commerce shall be deemed guilty of a misdemeanor, and for every such offense shall be punishable by a fine of not exceeding $100, or by punishment for not exceeding six months, or by both such fine and imprisonment, and the President of the United States is hereby authorized whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of the passage of the mail, or of the orderly conduct or movement of interstate or foreign commerce in any part of the United States or any train, locomotive car or other vehicle upon any railroad or elsewhere in the United States engaged in interstate or foreign commerce: Provided, That nothing in this section shall be construed to repeal, modify or effect either section six or section twenty of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes approved October fifteenth, nineteen hundred and fourteen."

"That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security to direct that such traffic or such shipments of commodities as, in his judgment may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them, and for any such purpose he is

[6] Kinlock Tel. Co. v. 39 Striking Wiremen and others. Ex parte U. S. D. C. Ed. Mo., Mar. 3, 1920. U. S. R. S., § 5440.

hereby authorized to issue orders direct, or through such person or persons as he may designate for the purpose or through the Interstate Commerce Commission. Officials of the United States when so designated, shall receive no compensation for their services rendered hereunder. Persons in the employ of the United States so designated shall receive such compensation as the President may fix. Suitable offices may be rented and all necessary expenses, including compensation of persons so designated, shall be paid as directed by the President out of funds which may have been or may be provided to meet expenditures for the national security and defense. The common carriers subject to the Act to regulate commerce or as many of them as desire so to do are hereby authorized without responsibility or liability on the part of the United States, financial or otherwise, to establish and maintain in the city of Washington during the period of the war an agency empowered by such carriers as join in the arrangement to receive in behalf of them all notice and service of such order and directions as may be issued in accordance with this Act, and service upon such agency shall be good service as to all the carriers joining in the establishment thereof. And it shall be the duty of any and all the officers, agents or employees of such carriers by railroad or water or otherwise, to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatsoever necessary to the prompt execution of such order, shall render such officers, or agents or employees guilty of misdemeanor, and any such officer, agent or employee shall upon conviction be fined not more than $5,000 or imprisonment for not more than one year or both in the discretion of the court. For the transportation of persons or property, in carrying out the orders and directions of the President just and reasonable rates shall be fixed by the Interstate Commerce Commission; and if the transportation be for the Government of the United States, it shall be paid for currently or monthly by the Secretary of the Treasury out of any funds not otherwise appropriated. Any carrier complying with any order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil and criminal pains, penalties obligations or liabilities upon

carriers by reason of giving preference priority in compliance with such order or direction."[7]

§ 276d. Injunctions under the Act of Aug. 10, 1917, for the conservation of supply and control of distribution of necessaries. The Act of Aug. 10, 1917, for the conservation of supply and control of distribution of necessaries, which is sometimes called the Lever Act as amended on October 22, 1919, amongst other things provides: "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers; fuel including fuel oil, and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions, hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act."[1]

"It is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production manufacture, or distribution; to hoard, as defined in section six of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or de-

7 Act of Aug. 10, 1917, 40 St. at L. 272, ch. 51, Comp. St., § 8563, subd. 10.

§ 276d. 1 § 140 St. at L. 274, as amended 41 St. at L., Comp. St., 3115¼c.

vice, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any neeessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any neeessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respeet to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners or other produeers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."[2]

Under this statute the United States obtained an injunction, restraining the officers of the International Union and United Mine Workers of America from issuing an order for a strike by miners and mine workers in bituminous mines and from any acts of encouragement or assistance of from such a strike including the payment for strike benefits, of any money previously accumulated for assistance during strikes and also commanding them to issue a withdrawal and cancellation of their strike order previously issued and to communicate the same to the district and local unions and to members of the union, as fully and completely as the strike order had been previously distributed and circulated.[3] Before the amendment of 1919, it

2 Ibid, § 2, Comp. St., 3115⅛ff.

3 U. S. v. Hayes, D. C., D. Ind., Anderson, J.; Nov. 8, 1919. The injunction is printed in full in the appendix. *Cf.* Montgomery v. Pac. Elec. Ry. Co., C. C. A., 258 Fed. 382.

was held that the statute authorized an injunction against the order of a strike of the employees in a large number of stores where the plaintiff sold perishable food.[4]

§ 277. Injunctions to restrain the infringement of patents. Injunctions to restrain the infringement of patents and copyrights are of ancient use in equity. They are founded upon both the irreparable injury that would otherwise be caused to the complainant, and the desire of the court to prevent a multiplicity of suits.[1]

[4] Kroger Grocery and Bakery Co. v. Retail Clerks' International Protective Ass'n, 250 Fed. 890, 895, Per Trieber, J.: "Probably 2,000,000 of men and women have been taken from their usual vocations to engage in this great struggle. The government is dependent upon the work of wage-earners and manufacturers in order to carry this war to success, and, while the court is not willing to say that an unjustifiable strike in times like this is treason, it comes mighty close to it, morally. * * *

"The next question is: Were the acts of the defendants unlawful by reason of the fact that by ordering this strike, and inducing so many of the employees of the plaintiff to withdraw from employment, 85 of the 140 retail stores of this plaintiff had to be closed by reason of the strikes, causing a loss of the value of $36,000 of perishable food, such an unlawful act as would justify the court, in view of the Food Conservation Act of Congress, to grant the writ of injunction. That act provides:

"'That it is unlawful under this act for any person or persons to knowingly commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production or distribution.'

"And further it makes it an offense for any person to restrict the distribution of any necessaries, or do anything whereby transportation, producing, harvesting, manufacturing, supply, or dealing in any necessaries of life is interfered with. If these defendants, by reason of their acts, caused a loss of all this perishable food, they were certainly guilty of a violation of this act, and in the opinion of the court it would be wholly immaterial whether it was done by violence, threats, intimidation, or otherwise. The owner of this perishable food would be entitled to the aid of a court of equity of the United States to restrain them from acts which will cause still greater destruction of such food. The evidence shows that this plaintiff, in every one of the stores, dealt in meats, butter, eggs, vegetables, oleomargarine, lard, and other perishable goods, that they were also bakers, and dealt in breads, cakes, pies, and pastries; and, of course, these defendants, who had been employees of the plaintiff, knew these facts, and they must have known that, if the stores were closed, especially on Friday and Saturday, that these food products would naturally deteriorate, if not altogether spoil and be wasted."

§ 277. [1] Eden on Injunctions, chs. xii and xiii; Daniell's Ch. Pr. (5th Am. ed.) 1642-1648; Hogg v.

This inherent power of the courts is confirmed in the United States by statute. The provision of the Revised Statutes authorizing injunctions to restrain the infringement of patents is as follows: "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, upon such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase damages found by verdicts in actions in the nature of actions of trespass upon the case."[2]

It seems to have been formerly the opinion that courts of equity would not interfere to protect a patent right by injunction, until the right has been established at law; but since Lord Eldon's time their jurisdiction thus to interfere, when the title of a complainant is established by the preponderance of evidence, has been settled.[3] In a decree to compel the assignment of a patent an injunction restraining its future use by the assignor may be included.[4] But in a suit to restrain an infringement there can be no injunction against the payment by the defendant of dividends although it has transferred its business and tangible assets.[4a] The remedy in such a case is an application for a receiver.[4b]

Unless the validity of a patent has been adjudicated in another case, a preliminary injunction to restrain its infringement will nearly always be refused, if the defendant has ample pecuniary

Kirby, 8 Ves. 215; Wilkins v. Aikin, 17 Ves. 422. See High on Injunctions §§ 934-952.

[2] U. S. R. S., § 4921. See *supra*, §§ 146, 175 and 29 St. at L. 695; cited *supra*, § 61.

[3] Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689; Hill v. Thompson, 3 Meriv. 622; Pierpont v. Fowle, 2 W. & M. 23; Motte v. Bennett, 2 Fisher, 642; Kerr on Injunctions, 272.

[4] Chadeloid Chem. Co. v. H. B. Chalmers Co., C. C. A., 243 Fed. 606.

[4a] Manton-Gaulin Mfg. Co. v. Amer. Bottle Cap Co., 250 Fed. 865.

[4b] Ibid.

responsibility, or gives security against loss to the plaintiff, and is willing to keep an account of his manufacture, use, and sale of the article claimed to be patented, and the damages which the plaintiff will suffer can be readily reckoned in money.[5]

Before a preliminary injunction will be granted against the alleged infringement of a patent, it should be shown: that the plaintiff's right to the exclusive use of the invention is clear,[6] and usually that it has been established by a prior adjudication[7] or by public acquiescence;[8] and that there is no room for reasonable doubt as to the infringement.[9]

Before the creation of the Circuit Courts of Appeal, the rule was that if previous adjudications in the same or other Circuit Courts had established the validity of the plaintiff's patent, a

5 Foster v. Moore, 1 Curt. 279; Morris v. Shelbourne, 8 Blatchf. 266; Gilbert & B. Mfg. Co. v. Bussing, 12 Blatchf. 426; Swift v. Jenks, 19 Fed. 641; Hoe v. Boston D. Adv. Co., 14 Fed. 914; U. S. Annunciator Co. v. Sanderson, 3 Blatchf. 184. But see Gibson v. Van Dresar, 1 Blatchf. 532; Tracy v. Torrey, 2 Blatchf. 275; Parkhurst v. Kinsman, 2 Blatchf. 78; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419. The rules of decision upon motions for injunctions in patent suits are explained in § 277, *supra*.

6 Welsbach Lt. Co. v. Cosmopolitan Inc. G. L. Co., 100 Fed. 648; Bradley & H. Mfg. Co. v. Charles Parker Co., 17 Fed. 240; Consol. S. V. Co. v. Crosby S. G. & L. Co., 7 Fed. 768; Illingworth v. Spalding, 9 Fed. 154. For a case where the complainant's rights were held so clear as to warrant a preliminary injunction without a prior adjudication or public acquiescence, see Wilson v. Consol. S. S. Co., C. C. A., 88 Fed. 286.

7 Duff Mfg. Co. v. Kalamazoo Ry. Sig. Co., 100 Fed. 357; Richmond Milk Co. v. DeClyne, 90 Fed. 661.

8 Palmer P. T. Co. v. Newton R. Works, 73 Fed. 218; Duff Mfg. Co. v. Kalamazoo Ry. Sig. Co., 100 Fed. 357; Silver & Co. v. J. P. Eustis Mfg. Co., 130 Fed. 348. Eight months of public acquiescence were held to be enough. Wilson v. Jefferson, 78 Fed. 366. *Cf.* Johnston R. Co. v. Avery Mach. Co., 28 Fed. 195; Stahl v. Williams, 52 Fed. 645. Five years of public acquiescence were held sufficient. McDowell v. Kurtz, C. C. A., 77 Fed. 206. So of six years. White v. Hunter, 47 Fed. 819; Nat. Typ. Co. v. N. Y. Typ. Co., 46 Fed. 144.

9 Whippany Mfg. Co. v. United I. F. Co., C. C. A., 87 Fed. 215; Duff v. Kalamazoo Ry. Sig. Co., 100 Fed. 357; Richmond Mica Co. v. De Clyne, 90 Fed. 661; Standard Paint Co. v. Reynolds, 43 Fed. 304; Johnson R. R. S. Co. v. Union S. & S. Co., C. C. A., 55 Fed. 487; Hatch S. Ry. Co. v. El. Storage Ry. Co., C. C. A., 100 Fed. 975; Jefferson Electric Light, Heat & Power Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 134 Fed. 392. *Cf.* Sawyer Sp. Co. v. Turner, 55 Fed. 979.

preliminary injunction would be granted him almost as of course in a subsequent suit, to prevent the infringement of the same by a person not a party to the former proceeding;[10] unless the latter could produce new evidence that was conclusive,[11] or show that such judgments were obtained by consent, collusion or fraud,[12] or without any substantial contest.[13] This is still the rule in the same circuit,[14] and has been applied when the previous adjudication was a judgment at law rendered upon a verdict, as well as when an interlocutory decree in equity.[15] It has special force when the Supreme Court of the United States,[16] or the Circuit Court of Appeals for that circuit,[17] has established the

10 Orr v. Littlefield, 1 W. & M. 13; Thayer v. Wales, 9 Blatchf. 170; s. c., 5 Fisher, 130; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; but see Many v. Sizer, 1 Fish. Pat. Cas. 31.

11 Page v. Holmes B. A. Tel. Co., 2 Fed. 300; s. c., 18 Blatchf. 118; Bragg v. Mayor, etc. of N. Y., 141 Fed. 118. But see Motion Picture Patents Co. v. Laemmle, 178 Fed. 104.

12 Am. Nic. P. Co. v. Elizabeth, 4 Fish. 189; Page v. H. B. A. Tel. Co., 2 Fed. 330; American M. Purifier Co. v. Vail, 15 Blatchf. 315; but see Orr v. Littlefield, 1 W. & M. 13. Where, after proofs had been taken, the defendant made default, the court merely examined the case sufficiently to dispose of the actual controversy and refused to pass upon the questions arising in detail so as to enable the decision to be used in a case of a subsequent infringement. Victor Talking Mach. Co. v. Leed & Catlin Co., 180 Fed. 778.

13 N. Y. Button Works v. Crescent Button Co., 185 Fed. 820.

14 Elite Pottery Co. v. Dececo Co., C. C. A., 150 Fed. 581; Cohen v. Stephenson & Co., C. C. A., 142 Fed. 467; A. B. Dick Co. v. Pomeroy Duplicator Co., 117 Fed. 154; Walker Patent Pivoted Bin Co. v. Miller & England, 132 Fed. 823; Warren Bros. Co. v. City of Montgomery, 172 Fed. 414; Interurban Ry. & T. Co. v. Westinghouse E. & Mfg. Co., C. C. A., 186 Fed. 166; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Mine & Smelter Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897; Johns-Pratt Co. v. Economy Fuse & Mfg. Co., 216 Fed. 639; Engineer Co. v. Blaisdell-Canady Co., C. C. A., 220 Fed. 673.

15 Panoulias v. Hawley, 178 Fed. 101; Sherman-Clay & Co. v. Searchlight Horn Co., C. C. A., 214 Fed. 99. But see Fountain Ele. Floor Box Corporation v. Steel City Ele. Co., C C. A., 223 Fed. 544; Cheatham Ele. Switching Device Co. v. Bklyn Rapid Transit Co., 229 Fed. 165.

16 Am. Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. 661; Westinghouse Air-Brake Co. v. Christensen Eng. Co., 113 Fed. 594; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222.

17 Armat Moving Picture Co. v. Edison Manufacturing Co., 121 Fed. 559; Penfield v. Potts, C. C. A. 126 Fed. 475, 478; Grinnell Washing Mach. Co. v. Clarinda Lawn

validity of the patent. It is usually followed when the decision was by the Circuit Court of Appeals,[18] or by a District Court,[19] of another circuit. The effect as an adjudication of a decree sus-

Mower Co., 237 Fed. 98; Motion Picture Patents Co. v. Laemmle, 178 Fed. 104; Victor Talking Mach. Co. v. Sonora Phonograph Co., 188 Fed. 330; Walker Patent Pivoted Bin Co. v. Bernard Gloekler Co., 188 Fed. 435; Sanitary Street Flushing Mach. Co. v. City of Amsterdam, 225 Fed. 389; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Weber Ele. Co. v. Conn. Ele. Mfg. Co., 257 Fed. 429.

18 Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 312, 29 Sup. Ct. Rep. 495, 53 L. ed. 805; Cohen v. Stephenson & Co., C. C. A., 142 Fed. 467; Thomson-Houston Electric Co. v. Holland, 14 Fed. 903; Calculagraph Co. v. Automatic Time Stamp Co., 149 Fed. 436; Badische Anilin & Soda Fabrik v. A. Klipstein & Co., 125 Fed. 545; Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York, C. C. A., 157 Fed. 677; Timolat v. Phila. Pneumatic Tool Co., 123 Fed. 899; Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 159 Fed. 144; Gormley & Jeffrey Tire Co. v. U. S. Agency, C. C. A., 177 Fed. 691; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 530; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A., 298; Calculagraph Co. v. Automatic Time Stamp Co., C. C. A., 187 Fed. 276; Parsons Non-Skid Co. v. E. J. Wilis Co., 190 Fed. 333; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321; Wallerstein v. Christian Feigenspan, Inc., C. C. A., 215 Fed. 919; Cincinnati Butchers' Supply Co. v. Walker Bin Co., C. C. A., 230 Fed. 453; Thatcher v. Inhabitants of Town of Falmouth, C. C. A., 241 Fed. 869; Manton-Gaulin Mfg. Co. v. American Bottle Cap Co., 250 Fed. 865; Weber El. Co. v. Cutler-Hammer Mfg. Co., C. C. A., 256 Fed. 31; Underfeed Stoker Co. of America v. Riley, 207 Fed. 962; Hildreth v. Auerbach, 223 Fed. 545.

19 Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 312, 29 Sup. Ct. 495, 53 L. ed. 805; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A., 298; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321; Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co., C. C. A., 198 Fed. 650; Wayne Mfg. Co. v. Coffield Motor Washer Co., C. C. A., 209 Fed. 614; Kawneer Mfg. Co. v. Ventwell Store Front Co., 210 Fed. 459. See Westinghouse Electric & Mfg. Co. v. Sutter, 194 Fed. 888; Hamomnd Buckle Co. v. Weld, C. C. A., 72 Fed. 171; Westinghouse El. & Mfg. Co. v. Royal Weaving Co., 115 Fed. 733; Western El. Co. v. Keystone Tel. Co., 15 Fed. 809; Brunswick-Balke-Colender Co. v. Koehler & Hinrichs, 115 Fed. 648; U. S. Gramaphone Co. v. Seaman, C. C. A., 113 Fed. 745; Brill v. Peckham Mfg. Co., 129 Fed. 139.

taining a patent is not suspended by taking a decree therefrom.[20] It has been held: that the issue of a writ of certiorari from the Supreme Court does not impair the effect as a precedent of the decision of the Circuit Court of Appeals.[21] When a vendee has been enjoined from using certain apparatus and this injunction has been affirmed by the Circuit Court of Appeals, an action for the purchase price was dismissed although the vendor was not a party to the suit in which the injunction was granted.[22] When a preliminary injunction has been granted upon the faith of such an adjudication, the appellate court should ordinarily affirm the same upon an interlocutory appeal, without passing upon the validity of the patent or the merits.[23] But it has been said that the doctrine depends upon comity,[24] and is not a rule of law, but one of practice, convenience and expedience.[25] When a judge is clear in his conviction that a previous decision, made in another District Court against another defendant, has been wrongfully decided, he is not bound to follow it.[26] He will not

20 Treibacher Chemische Werke Gesellschaft Mit Beschrankter Haftung v. Wolf Safety Lamp Co. of America, Inc., 215 Fed. 126.

21 Minerals Separation v. Butte & Superior Copper Co., 227 Fed. 401.

22 DeForest Radio Tel. & Tel. Co. v. Standard Oil Co., C. C. A., 2.. Fed. 346.

23 Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 312, 29 Sup. Ct. 495, 53 L. ed. 805; Fireball Gas Tank & Ill. Co. v. Commercial Acetylene Co., 239 U. S. 156; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A. 298.

24 See, however, Mine & Smelter Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897.

25 Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 44 L. ed. 856, 858. See Comity in the Federal Courts by Arthur M. Brown, Harv. Law Rev. xxviii, p. 589.

26 Welsbach Lt. Co. v. Cosmopolitan Inc. El. Co., 100 Fed. 648; Horn & Br. Mfg. Co. v. Pelzer, 91 Fed. 665; Nat. Cash Reg. Co. v. Amer. C. R. Co., C. C. A., 53 Fed. 367; Wanamaker v. Enterprise Mfg. Co C. C. A., 53 Fed. 791; Cimiotti U. Co. v. Am. Fur. Ref. Co., 120 Fed. 672; Diamond Match Co. v. Union Match Co., 129 Fed. 602; Westinghouse El. & Mfg. Co. v. Condit El. Mfg. Co., 159 Fed. 144; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 530; Baldwin v. Abercrombie & Fitch Co., C. C. A., 228 Fed. 895; Cheatham E. Switching D. Co. v. Brooklyn R. T. Co., 238 Fed. 172; Vulcan Soot Cleaner Co. v. Amoskeag Mfg. Co., C. C. A., 255 Fed. 88. See also Hatch S. B. Co. v. El. St. Ry. Co., C. C. A., 100 Fed. 975; Consol. El. S. C. v. Accumulator Co., C. C. A., 55 Fed. 485; Am. Paper P. & B. Co. v. Nat. F. B. & P. Co., C. C. A., 51 Fed. 259; N. Y. Filter Mfg. Co. v. Niag-

do so when new evidence is introduced of such clear and persuasive character as to leave no fair doubt that the court in the former case would have reached a different conclusion had such evidence been before it.[27] A difference of ruling must be effected, not by a change in the conclusions or judgments which dictated the former rulings, but in the evidence commanding different findings of facts from those on which the former conclusions of law were based. The evidence must differ also in kind as well as the means by which it is introduced.[28] Insufficient weight was given below to the doctrine of comity.[29]

When the only disputed question was the priority of invention, similar weight has been given to the decisions of the Supreme Court of the District of Columbia or Court of Appeals of that District upon appeals from the decisions of the Patent Office in interference proceedings,[30] and to the decisions of the Commissioner of Patents in such proceedings;[31] but not in controversies concerning the patentability or novelty of the patent, or other disputed points.[32] Decisions of the Canadian courts are also entitled to great consideration upon such a motion.[33]

ara Falls W. W. Co., C. C. A., 80 Fed. 924; Adams v. Tannage P. Co., C. C. A., 81 Fed. 178; Electric Mfg. Co. v. Edison El. L. Co., C. C. A., 61 Fed. 834; Overman Wheel Co. v. Curtis, 53 Fed. 247; N. Y. Filter Mfg. Co. v. Jackson, 112 Fed. 678. *Infra*, § 377.

27 Wayman v. Louis Lipp Co., 222 Fed. 679.

28 Johns-Pratt Co. v. Economy Fuse & Mfg. Co., 217 Fed. 639, 641, per Dickenson, J.

29 Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 44 L. ed. 856, 858. See Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co., C. C. A., 101 Fed. 282, 41 C. C. A., 351; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A. 298.

30 Scott v. Laas, C. C. A., 150 Fed. 764; White Dental Mfg. Co. v. Johnson, 56 Fed. R. 262; Hildreth v. Mastoras, 253 Fed. 68.

31 Smith v. Halkyard, 16 Fed. 414; Celluloid Mfg. Co. v. Chrolithian C. & C. Co., 24 Fed. 275; Turner Brass Works v. Appliance Mfg. Co., 164 Fed. 195; Weston Instrument Co. v. Am. Instrument Co., 169 Fed. 659; Perfection Cooler Co. v. Rose Mfg. Co., 175 Fed. 120; Thoma v. Perri, C. C. A., 228 Fed. 904. *Contra*, Wilson v Consolidated Store-Service Co., C. C. A., 88 Fed. 286, 288. See Fenton Met. Mfg. Co. v. Chase, 73 Fed. 831.

32 Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 143, 146; Turner Brass Works v. Appliance Mfg. Co., 164 Fed. 195; Perfection Cooler Co. v. Rose Mfg. Co., 175 Fed. 120.

33 Carter & Co. v. Wollschlaeger, 53 Fed. 573.

The rule has been applied to adjudications, that a given state of facts does or does not constitute an infringement, as well as to those upon the construction and validity of a patent.[34]

It does not include a case where an entirely new defense is pleaded, although then that defense alone will be considered upon the decision of the motion.[35]

Where there has been no adjudication, a preliminary injunction will not be granted if there is a fair doubt as to invention, anticipation, construction, or infringement.[36] The burden of proving anticipation is upon the defendant, and every reasonable doubt is resolved against him.[37]

34 Byerley v. Ellis Co., 190 Fed. 772.

35 General El. Co. v. Condit El Mfg. Co., 191 Fed. 511; Gamewell Fire Alarm Tel. Co. v. Hackensack Improvement Commission, 199 F 182; Bragg v. Mayor, etc. of N. Y. 141 Fed. 118.

36 Newhall v. McCabe Hanger Mfg. Co., C. C. A., 125 Fed. 919, 60 C. C. A. 629; Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865. See Hildreth v. Norton, C. C. A., 159 Fed. 428; Motion Picture Patents Co. v. N. Y. Motion Picture Co., 174 Fed. 51; Meyers v. Skinner, 179 Fed. 860; Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co., 190 Fed. 323; Lovell-McConnell Mfg. Co. v. Automobile S. Mfg. Co., 193 Fed. 658; Gamewell Fire Alarm Tel. Co. v. Star El. Co., 199 Fed. 185; Long Arm System Co. v. New York Shipbuilding Co., 207 Fed. 955; Denison v. Gifford, C. C. A., 209 Fed. 231; Layne v. Getty, C. C. A., 222 Fed. 917; Hurd v. James Goold Co., C. C. A., 203 Fed. 998; Crescent Specialty Co. v. National Fireworks D. Co., 219 Fed. 130; M'Master v. Daugherty Mfg. Co., 219 Fed. 219; Ryder v. Beaver Silo & Box Mfg. Co., 219 Fed. 242; Individual Drinking Cup Co. v. Public Service Cup Co., 234 Fed. 653; Safety Car Heating & Lighting Co. v. Gould Coupler Co., 245 Fed. 755.

37 Wayman v. Louis Lipp Co., 222 Fed. 679; Eddy v. Kramer, 247 Fed. 962, 965, 967: "In order to establish their validity, the defendants introduced in evidence several calendars and patents. The first was the 'Tear Kleen' calendar of the Herold Company of Milwaukee for the year 1915, defendants' Exhibit B. disclosing features or structures similar to those disclosed in the claims in question in the plaintiffs' patents. They introduced a circular describing the same and soliciting orders for 1915, defendants' Exhibit C, and a blotter or pad, on the back of which is a picture of the Herold calendar and the date 'March, 1914.' This calendar, they alleged anticipated the Eddy patents. It was pretty clearly established, that the inventions, if such they be, of the first patent, No. 1,153,543, was completed February 6, 1913, and of the second, No. 1,153,545, March 20, 1913, and that application for said patents were filed, respectively, on March 17, 1913, and October 17, 1913. The earliest date of the Herold calendar established with any certainty

The existence and use of an unpatented anticipating device prior to the invention covered by the patent, may be established

is contained on the blotter, March, 1914. Augustus J. Keil testified that he saw a Herold 'Tear Kleen' calendar in the building of the Franklin Trust Company in the fall of 1912, and that he opened correspondence with said company early in 1913, and received a number of calendars from it, among which was one similar, so far as he could then judge, in all respects to the Herold calendar. This calendar he showed, he says, to Frank Hobson, one of the defendants. In this Hobson corroborates him. In this way, the defendants seek by the Herold calendar to anticipate and antedate the alleged invention, constituting the patents in question. The acceptance of this testimony, as a fact, is met with several difficulties. The testimony was not clear and positive, but indefinite and in some respects contradictory. It was based solely upon memory, both as to the date and as to the resemblance of the calendar, said to have been seen by them, to defendants' Exhibit B, a calendar for the year 1915. The witnesses, even if trying their best to recall exactly what they declare they saw, may be mistaken as to the very features constituting the novel ideas in the Eddy patents, for there appears to have been no special reason to call unusual attention to the calendar. After a period of more than three years, it can hardly be expected that they would be able to recall with exactness the principal features and structures of the calendar which they saw. Neither of the witneses were experts in mechanics or patents, and had no particular reason to rivet attention upon that particular calendar. Memory after such a long time, with the best of men, is fallible, and plays such tricks upon us that it is unsafe to rely entirely upon it under such circumstances. This is especially true when possible interest, bias, or perjury is taken into account. No attempt whatever was made to corroborate the testimony of these witnesses. The defendants did not call any officer of the Franklin Trust Company to establish the fact that it received any such calendar from the Herold Company in 1912. No witnesses from the Herold Company or deposition of any kind from any one connected with such company, or correspondence, was offered to show when the calendar like defendants' Exhibit B was first made by that company, and no explanation was given as to why no attempt was made to corroborate these witnesses upon this important testimony. I am therefore not satisfied to accept the uncorroborated testimony of the said witnesses as to the date when they saw the Herold calendar, or as to its resemblance to the defendants' Exhibit B. The possibility, or even probability, of mistake is too great. Defendants' Exhibits B, C, and D may may therefore be eliminated from further consideration. Anticipation must be made out clearly and satisfactorily. The law requires not conjecture, but certainty. The burden of proof rests upon the defendants, and every reasonable doubt should be resolved against them. Coffin v. Ogden, 85 U. S. (18 Wall.) 120, 124, 21 L. ed. 821; Clough v. Mfg. Co., 106 U. S. 178, 1 Sup. Ct. 198, 27 L. ed. 138."

by oral testimony, when sufficient to prove the facts beyond a reasonable doubt.[38] The burden of proof of anticipation is upon the defendant and every reasonable doubt is resolved against him.[39] Where the defense depends on the construction of former patents or of written instruments affecting the title the question may be determined upon a motion for a preliminary injunction.[40] It has been said that the defendant cannot raise technical objections to the title of an assignee of a patent where the validity of the assignment is not questioned by the assignor.[41] The failure of complainant to call an expert witness is no reason for denying him an injunction.[42] There is a strong presumption of the utility of an invention which the defendant is using.[43]

Where there is no prior patent or publication submitted, nor any room for doubt as to the infringement, it has been held that the presumption arising from the grant of the patent is sufficient to warrant the issue of an injunction.[44] This has been described as "the Second Circuit Rule," but a recent case states that it rests upon "a slender foundation."[45] It was there said, that the phrase "fair doubt" refers to something more than the effect produced on the judicial mind by the direct evidence submitted on the motion, but includes "a belief that other reach-

38 De Laval Separator Co. v. Iowa Dairy Separator Co., C. C. A., 194 Fed. 423.

39 Crone v. John J. Gibson Co., C. C. A., 247 Fed. 503.

40 Individual Drinking Cup v. Osmun-Cook Co., 220 Fed. 335.

41 Imperial Mach. Co. v. N. R. Streeter & Co., 214 Fed. 985.

42 Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634.

43 Davey Free Expert Co. v. Van Billiard, 248 Fed. 718.

44 Pelzer v. City of Binghamton, C. C. A., 95 Fed. 823, 37 C. C. A., 288, which has been said to be the only case in which a motion for a preliminary injunction, lost in the court below, prevailed in the Circuit Court of Appeals; Seidenberg v. Davidson, 112 Fed. 431, 432, Lacombe, J.; Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865, 866. See, also, Fuller v. Gilmore, 121 Fed. 129.

45 Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865, 866, per Hough, J.: "The function of the apellate court has more frequently been directed to discovering doubt, and thus delaying decision, than to adjudicating matters far more fully and elaborately presented to the lower court than it was the practice in equity to do when so vital a litigation as that over the Morse electric telegraph reached the Supreme Court. The record of that case, compared with modern records, is an instructive example of deterioration in procedure."

able testimony exists which, by reasonable effort, the party may adduce."[46]

If, upon a motion for a preliminary injunction, the parties are willing to rest their case for a final hearing upon the papers then presented, without oral testimony, the court is more inclined to decide the question upon the merits.[47]

Because of the weight which the decision has as a precedent, proof that the defendant will not be seriously injured by the injunction, does not justify its issue,[48] although when there is evidence that the complainant cannot suffer serious loss it may afford a reason for denying the writ.[49] Laches by the plaintiff before the suit,[50] and after the suit has begun,[51] is a reason for denying the motion. A delay pending litigation with other infringers is not laches.[52]

If serious public inconvenience would result from a preliminary injunction, the application may be denied.[53]

Where some of the claims in the patent were sustained and

46 Ibid.

47 Crown Cork & Steel Co. v. Bklyn Bottle Stopper Co., 190 Fed. 323.

48 Victor Talking Mach. Co. v. Heed & Catlin Co., 180 Fed. 778.

49 Meyers v. Skinner, 179 Fed. 860; Firestone Tire & Rubber Co. v. Dientenfass, 215 Fed. 747; Boyce v. Stewart-Warner Speedometer Corporation, C. C. C., 220 Fed. 118.

50 United Nickel Co. v. New H. S. M. Co., 17 Fed. 528; Waite v. Chichester Chair Co., 45 Fed. 258; Keyes v. Pueblo Sm. & Ref. Co., 31 Fed. 560; Byerley v. Standard Asphalt & Rubber Co., 189 Fed. 759; Valvona-Marchiony Co. v. Silverstein, 207 Fed. 374; Hills v. Hamilton Watch Co., 248 Fed. 499, 502. See §§ 180, 182, *supra*. In one case a delay of two months was held such laches as to defeat the application. New Mfg. Co. v. Superior Drill Co. (C. C. Ohio), 56 Fed. 152. But see Brush El. Co. v. El. Imp. Co., 45 Fed. 241; Nat. Heeling Mach. Co. v. Abbott, 77 Fed. 462; Collingnon v. Hayes, 8 Fed. 912; N. Y. G. S. Co. v. Buffalo G. S. Co., 18 Fed. 638; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed 768.

51 Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865, 867, where, with proper diligence, the case would have been ready for final submission. But see Cheatham El. Switching Device Co. v. Transit Development Co., 226 Fed. 495; American Grain Separator Co. v. Twin City Separator Co., C. C. A., 202 Fed. 202.

52 Timolat v. Franklin Boiler Works, C. C. A., 122 Fed. 69; [a delay of three years]. See § 182 *supra*.

53 S. W. Brush El. & P. Co. v. La. El. L. Co., 45 Fed. 893; Bliss v. Brooklyn, 4 Fisher's Pat. Cas. 596; Am. Ordinance Co. v. Driggs Seebury Co., 87 Fed. 947; Hoe v. Boston Adv. Corp., 14 Fed. 914; Robinson on Patents, § 1200. Treibacher

found to have been infringed and others held to be invalid, the complainant has been required to disclaim the latter before the injunction issues.[54] But the better practice is not to require a disclaimer until the entry of the final decree after any accounting that may be ordered has been terminated, in order that the complainant may have the right to have so much of the adjudication as is against him reviewed upon appeal.[55]

The combination of the complainant with other patentees, so as to create a monopoly,[56] the absolute refusal of the owner of the patent to use the same, which had deprived the public of the benefit of the invention,[57] and the fact that the principal use of the invention was in connection with gambling, when it might be used for other purposes;[58] were held to be no reasons for denying an injunction.[59]

Where the defendant is pecuniarily responsible,[60] especially where the complainants have established a regular license fee,[61]

Chemische Werke Gesellschaft Mit Beschrankter Haftung v. Wolfe Safety Lamp Co. of America, Inc., 214 Fed. 414. Within a month the suspension was set aside, S. C., 215 Fed. 126. But see Pelzer v. Binghamton, C. C. A., 95 Fed. 823; N. Y. Filter Mfg. Co. v. Niagara Falls W. Co., C. C. A., 77 Fed. 900; Westinghouse A. B. Co. v. Great N. Ry. Co., 86 Fed. 132.

54 F. D. Cummer & Son Co. v. Atlas Dryer Co., C. C. A., 193 Fed. 993. See *infra*, § 400.

55 Page Mach. Co. v. Dow, Jones & Co., C. C. A., 168 Fed. 703.

56 Lanyon Zinc Co. v. Brown, C. C. A., 115 Fed. 150; Edison El. L. Co. v. Sawyer-Man El. Co., C. C. A., 53 Fed. 592.

57 General El. Co. v. Wise, 119 Fed. 922; Continental Paper Ba Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 L. ed. 1122. See *infra*, § 400.

58 Fuller v. Berger, C. C. A., 65 L.R.A. 381, 120 Fed. 274.

59 But see *infra*, § 284.

60 N. Y. Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 835; Westinghouse A. B. Co. v. Burton S. C. Co., 70 Fed. 619; Nilsson v. Jefferson, 78 Fed. 366; Huntington D. P. Co. v. Alpha P. C. Co., 91 Fed. 534; Karfiol v. Bothner, 151 Fed. 777; Byerley v. Standard Asphalt & Rubber Co., 189 Fed. 759; Gamewell Fire Alarm Tel. Co. v. Star El. Co., 199 Fed. 185. *Contra*, General El. Co. v. Wise, 119 Fed. 922. In some cases the defendant is then required to keep an account. See *infra*, § 297.

61 Overweight C. El. Co. v. Cahill & H. El. Co., 86 Fed. 338; Overweight C. El. Co. v. Improved O. & R. M. H. Ass'n, C. C. A., 94 Fed. 155; Nat. Heeling Mach. Co. v. Abbott, 77 Fed. 462. See Nat. Cash Reg. Co. v. Navy C. R. Co., 99 Fed. 565; Eastern B. P. Co. v. Nixon, 35 Fed. 752; McMillan v. Conrad, 16 Fed. 128; Eagle Mfg. Co. v. Chamberlain Plow Co., 36 Fed. 905; Hoe v. Knap, 27 Fed. 204; Geo. A. Macbeth Co. v. Lippincott

or where the defendant offers a bond or undertaking with a sufficient surety that he will pay whatever may be awarded against him for damages or profits, the injunction will usually be denied, unless there has been a previous adjudication sustaining the plaintiff's patent.[62] Sometimes even where there had been such an adjudication,[63] especially when an appeal from such an adjudication is pending.[64] An injunction may be dissolved where the plaintiff has sent a false or misleading description of the same to the trade.[65] The complainant may be restrained from sending out circulars which misrepresent, directly or by innuendo the scope of the decree and contain veiled threats of suits for infringement.[66] But notices of the claim of infringement and threats of suit when made in good faith are not unfair competition and should not be enjoined.[67]

An *ex parte* application for an injunction to restrain the infringement of a patent should, it seems, be supported by an affidavit, or an allegation in a bill verified by affidavit of the plaintiff, stating that he believes that the person to whom the patent was issued was the original inventor thereof, or that the invention was new, or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued.[68] An injunction against the manufacture or sale of articles in violation of a

Glass Co., 54 Fed. 167; Washburn & M. Mfg. Co. v. H. B. Scott & Co., 22 Fed. 710; Edison El. Lt Co. v. Columbia Inc. L. Co., 56 Fed. 496; N. Y. Belting & P. Co. v. Magowan, 23 Fed. 596; Greenwood v. Bracher, 1 Fed. 856. *Contra*, Warren Bros. Co. v. City of Montgomery, 172 Fed. 414; Kryptok Co. v. Haussman & Co., 216 Fed. 196.

62 McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Campbell Pr. Press Co. v. Prieth, 77 Fed. 976; Carter & Co. v. Wollschlaeger, 53 Fed. 573. See *infra*, § 297.

63 Westinghouse A. B. Co. v. Burton S. Car Co., C. C. A., 77 Fed. 301; Norton v. Eagle Auto Can Co., 61 Fed. 293.

64 Hills v. Hamilton Watch Co., 248 Fed. 499, 505.

65 Meyers v. Skinner, 186 Fed. 347. See *infra*, §§ 284, 296.

66 Rollman Mfg. Co. v. Universal Hardware Works, C. C. A., 238 Fed. 568. See *infra*, § 284a.

67 Clip Bar Mfg. Co. v. Steel Protected Concrete Co., 209 Fed. 874; Kryptok Co. v. Haussmann & Co., 216 Fed. 196.

68 Hill v. Thompson, 3 Meriv. 622; Sturz v. De La Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441; U. S. R. S., §§ 4886, 4887; *supra*, § 147.

patent right is violated by their sale or manufacture within the United States, beyond the jurisdiction of the court.[69]

After an injunction against the infringement of a patent, the defendant or his trustee in bankruptcy may be enjoined from selling the infringing apparatus pending his appeal from the decree.[70]

It has been held, that, after an interlocutory decree granting an injunction, the complainants cannot sue in another district for the sole purpose of obtaining an adjudication that other parties therein located have been the real parties in interest in the prior suit and are bound by the injunction.[71]

Where the question of infringement is doubted "the fact that the patent is a mere paper patent may turn the scale against infringement as it may resolve a light doubt of validity."[72] Evidence that defendant had an infringing device in his possession, without proof that it made, used, or sold the same, does not make out a case of infringement.[73] The publication of a cut of an infringing article with a general description from which a skilled mechanic may make the same is not a contributory infringement when no such machine has been made.[74] Because a patent has been infringed by another justifies no inference that the defendant was guilty of infringement.[75]

After a defendant has once infringed a patent owned by the plaintiff, it seems that the court will usually enjoin him from doing so in the future[76] even though he has gone out of the business and sold his property[77] and even though he swears that he has no intention of doing so again, unless he further proves that he has paid all damages occasioned by his infringement,

69 Macaulay v. White S. M. Co., 9 Fed. 698.

70 United Wireless Tel. Co. v. Nat. El. Signaling Co., C. C. A., 198 Fed. 385.

71 Kehoe v. Bradford & Lasher, 175 Fed. 800.

72 Heels v. Hamilton Watch Co., 248 Fed. 499, 505.

73 Sheffield Car Co. v. Buda Foundry & Mfg. Co., 177 Fed. 713.

74 Popular Mechanics Co. v. Brown, C. C. A., 245 Fed. 859.

75 Kryptok Co. v. Harris, 216 Fed. 642; Gilliland v. Adamson, C. C. A., 227 Fed. 93.

76 Goshen Mfg. Co. v. Hubert A. Meyers Mfg. Co., 242 U. S. 202; Van Kannel Revolving Door Co. v. Uhrich, 247 Fed. 344.

77 Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 242 U. S. 202; Manton-Gaulin Mfg. Co. v. American Bottle Cap Co., 250 Fed. 865.

and has desisted from it;[78] but not where it clearly appears that the infringement ceased before the suit was brought and was made without knowledge of the complainant's rights,[79] especially when the complainant knew of the cessation before the suit was brought.[80]

It has been held that after the expiration of a patent an injunction may issue to prevent the use of a machine made while the patent was in force,[81] and it has been said that an injunction previously issued will, until dissolved by order, remain in force so far as still to forbid such a use.[82] But a bill praying for such an injunction must allege either that the defendant is using machines manufactured during the term of the patent and in violation of it, or that the plaintiff has cause to fear such use.[83]

§ 278. Injunctions to restrain the infringements of copyrights. The Act of March 4, 1909, provides: "That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: (a) To an injunction restraining such infringement."[1] "That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative

78 Jenkins v. Greenwald, 1 Bond. 126; s. c., 2 Fisher, 37 Sickels v. Mitchell, 3 Blatchf. 548; Poppenhusen, v. N. Y. G. P. C. Co., 4 Blatchf. 184; Celluloid Mfg. Co. v. Arlington Mfg. Co., 34 Fed. 324; Morton Tr. Co. v. Standard Steel Car Co., C. C. A., 177 Fed. 931.

79 General El. Co. v. Pittsburgh-Buffalo Co., 144 Fed. 439. See Home Ins. Co. v. Nobles, 63 Fed. 642.

80 Kennicott Water Softener Co. v. Bain, C. C. A., 185 Fed. 520.

81 Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. 355. But see Am. Cable, Ry. Co. v. Chicago City Ry. Co., 41 Fed. 522; Westinghouse v. Carpenter, C. C. A., 43 Fed. 894; Am. Sulphite Pulp. Co. v. Hinckley Fiber Co., 217 Fed. 57. See *infra*, §§ 287, 296.

82 Am. D. R. B. Co. v. Rutland R. Co., 2 Fed. 355.

83 Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. 355.

§ 278. 1 35 St. at L. 1075, § 25, Pierce Fed. Code (Supp.), § 1587.

throughout the United States and be enforcable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants."[2]

This statute is, however, merely declaratory of the previous rule in equity which, it is said by Lord Eldon, was "founded upon this; that the law does not give a complete remedy to those whose literary property is invaded; for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease. This court, therefore, interposes by injunction; but not in cases where an action cannot be maintained."[3] The rules regulating the issue of injunctions to prevent the infringement of copyrights are in general similar to those regulating the issue of injunctions restraining the infringement of patents; but decisions which relate to patent cases are not absolutely controlling in cases arising under the copyright law.[4]

The plaintiff must show a clear title to his copyright, and an infringement or threatened infringement by the defendant.[5] It has been held that an injunction is void when obtained and served before two copies of the work, of which a copyright is sought, have been deposited in the copyright office or mailed addressed to the register.[6] A preliminary injunction will not be granted where the validity of the copyright and the infringement are denied and not clearly established.[7]

The injunction will be denied if the defendant shows that the plaintiff has consented to his infringement, or has been guilty of unreasonable delay after he learned that it had occurred or was threatened.[8] How long a time must have elapsed to bar

2 Ibid., § 36, Pierce Fed. Code (Supp.), § 1589.

3 Lawrence v. Smith, Jacob. 471, 472.

4 Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 345, 52 L. ed. 1086, 1091; Park & Sons, v. Hartman, 12 L.R.A. (N.S.) 135, 153 Fed. 24. *Contra* Scribner v. Straus, 130 Fed. 389.

5 Chase v. Sanborn, 6 Off. Gaz. 932; Parkinson v. Laselle, 3 Saw. 330; Lawrence, v. Dana, 4 Cliff. 1; Yuengling v. Schile, 12 Fed. 97; Drone on Copyright, ch. xi. pp 496-543.

6 N. Y. Times Co. v. Star Co., 195 Fed. 110.

7 Nixon v. Doran, 168 Fed. 575.

8 Rundell v. Murray, Jacob, 311; Saunders v. Smith, 3 Myl. & Cr. 711; Chappell v. Sheard, 1 Jur. (N. S.) 996; Tinsley v. Lacy, 1 Hem. & M. 747; Keene v. Clarke, 5 Robertson (N. Y.), 38, 66, 67; Miller v. M'Elroy, 1 Am. Law. Reg. 198; Haas v. Leo Feist, Inc., 234

the plaintiff's right to an injunction has not been definitely settled. It has been held in England, however, that an injunction may be obtained after the copyright has been infringed to the plaintiff's knowledge during four years.[9] Moreover, delay will not prejudice him, if caused solely by his waiting until the result of litigation, whether prosecuted by himself or others, to settle a doubtful question of law involving the validity of his title.[10]

As has been said, an injunction will not be granted unless the plaintiff shows a plain title to the copyright which he claims; but the copyright is *prima facie* evidence that he is the author, and the burden of proof is upon the defendant to show the contrary,[11] or that, for some other reason, there is a defect in the title claimed.[12] When copyright was obtained under the Act of January 3, 1831,[13] the certified copy of its title as deposited and recorded, signed and sealed by the clerk of the court, is *prima facie* evidence of the deposit of the title at the date therein named.[14] When copyright was obtained, under the later statutes, in force prior to 1909, the certificate of the librarian of Congress duly signed is sufficient evidence of the deposit and date of deposit of the title and of the copies of the book in his office,[15] although not under seal.[16] An unsigned memorandum of the deposit of the copies of the book, written upon a certificate to a copy of the record of the deposit is not competent evidence.[17]

The Act of March 4, 1907, expressly provides that the certificate under seal of the register of copyright shall be "admitted in any court as *prima facie* evidence of the facts stated therein."

Fed. 105; Flanagan v. Coleman, 255 Fed. 178.

9 Hogg v. Scott, L. R. 18 Eq. 444, 454; Drone on Copyright, 504, 512.

10 Buxton v. James, 5 De G. & Sm. 80; Rumford Chem. Works v. Vice, 14 Blatchf. 179.

11 Taney, C. J., in Reed v. Carusi, Taney, 72, 74.

12 Drone on Copyright, 499; Story's Eq. Jur., § 936, note 6.

13 4 St. at L. 436, § 4, Act of Jan. 3, 1831.

14 Callahan v. Myers, 128 U. S. 617, 655, 656, 9 Sup. Ct. 177, 187, 32 L. ed. 547.

15 Belford v. Scribner, 144 U. S. 488, 505, 506, 12 Sup. Ct., 734, 739, 36 L. ed. 514; Uebelies v. Arthur H. Christ Cl., 209 Fed. 885, 890.

16 Belford v. Scribner, 144 U. S. 488, 505, 506, 12 Sup. Ct., 734, 739, 36 L. ed. 514.

17 Merrill v. Tice, 104 Fed. 557, 26 L. ed. 854.

namely the name and address of the claimant of the copyright, the title of the work, the date and the deposit of the copies, such marks, as shall fully identify the entry and in the case of a book the receipt of the affidavit provided for by the Act and the date of the completion of the printing or the date of the publication as stated in the affidavit.[18]

Certificates of the officers with whom law reports were required to be deposited, that such deposits were made in their offices on specified dates as required by law, are competent evidence of the date of publication.[19] The date on the title page, if any evidence of the date of publication, is not conclusive.[20] The certificate of registration is not evidence that the work was not previously published.[21] Testimony that the witness heard a piece of music from printed sheets is not evidence that the music had not previously been published as a book.[22] Testimony by an artist's neighbors that they did not know that he ever exhibited a painting of his own, outside of his own parlor, or gave anyone permission to copy it previously to the application for copyright, was held to be insufficient to prove non-publication.[23]

Evidence by the complainant that he ordered the book printed by a firm in the United States creates a presumption that it was there printed.[24]

The court will protect an equitable title against infringement, unless the defendant possesses superior equities to those of the complainant.[25] The equitable owner cannot obtain an injunction against the licensee for value of the legal owner, who has acted without notice of the complainant's equitable rights.[26] The complainant may obtain an injunction against future infringements without proving title to the copyright when it was

18 Act of Mar. 4, 1907, 35 St. at L., ch. 320, § 55, p. 1075.

19 Callahan v. Myers, 128 U. S., 617, 9 Sup. Ct., 177, 32 L. ed. 547.

20 Lover v. Davidson, 1 C. B. N. S. 182.

21 Boosey v. Davidson, 13 Q. B. 257.

22 Davies v. Bownes, C. C. A., 219 Fed. 128, see Hale on Copyright and Literary Property, 13 Corpus Juris 1210.

23 Booselman v. Richardson, C. C. A., 174 Fed. 622, 624.

24 Uebches v. Arthur H. Christ Co., 209 Fed. 885, 889.

25 Little v. Gould, 2 Blatchf. 165.

26 Brady v. Reliance Motion Picture Corp., C. C. A., 229 Fed. 137. *Cf.* T. B. Harms & Francis, Day & Hunter v. Stern, 222 Fed. 581.

previously infringed by the defendant.[27] When the copyright was entered in the name of a fictitious company it was held that it could not be enforced by the courts.[28]

The complainant is not obliged to prove damage from the breach of copyright.[29] Ordinarily, the injunction forbids the publication of only so much of the defendant's work as infringes upon the copyright of the plaintiff.[30] Where the defendant's publication intermingles matter infringing the complainant's copyright with other matter which does not, the entire publication may be enjoined, with permission to the defendant to apply for a modification of the injunction after he has eliminated the objectionable matter;[31] but where the piratical matter is insignificant in amount and value when compared with the rest of the defendant's publication, an injunction should be refused and the plaintiff's right limited to a trial by jury of the damages actually sustained.[32] If there is any doubt concerning the infringement, and its ascertainment will necessitate the examination of a great deal of matter, the court, in this country, usually directs a reference to a master to hear testimony and state the facts, together with his opinion for its consideration, before granting an injunction.[33] Such a reference is usually ordered before the final hearing, but may be at the decree.[34] In England, however, laborious examinations have frequently been made by the judges themselves, unassisted, except by counsel.[35]

27 Historical Pub. Co. v. Jones Bros. Pub. Co., C. C. A., 231 Fed. 638.

28 Haas v. Leo Feist Inc., 234 Fed. 105.

29 Reed v. Holliday, 19 Fed. 325, 327.

30 Webb v. Powers, 2 W. & M. 497; Story v Holcombe, 4 McLean, 306; Farmer v. Elstner, 33 Fed. 494; Historical Pub. Co. v. Jones Bros. Pub. Co., et al., C. C. A., 231 Fed. 639.

31 Park & Pollard Co. v. Kellerstrass, 181 Fed. 431.

32 Dun v. Lumbermen's Credit Ass'n, 209 U. S. 20, 52 L. ed. 663.

33 Folsom v. Marsh, 2 Story, 100; Webb v. Powers, 2 W. & M. 497; Story v. Derby, 4 McLean, 160; Greene v. Bishop, 1 Cliff. 186; Lawrence v. Dana, 4 Cliff. 1; West Pub. Co. v. Lawyers' Co-operative Pub. Co., 25 L.R.A. 441; 64 Fed. 360; S. C., C. C. A., 35 L.R.A. 400, 79 Fed. 756; Drone on Copyright, 513. But see Smith v. Johnson, 4 Blatchf. 252.

34 Lawrence v. Dana, 4 Cliff. 1; Drone on Copyright, 513.

35 Lewis v. Fullarton, 2 Beav. 6; Murray v. Bogue, 1 Drew, 353; Jarrold v. Houlston, 3 Kay & J. 708; Pike v. Nicholas, L. R. 5 Ch. 251; Drone on Copyright, 513.

Instead of a reference, an issue at law may be directed.[36]

The plaintiff need not specify in either his bill or his affidavit the parts of the defendant's publication which he thinks have been taken from his work. A general allegation of infringement accompanied by a verification by affidavit of the two works is sufficient.[37] The practice has been that, when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as showing the piracy.[38] But in a suit for an accounting of profits by the publication of a song, the allegation that the publication was based upon an idea or theme which was conceived by the plaintiff for a popular song and upon a chorus, verse, or lyrics, written by a plaintiff for his song without setting forth in words or substance the idea, theme, verse, or chorus which the plaintiffs claim have been conceived and written: was held to be insufficient.[39]

When copies of the two works are not filed in accordance with the rules, an injunction will be denied.[40] Clearer proof and a stronger case than would be sufficient to entitle a plaintiff to an injunction after the hearing is often required before he can obtain an interlocutory injunction.[41] Where there is doubt about the infringement, an injunction may be withheld upon the filing of a bond by the defendant.[42] The difficulty of accurately determining the damages resulting from an unauthorized publication of his work will often have weight in leading the court to grant a preliminary injunction, when otherwise it might refuse one.[43] But, on the other hand, the court will often refuse an injunction before the hearing, when it is plain that the defendant would suffer more injury from being obliged to dis-

36 Jollie v. Jacques, 1 Blatchf. 618.

37 Farmer v. Calvert L. Co., 1 Flip. 228, 235; Sweet v. Maugham, 11 Sim. 51; Drone on Copyright, 513.

38 Sweet v. Maugham, 11 Sim. 51, 53.

39 Kennedy v. Pease, N. Y., Sup. Ct., Sp. Tm., N. Y. L. J., May 28, 1919, per Lehman, J.

40 Tully v. Triangle Film Co., 229 Fed. 297; Copyright rule No. 2, 214 U. S. 536; *supra*, § 150.

41 Johnson v. Wyatt, 2 De G., J. & S. 18; Drone on Copyright, 517, 518.

42 Louis De Jonge & Co. v. Breuker & Kessler Co., 147 Fed. 763. See *supra*, § 277.

43 Matthewson v. Stockdale, 12 Ves. 270; Wilson v. Luke, 1 Vict. Law R. 127; Prince Albert v. Strange, 1 Mac. & G. 25, 46; Little

continue the publication than can result to the plaintiff from his continuing.[44]

It has been held in England that if a work be libelous, immoral, or blasphemous, which last named term would include one "which impugned the doctrines of the immateriality and immortality of the soul,"[45] there can be no copyright therein, and a piratical edition thereof will not be enjoined.[46] These decisions, however, one of which stigmatized as unworthy of protection Byron's "Cain,"[47] have been severely criticised,[48] and it is not likely that they would be fully sustained if the question should be raised in the United States; although in a case in the Federal courts Judge Deady assigned as one among several reasons for refusing to enjoin an unauthorized representation of "The Black Crook," that it "only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."[49]

"An author who has pirated a large part of his book from others is not entitled to have his copyright protected."[50] It has been held: that the fact that a complainant is a member of an illegal combination, formed to restrain interstate commerce, is no defense to a suit for the infringement of a copyright.[51] Injunctions to restrain breaches of copyright may be served and enforced by contempt proceedings, anywhere in the United States;[52] and, at least when they protect dramatical and musical

v. Gould, 2 Blatchf. 165; Drone on Copyright, 516–519.

[44] Spottiswoode v. Clarke, 2 Phil. 154; Cox v. Land & W. J. Co., L. R. 9 Eq. 324; Lodge v. Stoddart, 9 Rep. 137. But see Emerson v. Davies, 3 Story, 768.

[45] Lawrence v. Smith, Jacob, 471.

[46] Walcot v. Walker, 7 Ves. 1; Stockdale v. Onwhyn, 5 Barn. & Cr. 173; Murray v. Benbow, 6 Petersd. Abr. 559; Lawrence v. Smith, Jacob, 471; Southey v. Sherwood, 2 Meriv. 435. But see Burnett v. Chetwood, 2 Meriv. 441.

[47] Murray v. Benbow, 6 Petersd. Abr. 559.

[48] Campbell's Lives of the Lord Chancellors, ch. ccxiii; Drone on Copyright, 181–196.

[49] Martinetti v. Maguire, 1 Deady, 216, 223.

[50] Edward Thompson Co. v. Am. Law Book Co., C. C. A., 122 Fed. 922, 926, per Cox, J., 62 L.R.A. 607. But see Bentley v. Tibbals, C. C. A., 223 Fed. 247, S. E. Hendricks Co. v. Thompson Pub. Co., 242 Fed. 37, 40 Hale on Copyright and Literary Property, 13 Corpus Juris, 1197. See supra, § 182.

[51] Scribner v. Straus, 130 Fed. 389.

[52] 35 St. at L. 1084, Comp. St., § 9557.

compositions, the defendant may move to dissolve the same in any circuit in which he is engaged in such performance;[52] and suits for such injunctions may be instituted in any district where the defendant or his agent may be found.[53]

§ 279. Injunctions to restrain the unlawful use of trade-marks. Injunctions to restrain the use of trade-marks by others than their owners are granted by courts of equity, it has been said, partly to prevent the fraud upon the public which would otherwise be perpetrated, and partly on account of the difficulty of estimating the injury which would be caused the owner of a trade-mark from its improper use.[1] The former ground of the interference of the court has, however, been expressly repudiated by a great judge, Lord Westbury, who said, when Lord Chancellor, in delivering the judgment in a leading case: "Imposition upon the public becomes the test of the property in the trade-mark having been invaded and injured, but not the ground on which the court rests its jurisdiction."[2]

"Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in."[3] "Where the trade-mark consists of a picture or symbol, or in any peculiarity in its appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the

52 35 St. at L. 1075, § 25, Pierce's Fed. Code Supp. § 1587.

53 Ibid. § 35, Pierce Supp. § 1589.

§ 279. 1 Perry v. Truefit, 6 Beav. 66, 73; Croft v. Day, 7 Beav. 84; Leather C. Co. v. American L. C. Co., 10 Jur. (N. S.) 81; Walton v. Crowley, 3 Blatchf. 440; Shaw Stocking Co. v. Mack, 12 Fed. 707. See High on Injunctions, (4th ed.) §§ 1063–1084.

2 Leather C. Co. v. American L. C. Co., 10 Jur. (N. S.) 81. But see the language of Coxe, J., in Shaw Stocking Co. v. Mack, 12 Fed. 707, 710.

3 Judge Rapallo in Hier v. Abrahams, 82 N. Y. 519, 523, 37 Am. Rep. 589.

court will not interfere."[4] "But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or in any form of label, and its use by another is unlawful. The statute" of New York "requires only that the imitation should be either the same to the eye, or in sound to the ear, as the genuine trade-mark, and this accords with the authorities."[5]

"To make an exclusive right to use a name or symbol as a trade-mark, such use must be new; if ever before used as applicable to a like article, it cannot be exclusively appropriated. If the article is known to commerce in general, by the term claimed, as a trade-mark, the claim is ill-founded. If the term employed indicates the nature, kind, or quality of the article, instead of showing its origin, an exclusive right to its use is not maintainable."[6]

A voluntary association for religious, fraternal, benevolent or social purposes may enjoin the use of another of a name or emblem so similar to its own as to be likely to induce persons to join or deal with the defendant, as the plaintiff.[7] But it has been held that Vassar College has no right to enjoin the sale of confectionery as Vassar Candy.[8]

By the Act of February 20, 1905, "No action or suit shall be maintained under the provisions of this Act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate of registration fraudulently obtained."[9] Before this enactment in accordance with the maxim that he who seeks equity must come with clean hands, it is well established that, if the trade-mark for which protection is sought contains representations calculated to deceive the public, an injunction will be denied the plaintiff.[10]

An act of Congress allowing suits to enjoin the use of trade-

4 Ibid.

5 Ibid.

6 Van Beil v. Prescott (The Rye & Rock Case), 82 N. Y. 630.

7 Talbot v. Independent order of Owls, C. C. A., 220 Fed. 660.

8 Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982.

9 Act of Feb. 20, 1905, Ch. 592, § 21, 33 St. at L. 729.

10 Leather C. Co. v. American L. C. Co., 11 H. L. C. 523; s. c., in a lower court, 10 Jur. (N. S.) 81; Fowle v. Spear, 7 Penn. L. J. 176;

marks to be brought in a Federal court against a citizen of the same State as the complainant was held unconstitutional.[11] The later statutes give the Federal courts jurisdiction of such a suit when the plaintiff has registered his trade-mark for use in commerce with foreign nations, or among the several States, or with Indian tribes; provided he is domiciled within the territory of the United States, or resides in, or is located in, any foreign country which affords similar privileges to the citizens of the United States; and provided, that the defendant has used the trade-mark in the course of commerce among the several States, or with a foreign nation, or with the Indian tribes.[12] "The several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity to prevent the violation of any right of the owner of a trade-mark registered under this Act on such terms as the court may deem reasonable."[13] Such an injunction may be served anywhere in the United States and may be enforced by contempt proceedings by the District Court of any district or by the Supreme Court of the District of Columbia, or by any judge of either of such courts.[13a] This statute does not give the Federal courts jurisdiction of a suit between citizens of the same State to enjoin unfair competition in trade, where the complainant has no valid and exclusive trade-mark.[14]

A delay of eighteen months before an application for a preliminary injunction against unfair competition was held sufficient laches to defeat the motion.[15]

A disuse of complainant's trade-mark before suit will not defeat the complainant's right to an injunction, when the defendant continued to use the trade-mark sometime after notice

Heath v. Wright, 3 Wall. Jr. 141; Ginter v. Kinney Tobacco Co., 12 Fed. 782. See *supra*, § 79a.

11 Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550.

12 Act of Feb. 20, 1905, Ch. 592, §§ 1, 16, 17, 33 St. at L. 724, 728, 729, as amended May 4, 1906, Ch. 2081, 34 St. at L. 168, Feb. 18, 1909, Ch. 144, 35 St. at L. 628, Comp. St. § 9485, 9501, 9502.

13 33 St. at L. 729, § 19, Comp. St. § 9504.

13a 33 St. at L. 729, Comp. St., § 9505. See *infra*, § 429.

14 Elgin Nat. Watch Co. v. Illinois Tr. C. Co., 179 U. S. 665, 45 L. ed. 365.

15 C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944. See *supra*, § 181. Thomas G. Plant Co. v. May Mercantile Co., 153 Fed. 229.

to desist, and in the suit contest the complainant's exclusive right to the same.[16]

A preliminary injunction against the infringement of a trade-mark will not be granted if the title, validity or infringement are doubtful.[17]

The writ may contain, in addition to an injunction against the infringement of a trade-mark, a prohibition of the use of any mark "so similar to complainant's as to be likely to deceive purchasers."[18]

§ 280. Injunctions to prevent the opening of letters. Injunctions may be granted to restrain the opening of business letters.[1]

§ 281. Injunctions to compel the performance or prevent the breach of contracts not affecting land. The performance of a contract not affecting lands will be enforced in equity by means of an injunction when, and only when, a judgment for damages would be no adequate remedy for its breach;[1] and it does not require a purely personal act which it would be impossible for the court to enforce,[2] or continued acts for an indeterminate term, which will require the constant supervision by the court subsequent to the decree.[3]

The inadequacy of the remedy at law which will entitle one to specific performance of a contract may, it has been held, be proved by the fact that the damages in money cannot be ascertained.[4]

In some cases an injunction may be obtained to restrain a defendant from violating a negative promise contained in a contract, although the court has no power specifically to enforce the affirmative promises contained therein.[5] Thus, when opera

16 Ibid.

17 Esta Co. v. Burke, 257 Fed. 743. See supra, § 277.

18 Capewell Horse Nail Co. v. Green, C. C. A., 188 Fed. 20.

§ 280. 1 Schelle v. Brackell, 11 W. R. 796; David Kennedy Corp. v. Kennedy, 165 N. Y. 353, 359.

§ 281. 1 Buxton v. Lister, 3 Atk. 383; Robinson v. Catheart, 2 Cranch C. C. 590; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. ed. 187; Very v. Levy, 13 How. 345, 14 L. ed. 173. See *supra*, § 148.

2 Clarke v. Price, 2 Wilson Ch. Cas. 157; Mair v. Himalaya T. Co., L. R. 1 Eq. 411.

3 Sewerage and Water Board v. Howard, C. C. A., 175 Fed. 555.

4 Adderley v. Dixon, 1 Sim. & Stu. 607; Sullivan v. Tuck, 1 Md. Ch. 59; Finley v. Aiken, 1 Grant's Cases (Pa.) 83; Bispham's Eq., § 369.

5 Montgomery Light & Power Co. v. Montgomery Traction Co., 191

singers of extraordinary talent had contracted to sing,[6] or dancers of extraordinary character had contracted to dance,[7] at the plaintiff's theatre and nowhere else, or a ball player had contracted to give his exclusive services to a baseball club;[8] injunctions have been granted to restrain them from performing in rival establishments, although they could not be compelled to sing, dance, or play for the plaintiffs. An injunction, however, will not issue to prevent a similar breach of his contract of employment by a person whose abilities are not so extraordinary that his place cannot be filled,[9] nor when the contract is not mutual;[10] nor when the complaint shows that the damages for the breach of contract might easily be liquidated.[11] Where a traction company had agreed to hire electric power from another company during a period of years, the court while refusing specific performance enjoined the traction company from taking electric power from anyone except the plaintiff.[12]

The rule has been thus stated by Judge Lowell: "I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach,

Fed. 657; S. C., 219 Fed. 963; aff'd, C. C. A., 229 Fed. 672, where a street railway company was enjoined from refusing to perform a contract binding itself to take from the plaintiff, at an agreed price, all the electric power which it required for a term of years.

6 Lumley v. Wagner, 1 De G., M. & G. 604; McCaull v. Braham, 16 Fed. 37. It is not a prerequisite to the injunction that the defendants are the stars of complainant's entertainment or that the entertainment would be stopped because of their withdrawal. Comstock v. Lopokowa, 190 Fed. 599. See High on Injunctions (4th ed.), §§ 1163-1164c.

7 Comstock v. Lopokowa, 190 Fed. 599. See High on Injunctions (4th ed.), §§ 1163-1164c.

8 Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; Cincinnati Exhibition Co. v. Marsans, 216 Fed. 269; Star Co. v. Press Pub. Co., 162 App. Div. (N. Y.) 486.

9 Ibid.; Metropolitan Ex. Co. v. Ewing, 42 Fed. 198; Burney v. Ryle, 91 S. E. 701, 17 S. E. 986 (an insurance agent); Johnston v. Hunt, 66 Hun (N. Y.), 504; Strowbridge L. Co. v. Crane, 35 N. Y. State Rep. 73 (a designer of lithographs); Cort v. Lassard, 18 Or. 221, 6 L. R. A. 653 (an acrobat); § 151e, *supra*.

10 Lerner v. Tetrazzini, 71 Misc. (N. Y.), 182. See Cincinnati Exhibition Co. v. Marsans, 216 Fed. 269. High on Injunctions (4th ed.), § 1109a.

11 Sewerage and Water Board v. Howard, C. C. A., 175 Fed. 555.

12 Montgomery Light & Water Power Co. v. Montgomery Traction Co., 191 Fed. 657; s. c., 219 Fed. 963, aff'd C. C. A., 229 Fed. 672.

and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."[13] But where the affirmative promise cannot be specifically enforced, the court will not import into it a negative covenant, which is neither expressly nor by a fair implication contained therein.[14]

So an employee may be enjoined from carrying away documents containing trade secrets,[15] or from disclosing to others the trade secrets of his master.[16] Where irreparable injury would be otherwise caused, an injunction may be granted to prevent a stranger from inducing a party to a contract to violate the same.[17]

§ 281a. Injunctions to prevent the revocation or refusal of a permit or license. When irreparable injury would otherwise result by damages to the complainant's business or otherwise, a Federal court of equity may enjoin the revocation by a public officer of a permit or license for the transaction of business,[1] or in certain cases the refusal of a license or permit.[2] Such injunctions have been granted to restrain the revocation of a license to transact business in a State which has been issued

13 Singer Co. v. Union Co., 1 Holmes, 253, 258. See also Goddard v. Wilde, 17 Fed. 845; W. U. Tel. Co. v. Union Pac. Ry. Co., 3 Fed. 423; W. U. Tel Co. v. St. Joseph & W. Ry. Co., 3 Fed. 430; Met. El. Supply Co. v. Ginder (1901), L. R. 2 Ch. 799; Harrison v. Glucose Sugar Ref. Co., C. C. A., 58 L.R.A. 915, 116 Fed. 304. Delaware L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541.

14 Clarke v. Price, 2 Wilson Ch. C. 157; Pickering v. Bishop of Ely, 2 Y. & C. Ch. C. 249; Johnson v. S. & B. Ry. Co., 3 De G., M. & G. 914; Bispham's Eq., § 464; Kerr on Injunctions, 524.

15 Union Switch & Signal Co. v. Sperry, 169 Fed. 926.

16 Ibid.; High on Injunctions (4th ed.), §§ 19, 984, 1108.

17 Beekman v. Marsters, 195 Mass. 205, 11 L.R.A. (N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332; Am. Law Book Co. v. Edward Thompson Co., Bishoff, J., N. Y. Special Term, 1907. The Lloyd Sabaudo v. Cubicciotti, 159 Fed. 191. See § 276, *supra*.

§ 281a. 1 Wisconsin v. Phila. & Reading Coal Co., 241 U. S. 331.

2 Jacob Hoffman Brewing Co. v. McElligott, C. C. A., 259 Fed. 525; Fredenberg v. Whitney, 240 Fed. 819 (a mate's license). *Contra*, Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711 716.

to a foreign corporation,[3] such as an insurance company,[4] or a railroad company,[5] or a coal company.[6] The court refused to issue an injunction against the refusal to issue an annual license to an insurance company, which had refused to obey the statutory prerequisites, because it contended that these were unconstitutional.[7] An injunction was issued forbidding a Federal collector of internal revenue from refusing to sell revenue stamps to brewers.[8] An injunction has been granted to restrain forfeiture of the interest of a part owner of mining claims.[9]

Under a municipal ordinance, providing that permits for the exhibition of moving pictures shall not be granted, if the picture be immoral or obscene, or portrays any riotous, disorderly, or other unlawful scenes, or has a tendency to disturb the public peace, a permit to exhibit a moving picture film, which contains scenes of torture that may be terrifying and horrifying, cannot be denied; the picture not being one falling within those prohibited.[10]

An exclusive license under a patent is a unique property right, against the destruction of which a court of equity will give protection by injunctive relief.[11]

One who has not been injured thereby has no standing to attack the validity of an ordinance on the ground that it vests an arbitrary power to a board to grant or refuse licenses.[12]

§ 282. Injunctions to compel the delivery of personal property tortiously withheld. Under very extraordinary circum-

[3] Fox Film Corp. v. City of Chicago, 247 Fed. 231; Greenwich Ins. Co. v. Carroll, 125 Fed. 121, p. 394; Met. Life Ins. Co. v. McNall, 81 Fed. 888; Chicago R. I. & P. Ry. Co. v. Ludwig, 156 Fed. 152; Chicago, R. I. & P. Ry. Co. v. Swanger, 157 Fed. 783; Wisconsin v. Phila. & Reading Coal Co., 241 U. S. 331.

[4] Ibid. Met. Life Ins. Co. v. McNall, 81 Fed. 888.

[5] Chicago, R. I. & P. Ry. Co. v. Ludwig, 156 Fed. 152; Chicago, R. I. & P. Ry. Co. v. Swanger, 157 Fed. 783. See Harrison, 232 U. S. 318.

[6] Wisconsin v. Philadelphia & Reading Coal & Iron Co., 241 U. S. 329, affirming 216 Fed. 199. See Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S. 318.

[7] Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711, 716.

[8] Jacob Hoffman Brewing Co. v. McElligott, C. C. A., 259 Fed. 525.

[9] Under U. S. R. S., § 2324; Pack v. Thompson, C. C. A., 223 Fed. 641, 643.

[10] Fox Film Corp. v. City of Chicago, 247 Fed. 231.

[11] Barnett v. Q. & C. Co., C. C. A., 226 Fed. 935.

[12] Yee Gee v. City & County of San Francisco, 235 Fed. 757.

stances, equity will interfere to compel by injunction the delivery or return of letters, documents, or other articles of such a unique character that it would be impossible to replace them, when they are tortiously withheld from their rightful owners.[1]

§ 283. Injunctions authorized by statute. The statutes of the United States also authorize an injunction in the following cases, amongst others, besides those arising from infringements of patents,[1] copyrights,[2] trademarks,[3] and anti-monopoly laws,[4] which are elsewhere discussed. Compliance with the Interstate Commerce Act may also in certain cases be compelled by an injunction.[5]

§ 283a. Injunctions to restrain enforcement of warrants of distress. "Any person who considers himself aggrieved by any warrant of distress issued under the provisions of the statutes authorizing one to be issued by the Solicitor of the Treasury against an officer in default for not accounting for and paying over public money received by him, 'may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had in such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such

§ 282. 1 Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389; Clarke v. White, 12 Pet. 178, 9 L. ed. 1046; Prince Albert v. Strange, 1 Macn. & G. 25, 42; McGowin v. Remington, 12 Pa. St. 56.

§ 283. 1 See *supra*, § 277.

2 See *supra*, § 278.

3 See *supra*, § 279.

4 26 St. at L. 209, *supra*, §§ 151a, 276c.

5 24 St. at L. 380, *supra*, §§ 77g, 276b.

damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court.'[1] 'When the district judge refuses to grant an injunction to stay proceedings on a distress warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceedings had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction, or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires.'[2]

§ 283b. Injunctions to restrain comptroller of the currency. "Whenever an association against which proceedings have been instituted, on account of an alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven' of the Revised Statutes of the United States, 'apply to the nearest District, or Territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal."[1]

§ 283c. Injunctions to enforce orders of the United States Shipping Board. The Act of September 7, 1916, which creates the United States Shipping Board, provides: "In case of violation of any order of the board, other than an order for the payment of money, the board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing the court determines that the order was regularly made and duly issued,

§ 283a. [1] U. S. R. S., § 3636.
[2] U. S. R. S., § 3637.

§ 283b. [1] U. S. R. S., § 5237.

it shall enforce obedience thereof by a writ of injunction or other proper process, mandatory or otherwise."[1]

"In case of any violation of any order of the board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties a petition or suit setting forth briefly the causes for which he claims damages and the order of the board in the premises.

"In the district court the findings and order of the court shall be *prima facie* evidence of the facts therein stated, and the petitioner shall not be liable for costs, or shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

"All parties in whose favor the board has made an award of reparation by a single order may be joined as plaintiffs and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

"No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order."[2]

§ 283d. Injunctions to regulate coal mining or the operation of coal mines. The Act of March 3, 1891, regulating the operation of coal mines in Territories of the United States, provides: "As a cumulative remedy in case of the failure of any

§ 283c. [1] Act of September, 1916, ch. 451, § 29, 39 St. at L. 737, Comp. St., § 8146nn.

[2] The Act of Sept. 7, 1916, ch. 451, § 30, 39 St. at L. 737, Comp. St. § 8146o.

owner or manager of any mine to comply with the requirements contained in the notice of the Governor of such Territory or the Secretary of the Interior, given in pursuance of this act, any court of competent jurisdiction, or the judge of such court in vacation, may on application of the mine inspector in the name of the United States and supported by the recommendation of the Governor of said Territory, or the Secretary of the Interior, issue an injunction restraining the further operation of such mine until such requirements are compiled with, and in order to obtain such injunction no bond shall be required."[1]

"Wherever the term 'owner or manager' is used in this act the same shall include lessees or other persons controlling the operation of any mine. And in case of the violation of the provisions of this act by any corporation the managing officers and superintendents, and other managing agents of such corporation, shall be personally liable and shall be punished as provided in act for owners and managers."[2]

Compliance with the Interstate Commerce Act may also, in certain cases, be compelled by an injunction.[3]

§ 283e. Injunctions to protect political rights. A Federal court of equity will not grant an injunction to protect rights which are purely political even though a right to property may be thereby incidentally effected.[1] Such are: a bill by a State to enjoin interference with its government by the President;[2] or by the Secretary of War;[3] or by a general of the army,[4] and a bill by a citizen of a State on behalf of himself and others sim-

§ 283d. [1] The Act of March 3, 1891, ch. 564, § 16, 26 St. at L. 1106, Comp. St., § 3517.

[2] The Act of March 3, 1891, ch. 564, § 17, 26 St. at L. 1106, Comp. St. § 3518.

[3] 24 St. at L. 380; *supra*, § 276c.

§ 283e. [1] Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Green v. Mills, C. C. A., 30 L. R. A. 90, 69 Fed. 852; Anthony v. Burrow, 129 Fed. 783; Dallas v. Dallas Consol. El. St. Ry. Co. (s. c., Texas, June, 1812), 148 S. W. 292; *Cf.* Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945. But see People ex rel. Miller v. Tool (Colo. Sup. Ct.), 86 Pac. 224, defended by Henry J. Hersey before Colo. Bar Ass'n, Sept. 27, 28, 1906, criticized 20 Harv. L. Rev. 157.

[2] Mississippi v. Johnson, 4 Wall. 475.

[3] Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721.

[4] Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848.

ilarly situated to enjoin a State officer from the execution of a State registration law which he alleged denied him his rights under the Fifteenth Amendment.[5] But a taxpayer who was threatened with increased taxation was given an injunction against the canvass of the returns of an unauthorized election for the incorporation of a city.[6]

The Supreme Court of the United States has taken cognizance of a writ of error to review a decision of a State court upon a question involving the apportionment of Congressional Districts.[7]

In England the Emperor of Austria and King of Hungary, was allowed an injunction to prevent Kossuth and his associates from manufacturing in England paper currency not purporting to be issued by imperial authority, intended for circulation in Hungary, upon the ground that his property rights were thereby injured.[8] In a Federal court a bill was sustained when filed by the consul of Austria and Hungary, to restrain a beneficial association from using the name of the Emperor of those countries as a part of its corporate name, and from the use of that Emperor's portrait as a part of its advertising literature, in order fraudulently to induce his subjects who resided in the United States, to believe that the association was conducted under the customs of their own country, and that their Emperor was identified with the same and a patron thereof.[9] A Federal court will not compel the enrollment of a man upon a voting list [10] to certify his nomination for Congress [11] to restrain a removal from public office.[12]

§ 284. When injunctions will not issue. As a general rule, it may be stated that an injunction will not issue at the prayer

[5] Green v. Mills, C. C. A., 30 L. R. A. 90, 69 Fed. 852.

[6] Smith v. Board County Com'rs Skagit County, 45 Fed. 725.

[7] State of Ohio v. Hildebrant, 241 U. S. 565, 570.

[8] Emperor of Austria v. Day, 2 Giff. 628; s. c. on appeal, 3 De G. F. & J. 217.

[9] Von Thodorovich v. Franz Josef Beneficial Ass'n, 154 Fed. 911.

[10] Giles v. Harris, 189 U. S. 475, 23 L. ed. 909, 23 Sup. Ct. 639.

[11] Anthony v. Burrow, 139 Fed. 783.

[12] *Re* Sawyer, 124 U. S. 200, 31 L. ed. 402; White v. Berry, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. ed. 199, a gauger: Cooper v. Smyth, 84 Fed. 757, an assistant postmaster, Morgan v. Nunn, 84 Fed. 551, clerk in the office of collector; Page v.

of one who will suffer no pecuniary injury from the act which he wishes to prevent.[1] Thus, one will not be granted at the suit of a State to prevent the invasion of a purely political right;[2] or of adjacent property owners and church members to prevent a railroad from outraging their religious feelings by running cars upon Sunday;[3] nor at the suit of a minister of the gospel to prevent the use of his building for theatrical purposes, under a lease the validity of which he disputes.[4] An injunction will not issue to prevent an injury which is not actually threatened to the complainant.[5] Thus an injunction will not be granted to prevent an injury to a navigable stream, at the suit of an individual who is not engaged in navigating the same;[6] nor, at the suit of a coupon holder who is not liable to the payment of taxes to a State, to prevent the State officers from refusing to receive his coupons, when tendered by others to whom he has agreed to assign them for the payment of their taxes, in pursuance of a contract made by the State with its creditors and their successors.[7] "No court sits to determine questions of law *in thesi*."[8] A threat of irreparable injury to a right actually enjoyed and exercised by the complainant, or acts indicating a preparation to commit such a wrong, are, however, always a ground for the issue of an injunction.[9] The Circuit Court of the Southern District of New York has refused to grant a pre-

Moffett, 85 Fed. 38, Deputy of Internal Revenue; *contra* Pridle v. Thompson, 82 Fed. 686.

§ 284. [1] High on Injunctions, § 20.

[2] Georgia v Stanton, 6 Wall. 50, 18 L. ed. 721. *Supra*, § 283e.

[3] Sparhawk v. Union P. R. Co., 54 Pa. St. 401.

[4] Bodwell v. Crawford, 26 Kan. 292, 40 Am. Rep. 306.

[5] Slessinger v. Buckingham, 17 Fed. 454.

[6] Spooner v. McConnell, 1 McLean, 337. See also Mason v. Rollins, 2 Bliss. 99. *Cf.* Works v. Junction R. Co., 5 McLean, 425.

[7] Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325, 29 L. ed. 205.

[8] Matthews, J., in Virginia Coupon Cases, Marye v. Parsons, 114 U. S 325, 330, 29 L. ed. 205, 206. An injunction against the enforcement of an order of a Railroad Commission was denied where the Commission had suspended the operation of the order. Grand Trunk Ry. Co. v. Michigan R. R. Com., 198 Fed. 1009.

[9] St. Louis v. Knapp Co., 104 U. S. 658, 26 L. 883; Sherman v. Nutt, 35 Fed. 149; Butz Thermo-El. Reg. Co. v. Jacobs El. Co., 36 Fed. 191; McArthur v. Kelly, 5 Ohio, 139; Frearson v. Loe, L. R. 9

liminary injunction to restrain an obstruction to navigation in a navigable channel coming up from the Bay of New York, caused by a structure projecting from the New Jersey shore.[10] An injunction cannot be issued against the United States;[11] nor against an officer to interfere with the exercise of his discretion;[12] nor against an officer of the United States to prevent the infringement of a patent by him while in the exercise of his official duties.[13]

The Revised Statutes provide that "No suit for the purpose of restraining the assessment or collection of any tax" imposed by the United States for purposes of internal revenue, "shall be maintained in any court."[14] Under this provision, it has been held that wherever a tax is imposed by a person in office having authority over the assessment of taxes for the United States, and acting under color of a statute, no injunction will be issued to restrain its collection, no matter how erroneous the assessment may be, and although the person against whom the assessment is made does not own the property

Ch. D. 48. See also Piek v. C. & N. W. Ry. Co., 6 Biss. 177.

10 Atlantic D. Co. v. Bergen Neck Ry. Co., 44 Fed. 208.

11 U. S. v. McLemore, 4 How. 286, 11 L. ed. 977; Hill v. U. S., 9 How. 386, 13 L. ed. 185; *supra*, § 100.

12 Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Walker v. Smith, 21 How. 579, 16 L. ed. 223; McElrath v. McIntosh, 1 Law R. (N.S.) 399; Warner V. S. Co. v. Smith, 165 U. S. 28, 41 L. ed. 621; Smith v. Reynolds, 9 D. C. App. 287, 166 U. S. 717, 41 L. ed. 1186. An injunction has been issued to restrain the Secretary of the Interior from the commission of an act beyond his jurisdiction which would cause an irreparable injury to the plaintiff. Noble v. Union R. L. R. Co., 147 U. S. 165, 37 L. ed. 123; *Cf.* U. S. v. Nourse, 9 Pet. 8, 9 L. ed. 31; Kirwan v. Murphy, C. C. A., 83 Fed. 275, s. c., 49 U. S. App. 659. It has been held that a State court has no power to enjoin an officer of the United States. People ex. rel. Brower v. Kidd, 23 Mich. 440. It has been held that an injunction will not issue to restrain the Commissioner of Patents from issuing letters-patent. See Illingworth v. Atha, 42 Fed. 141; *supra*, §§ 95, 100.

13 James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 67, 28 L. ed. 901, 903; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599; *supra*, § 100; *infra*, § 671.

14 U. S. R. S., § 3224. It has been held that a mandatory injunction requiring a collector of internal revenue to accept an export bond for spirits in a warehouse and to allow their withdrawal for export, without payment of taxes, is in effect a bill to restrain the collection of internal revenue and cannot be granted. Miles v. Johnston, 59 Fed. 38.

taxed.[15] "It is sufficient that a statute has authorized the assessor to entertain the general subject of taxation; that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it."[16] It seems that the unconstitutionality of the statute imposing the tax will not authorize the issue of an injunction;[17] but it has been held that a bill to restrain a trustee from voluntarily making a return of his income and from paying an unconstitutional income tax is not within the prohibition of the statute.[18] It has been said that a stockholder's bill for a similar purpose may in a proper case be filed.[19]

An injunction cannot issue against a State at the suit of a citizen of another State or of a foreign State.[20] Nor can a mandatory injunction issue against an officer of a State so as to compel the action of the State against its expressed will.[21] But an officer of a State may be enjoined from an invasion of private rights which would cause irreparable injury, when about to act under an unconstitutional State statute.[22] As has been said before, an injunction will not ordinarily be granted to stay proceedings in a State court.[23] In England, a person may be restrained from petitioning or applying to the legislature in order to procure the passage of an act relating solely to private interests, provided he be under an express or implied agreement

15 Kensett v. Stivers, 10 Fed. 517; Pullan v. Kinsinger, 2 Abb. U. S. 94; Howland v. Soule, Deady, 413; Delaware R. Co. v. Prettyman, 17 Int. Rev. Rec. 99; Alkan v. Bean, 23 Int. Rev. Rec. 351; Kissinger v. Bean, 7 Biss. 60; U. S. v. Black, 11 Blatchf. 538. But see Frayser v. Russell, 3 Hughes, 227.

16 Emmons, J., in Pullan v. Kinsinger, 2 Abb. U. S. 94, 99.

17 Robbins v. Freeland, 14 Int. Rev. Rec. 28; Moore v. Miller, 5 D. C. App. 413.

18 Pollock v. Farmers' L. & Tr. Co., 157 U. S. 429, 454, 653, 39 L. ed. 759, 844.

19 Brushaber v. Union Pac. R. R. Co., 240 U. S. 1, 10.

20 Eleventh Amendment of the Constitution, *supra*, § 105.

21 Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448; Antoni v. Greenhow, 107 U. S. 769, 782-784, 27 L. ed. 468, 474, 475; Cunningham v. M. & B. R. Co., 109 U. S. 446, 27 L. ed. 992; *supra*, § 105c. But see McCauley v. Kellog, 2 Woods, 13.

22 Osborn v. Bank of U. S., 9 Wheat. 738, 6 L. ed. 204; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Board of L. v. McComb, 92 U. S. 531, 23 L. ed. 623; Virginia Coupon Cases, 114 U. S. 269, 29 L. ed. 185; Louisiana v. Layarde, 60 Fed. 186; *Ex parte*, Young, 209 U. S. 123, 52 L. ed. 714. See, however, In re Ayers, 123 U. S. 443, 31 L. ed. 216; *supra*, § 105c.

23 U. S. R. S., § 720; *supra*, § 270; *infra*, § 554.

not to do so, or his doing so would amount to a breach of trust.[24] This doctrine has, however, never been upheld in the United States and in a well-considered case in New Jersey was expressly repudiated.[25] An injunction will not issue to aid in the maintenance of a monopoly injurious to public policy;[26] nor in any other case when its operation would be repugnant to public policy.[27] An injunction will not issue when the removing party has a plain, adequate, and complete remedy at law.[28]

The Revised Statutes of the United States provide that "no attachment, injunction or execution shall be issued against a 'national bank' association or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court."[29] An injunction will never be issued merely because it will do no harm.[30]

§ 284a. Injunctions against slanders and libels. The early English cases held that an injunction would not issue to restrain the publication of a slander or libel, no matter how injurious it might be to the complainant.[1] Since the passage of the Judicature Act, however, such injunctions have been granted there in order to protect rights of property.[2]

24 Ware v. Grand J. W. W. Co., 2 Russ. & M. 470; Stockton & H. Ry. Co. v. Leeds & Th. Ry. Co., 2 Phil. 666; Heathcote v. N. S. Ry. Co., 2 Mac. & G. 100.

25 Story v. J. C. & B. P. P. R. Co., 1 C. E. Green (16 N. J. Eq.), 13, 84 Am. Dec. 134.

26 Pullman P. C. Co. v. Texas & Pac. Ry. Co., 11 Fed. 625; s. c., 4 Woods, 317; Foll's Appeal, 91 Pa. St. 434, 438, 36 Am. Rep. 671. But see Edison El. Lt. Co. v. Sangerman El. Co., C. C. A., 53 Fed. 592; *supra*, § 277.

27 Bryant v. W. U. Tel. Co., 17 Fed. 825; Blake v. Greenwood Cem., 14 Blatchf. 342; Denehey v. Harrisburg, 2 Pearson (Pa.), 330, 334.

28 U. S. R. S., § 723; High, Injunctions, § 28.

29 U. S. R. S., § 5242.

30 Teller v. U. S., C. C. A., 113 Fed. 463.

§ 284a. 1 Prudential Assur. Co. v. Knott, L. R. Ch. 142; Clark v. Freeman, 11 Beav. 112. See also Brandreth v. Lance, 8 Paige (N. Y.), 24, 34 Am. Dec. 368; Mauger v. Dick, 55 How. Pr. (N. Y.) 132; Singer Mfg. Co. v. Domestic S. M. Co., 49 Ga. 70, 15 Am. Rep. 674; Boston D. Co. v Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Smith v. Hutchinson S. B. Co., 110 Mo. 492, 16 L.R.A. 243, 33 Am. St. Rep. 476.

2 Thorley's C. F. Co. v. Massam, L. R. 6 Ch. D. 582; Saxby v. Easterbrook, L. R. 3 C. P. D. 339; Wren v. Weild, L. R. 4 Q. B. 730. See also Grand Rapids S. F. Co. v. Haney S. F. Co., 92 Mich. 558, 16 L.R.A. 721, 31 Am. St. Rep. 611, s. c., 52 N. W. 1009. *Contra*, Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L.R.A. 310; Boston Diatite Co.

The Federal courts have no power to restrain slanders or libels except in extraordinary cases[3] to protect property.[4]

When, however, a litigant is subject to the jurisdiction of a court, it may, by a motion in a suit[5] to which he is a party restrain him from improper statements concerning the order or decree, by misrepresentations, direct or indirect, concerning its effect, for such conduct might be held to be a contempt of court.[6] When the injunction against infringement had been suspended pending an appeal upon the filing of a bond by defendants to cover profits and damages, the complainant was restrained from sending circulars to their customers warning against purchases of their goods.[7] The issue of a false report may be a reason for dissolving an injunction against the infringement of a patent.[8] A dissolution was threatened in case the complainant advertised in any manner a decree restraining

v. Florence, etc., Co., 114 Mass. 69, 19 Am. Rep. 310. See Harv. Law Review, XVI, 67.

[3] Francis v. Flynn, 118 U. S. 385, 30 L. ed. 165; Kidd v. Horry, 28 Fed. 773, U. S. C. C., E. D. Pa., by Bradley and McKennan, JJ.; Baltimore C. W. Co. v. Bemis, 29 Fed. 95, U. S. C. C., D. Mass., by Colt and Carpenter, JJ.; Kelley v. Ypsilanti, D. S. M. Co., 10 L.R.A. 686, 44 Fed. 19, 23; Fougeres v. Murbarger, 44 Fed. 292, U. S. C. C., D. Indiana, by Woods, J.; International T. C. Co. v. Carmichael, 44 Fed. 350, 351, U. S. C. C., E. D. Wis., by Jenkins, J.; Davison v. National Harrow Co., 103 Fed. 360, N. D. N. Y.; Edison v. Thomas A. Edison, Jr., Chemical Co., 128 Fed. 957; Am. Malting Co. v. Kittle, C. C. A., 209 Fed. 351; Willis v. O'Connor, 237 Fed. 1004. The Missouri rule seems to be that after a verdict for damages of a libel the court in the same case upon another court may enjoin subsequent publication thereof, provided at least that the defendant is insolvent. Flint v. Hutchinson Smoke Burner Co., 110 Mo., loc. cit., 500, 19 S. W., 804, 16 L.R.A., 243, 33 Am. St. Rep., 476; Life Ass'n v. Boogher, 3 Mo. App. 173; Wolf v. Harris, (March, 1916, 184 S. W., 1138).

[4] Ide v. Ball Engine Co., 31 Fed. 901, U. S. C. C., S. D. Illinois, by Allen, J.; Emack v. Kane, 34 Fed. 46; U. S. C. C., N. D. Illinois, by Blodgett, J.; Home Ins. Co. v. Nobles, 63 Fed. 642. *Cf.* Palmer v. Travers, 20 Fed. 501, U. S. C. C., S. D. N. Y., by Wheeler J.; Celluloid Mfg. Co. v. Goodyear D. V. Co., 13 Blatchf. 375, U. S. C. C., S. D. N. Y., by Hunt, J.; Lewin v. Welsbach Light Co., 81 Fed. 904, E. D. Pa.; A. B. Farquhar Co. v. National Harrow Co., C. C. A., Third Circuit, 49 L.R.A. 755, 102 Fed. 714. See Shoemaker v. South, etc. Co., 135 Ind. 471, 22 L.R.A. 332.

[5] Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville & Co., 189 Fed. 611.

[6] Rollman Mfg. Co. v. Universal Hardware Works, C. C. A., 229 Fed. 579. But see Hobbs Mfg. Co. v. Gooding, C. C. A., 113 Fed. 615.

[7] Freeman-Sweet Co. v. Luminous Unit Co., C. C. A., 253 Fed. 958.

[8] Meyers v. Skinner, 186 Fed. 347.

unfair competition where it appeared that the defendant had acted in good faith.[9] An injunction was denied when sought to prevent a defendant from advertising that a patent was void, and it appeared that he honestly believed it to be so,[10] and published the statement for the sole purpose of protecting what he believed to be his rights,[11] but after the decree adjudging that a patent was void, the patentee was enjoined from threatening complainant's customers with suits for an infringement thereof.[12] Where the decree adjudging his patent void was made in another circuit the defendant was not enjoined from making such threats.[13] A patentee was enjoined from continuing similar threats, which it had made for two years, without beginning a suit for an infringement;[14] and an injunction was granted against a trade circular, issued by the defendant to a pending suit for infringement, which asserted that its device was not an infringement, that complainant's patent was invalid, and contained cuts of prior devices which it claimed anticipated such patent.[15]

Where the defendant has been in plaintiff's employ his trust relation may be a reason for enjoining him from threatening plaintiff's customers.[16] Attempts orally or in writing to induce plaintiff's customers or employees to break their contracts with him, although slanderous and libelous, may be enjoined.[17] An injunction may issue against the publication and circulation of posters and handbills in aid of an unlawful boycott,[18] and of threats to commit an unlawful act.[19]

9 Champion Spark Plug Co. v. L. R. Mosley, 233 Fed. 112, 118. But see Rollman Mfg. Co. v. Universal Hardware Works, 229 Fed. 579.

10 Halsey v. Brotherhood, 45 L. T. (N.S.) 640; Celluloid Mfg. Co. v. Goodyear D. V. Co., 13 Blatchf. 375; Pentlarge v. Pentlarge, 14 Repr. 579; N. F. Filter Co. v. Schwartzwalder, 58 Fed. 577.

11 Ibid.

12 Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co., C. C. A., 183 Fed. 978.

13 Clip. Box Mfg. Co. v. Steel Protective Concrete Co., 209 Fed. 74.

14 Electric Renovater Mfg. Co. v. Vacuum Cleaner Co., 189 Fed. 754.

15 Lovell-McConnell Mfg. Co. v. Automobile S. Mfg. Co., 193 Fed. 658.

16 Baker & Bennet Co. v. John C. Dettra & Co., 406 Fed. 251.

17 Am. Malting Co. v. Kittle, C. C. A., 209 Fed. 351, s. c., 217 Fed. 672.

18 Casey v. Cincinnati Typ. Union No. 3, 12 L.R.A. 193, 45 Fed. 135; Coeur d'Alene Cons. & Min. Co. v. Miners' Union, 19 L.R.A. 382, 51 Fed. 260; High, Injunctions, § 1415a.

19 Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. 310.

§ 285. Distinction between the judicial writ and the writ remedial. Injunctions were formerly either judicial writs or writs remedial. A judicial writ was a direction to yield up, to quiet, or to continue the possession of lands, and is said to be in the nature of a writ of execution.[1] It was issued in aid of, and only after a final decree in equity; and, in extraordinary circumstances, in aid of a judgment at law.[2] Under the equity rules, however, it is never necessary; and it had previously fallen into disuse in England. All other injunctions are writs remedial.

§ 286. Distinction between mandatory and prohibitory injunctions. Injunctions are either mandatory or prohibitory. A mandatory injunction is one that commands a defendant to perform a certain act or acts; a prohibitory injunction, one that forbids a defendant's doing a certain act or acts.

Mandatory are far less common than are prohibitory injunctions. They are usually issued to compel a restoration of the *status quo*.

Those most frequently issued have been such as commanded a defendant to abate a nuisance,[1] or to deliver the possession of land,[2] or to make restitution after a reversal by a court of review.[3] They have been granted to compel the return of letters and other documents,[4] the delivery of personal property whose loss could not be compensated in damages,[5] the giving of col-

§ 285. 1 Eden on Injunctions, chs. i and xvii, pp. 1, 2, 261, 262; Beamers' Orders, 8, 16.

2 Boult v. Blunt, Cary, 72; Eden on Injunctions, 262.

§ 286. 1 Gaines v. Baltimore & C. S. S. Co., 234 Fed. 786; Lane v. Newdigate, 10 Ves. 192; Robinson v. Lord Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 K. & J. 389; Rankin v. Huskisson, 4 Sim. 13; Bickett v. Morris, L. R. 1 H. L. Sc. 47; Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 470.

2 Hepburn v. Auld, 5 Cranch, 262, 3 L. ed. 96; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Findlay v. Hinde, 1 Pet. 241, 7 L. ed. 128; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Co., 86 Fed. 528.

3 U. S. Bank v. Washington Bank, 6 Petin 8, 8 L. ed. 299; Haebler v. Myers, 132 N. Y. 363; Morris v. Cotton, 8 Wall. 507. *Ex parte*, Morris, 9 Wall. 605, 79 L. ed. 799; N. W. Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. ed. 151.

4 Evitt v. Price, 1 Sim. 483; Seton on Decrees (4th ed.), 179. See also Clarke v. White, 12 Pet. 178, 9 L. ed. 1046.

5 Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389; Greatrex v. Greatrex, 1 De G. & Sm. 692; McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec.

lateral security in obedience to a contract,[6] the making of a policy of insurance,[7] the stopping of the receipt of freight by a railroad company at a particular place,[8] the performance of a contract by one railroad company to allow a telephone company the use of its right of way,[9] to send freight over the lines of another railroad,[10] the receipt of freight cars and passengers from one railroad company by another, and the transportation of the same,[11] the furnishing of equal facilities by a railroad company to another railroad company,[12] or to a shipper,[13] and the rescission of an order for the boycott of a railway company,[14] and to enjoin a reduction of charges for the transportation of freight and passengers, which deprived the complainant of its property without due compensation.[15]

It has been said that they may always be issued to compel the performance of an act which could be enforced by one of the ex-

584; Dinsmore v. L. C. & L. Ry. Co., 2 Fed. 465; Dinsmore v. L., N. A. & C. R. Co., 3 Fed. 593; Coe v. L. & N. R. Co., 3 Fed. 775; Ormsby v. Union Pac. R. Co., 4 Fed. 706; Texas Exp. Co. v. Texas & P. Ry. Co., 6 Fed. 426; Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. 516; C. S. M. Co. v. V. & G. H. W. Co., 1 Saw. 685; Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Southern Pac. R. Co. v. City of Oakland, 58 Fed 50; In re Lennon, 166 U. S. 548, 41 L. ed. 1110; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Ry. Co., 86 Fed. 528; Fairfield Floral Co. v. Bradbury, 87 Fed. 415; Motley v. Southern Ry. Co., 184 Fed. 956, stock in a corporation; High on Injunctions (4th ed.), §§ 2, 5a, 3, 708, &c. See Mandatory Injunctions, by Judge Jacob Klein, 12 Harv. Law. Rev. 95.

6 Robinson v. Catheart, 2 Cranch C. C. 590.

7 Union M. Ins. Co. v. Commercial Mut. M. Ins. Co., 2 Curt. 524.

8 Coe v. Louisville & N. R. Co., 3 Fed. 775; McCoy v. Cincinnati, L., St. L. & C. R. Co., 13 Fed. 3.

9 Western Union Telegraph Co. v. Postal Telegraph Co., C. C. A., 217 Fed. 533.

10 Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. 516.

11 Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; In re Lennon, 166 U. S. 548, 41 L. ed. 1110.

12 Ibid.

13 Butchers & D. St. Co. v. Louisville, S. & N. R. Co., C. C. A., 67 Fed. 35; Wells, F. & Co. v. N. Pac. Ry. Co., 23 Fed. 469.

14 Chicago, B. & Q. Ry. Co. v. Burlington, C. R. N. Ry. Co., 34 Fed. 481; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. 730; In re Lennon, 116 U. S. 548, 41 L. ed. 1110. See So. Cal. Ry. Co. v. Rutherford, 62 Fed. 796.

15 Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321.

traordinary writs at common law, were it not for some technical difficulty.[16]

In a case involving the constitutionality of certain Kentucky statutes, the court refused a mandatory injunction compelling a distribution of the money raised by a tax upon white people partly among public schools for colored children, in the absence of any contract right or legislative authority for such a distribution; but granted "a decree enjoining and restraining the proper parties from applying to the use of the schools organized for and at which white children only are allowed to attend, one-fourth of the money heretofore, or which may be hereafter, collected under the authority of the Act of 1871 and its amendments."[17] Mandatory injunctions are usually issued in a negative form, restraining a defendant from desisting or refusing to do an act.[18] They are rarely granted upon interlocutory motions,[19] except to preserve the *status quo*.

§ 287. Distinction between provisional and perpetual injunctions. Provisional, also called preliminary or interlocutory, injunctions are such as are to continue until a certain time usually specified therein; for example, until the coming in of the defendant's answer, the hearing of the cause, the master's

16 Stevens v. Ohio State Tel. Co., 240 Fed. 759, 766, 769. But see § 287.

17 Barr, J., in Claybrook v. Owensboro, 23 Fed. 634, 636.

18 Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co., 10 Fed. 210, 869; Smith v. Smith, L. R. 20 Eq. 500, 504; Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 470.

19 Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 13 Fed. 546; McCauley v Kellogg, 2 Woods 13; Camblos v. Phil. & R. R. Co., 9 Phila. (Pa.) 411; s. c., 4 Brews. (Pa.) 563; Rogers L. Works v. Erie Ry. Co., 5 C. E. Green (20 N. J. Eq.), 379; Miles v. Johnston, 59 Fed. 38; Am. Lead Pencil Co. v. Schneegass, 178 Fed. 735; Winton Motor Carriage Co. v. Curtis Pub. Co., 196 Fed. 906. But see Bachman v. Harrington, 184 N. Y. 458, *infra*, § 291. But see Dinsmore v. L. C. & L. Ry. Co., 2 Fed. 465; Dinsmore v. L., N. A. & C. R. Co., 3 Fed. 593; Coe v. L. & N. R. Co., 3 Fed. 775; Ormsby v. Union Pac. R. Co., 4 Fed. 706; Texas Exp. Co. v. Texas & P. Ry. Co., 6 Fed. 426; Chicago & A. Ry. Co. v. N. Y. L. E. & W. R. Co., 34 Fed. 516; C. S. M. Co. v. V. & G. H. W. Co., 1 Saw. 685; Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Southern Pac. R. Co. v. City of Oakland, 58 Fed. 50; In re Lennon, 166 U. S. 548, 41 L. ed. 1110; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Ry. Co., 86 Fed. 528; Fairfield Floral Co. v. Bradbury, 87 Fed. 415. See Mandatory Injunctions, by Judge Jacob Klein, 12 Harv. Law. Rev. 95.

report, or the further order of the court.[1] Perpetual, also called final, injunctions are those which, as their name denotes, perpetually restrain the defendant from the same act or acts. Provisional injunctions may be granted at any time during the progress of a suit. Perpetual injunctions can never be granted except at the time of the entry of the decree.[2] The setting up of outstanding terms can, it has been said, only be restrained by a perpetual injunction.[3] Mandatory injunctions also will very rarely be granted before a decree,[4] except to maintain the *status quo*.[5]

"It is a rule of practice in the Circuit Courts of the United States not to allow an injunction to stay an ejectment suit until it can be investigated in equity, unless a judgment be entered therein."[6]

§ 288. Distinction between common and special injunctions. Injunctions were formerly of two kinds, common and special. Common injunctions were granted, as of course, upon the defendant's default either in appearing or answering, and were only applicable to restrain proceedings at common law.[1] Special injunctions were those granted, not as a matter of course, but upon the special circumstances of the case as disclosed by the answer of the defendant or upon affidavits.[2] Common injunctions have been abolished by the Revised Statutes.[3] The learning upon the subject, which is very technical, seems now, therefore, useless, and will not be repeated here.[4]

§ 287. [1] Daniell's Ch. Pr. (2d Am. ed.) 1810; High, Injunctions, § 3; Eden, Injunctions, ch. xv.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1903; Adams v. Crittenden, 17 Fed. 42.

[3] Hylton v. Morgan, 6 Ves. 293; Byrne v. Byrne, 2 Sch. & Lef. 537; Barney v. Luckett, 1 Sim. & S. 419; Northey v. Pearce, 1 Sim. & S. 420.

[4] Camblos v. Phila. & R. R. Co., 9 Phila. (Pa.) 411; s. c., 4 Brewst. (Pa.) 563; Rogers L. M. Works v. Erie Ry. Co., 5 C. E. Green (N. J.), 379. But see Dinsmore v. L., C. & L. Ry. Co., 2 Fed. 465; Coe v. L. & N. R. Co., 3 Fed. 775, and other cases cited under § 225.

[5] Gaines v. Baltimore & C. S. S. Co., 234 Fed. 786.

[6] Billings, J., in Heirs of Szywauski v. Zunts, 20 Fed. 361, 363, citing Turner v. Am. B. M. Union, 5 McLean, 344.

§ 288. [1] Daniell's Ch. Pr. (2d Am. ed.) 1877.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1833.

[3] Perry v. Parker, 1 W. & M. 280; Lawrence v. Bowman, 1 McAll. 419.

[4] See Daniell's Ch. Pr. (2d Am. ed.) 1811-1833.

§ 289. Time and place of applications for interlocutory injunctions. An injunction may be obtained, at any time, as well in vacation as in term, and whether the court be sitting or not, at any place within which the judge granting it has jurisdiction and at almost any stage of the cause.[1] "But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is alloted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district."[2] In England it has been held, that, in a very extraordinary case, an injunction may be granted upon petition before the filing of a bill or the service of a subpœna.[3] In a court of the United States an injunction has been issued upon the filing of the bill and before service of the subpœna;[4] and a restraining order was granted upon the presentment of a bill to the court before its filing, when a notice of an application for leave to file the same had previously been given to the defendants.[5]

It has been held that a non-resident defendant who cannot be served with process may be enjoined from infringing a patent within the district.[6]

An injunction will ordinarily be refused while a demurrer or plea to the bill is pending.[7] But in cases of emergency, the court may order the sufficiency of such a pleading to be argued before the regular time for such a proceeding, together with the motion for the injunction;[8] or even grant a restraining order without waiting for the argument.[9] Should a motion be heard

§ 289. 1 Daniell's Ch. Pr. (5th Am. ed.) 1663; Kerr on Injunctions, 543, 545; Bacon v. Jones, 4 Myl. & Cr. 433.

2 Jud. Code, § 264, 36 St. at L. 1087.

3 Mayor of London v. Bolt, 5 Ves. 129.

4 Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415.

5 St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220. *Cf.* U. S. R. S., § 718; *infra*, § 291.

6 Kennedy v. Penn. I. & Coal. Co., 67 Fed. 339.

7 Cousins v. Smith, 13 Ves. 164; Ketchum v. Driggs, 6 McLean, 13.

8 Anon. v. Bridgewater C. Co., 9 Sim. 378; Daniell's Ch. Pr. (5th Am. ed.) 1671.

9 Frowd v. Lawrence, 1 J. & W. Maltby v. Bobo, 14 Blatchf. 53; Fremont v. Merced M. Co., 1 McAll. 267.

while a demurrer is on the file and undisposed of, it seems that upon the hearing of the motion the allegations in the bill will be considered as admitted.[10] An application for an injunction has been refused because the bill had been referred for scandal.[11] An application for an injunction, which has been denied, or may be renewed by leave of the court; but leave to renew will rarely be granted except upon new affidavits and in a clear case.[12]

§ 290. Injunctions not prayed for in the bill. The English rule was that an injunction would not issue against a person not made a party to a bill specifically praying an injunction against him:[1] and the injunction had to be prayed for not only in the prayer for relief, but also in the prayer for process.[2] To this, however, there were four exceptional classes of cases. If the court had by its decree taken the distribution or control of property into its own hands, it would prevent injury thereto either by the parties litigant or others, although no injunction had been prayed in the bill.[3] Thus, in a foreclosure suit, it would restrain waste by the mortgagor after a decree for an account;[4] and after a decree for the administration of the assets of a dead man, it would enjoin a creditor not a party to the suit from proceeding at law against the estate of the testator or intestate to satisfy his individual claim, provided that the executor made an affidavit stating what assets he had in his hands, or had previously admitted their amount.[5] If the suit were brought by a legatee, such a statement or admission was not indispensable.[6] Secondly, an injunction was granted without a bill being filed, for the express purpose of preventing a plaintiff from suing both at law and in equity at the same time and for the same matter, and to compel him to make an election.[7] Thirdly, an

10 Bayerque v. Cohen, McAll. 113.

11 Davenport v. Davenport, 6 Madd. 251.

12 Louisville & N. R. Co. v. Kentucky R. R. Commission, 214 Fed. 465.

§ 290. 1 Daniell's Ch. Pr. (5th Am. ed.) 1614-1617.

2 Wood v. Beadell, 3 Sim. 273.

3 Daniell's Ch. Pr. (5th Am. ed.) 1614.

4 Wright v. Atkyns, 1 V. & B. 313.

5 Daniell's Ch. Pr. (5th Am. ed.) 1617; Paxton v. Douglas, 8 Ves. 520; Thompson v. Brown, 4 J. Ch. (N. Y.) 619.

6 Ratcliffe v. Winch, 16 Beav. 576; Daniell's Ch. Pr. (5th Am. ed.) 1617.

7 Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

injunction could always be obtained to compel respect and enforce obedience to the decrees and orders of the court: Thus, publications which were disrespectful to the court, or which unfairly reported its proceedings, could be enjoined.[8] So, too, an injunction could issue to restrain an action at law to recover damages for false imprisonment under process of contempt improperly issued;[9] to compel compliance with the terms and spirit of a decree by one who had bought land under it;[10] to compel compliance with his lease by the tenant of a receiver;[11] and to prevent an unauthorized action against a receiver.[12] And fourthly, there seems to be a class of cases not clearly defined in which the court granted an injunction, when without it "the whole object of the proceedings would be defeated," although it was not prayed for in the bill.[13]

§ 291. Special practice of the Federal courts in the issue of injunctions. The Equity Rules provide: that a bill in equity shall contain "a statement of any prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."[1] Where a District Court upon an affidavit of defendant's counsel in the State court, issued an injunction restraining plaintiff in an action in the latter court from proceeding in such court it was held that such issuance was improper, since the filing of a properly verified bill in the Federal court is a necessary condition precedent to the issuance of an injunction.[2]

"No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, un-

8 Anon., 2 Ves. Sen. 520; Brook v. Evans, 29 L. J. Ch. 616; Coleman v. West H. Ry. Co., 8 W. R. 734; Mackett v. Com'rs of Herne Bay, 24 W. R. 845. But see U. S. R. S., § 725; Hobbs Mfg. Co. v. Gooding, C. C. A., 113 Fed. 615.

9 Frowd v. Lawrence, 1 J. & W. 655; Ex parte Clarke, 1 R. & M. 563; Daniell's Ch. Pr. 511.

10 Casamajor v. Strode, 1 Sim. & Stu. 381; Kerr on Injunctions, 543.

11 Walton v. Johnson, 15 Sim. 352.

12 Angel v. Smith, 9 Ves. 335.

13 Blomfield v. Eyre, 8 Beav. 250. See Shainwald v. Lewis, 6 Fed. 766.

§ 291. 1 Eq. Rule 25.

2 Cathey v. Norfolk & W. Ry. Co., C. C. A., 228 Fed. 26.

less it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expenditures as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."[3]

The practice is now regulated by the Clayton Act of October 15, 1914, as follows: "No preliminary injunction shall be issued without notice to the opposite party. No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had therein. Every such temporary restraining order shall be indorsed with the date and hour of issuance shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall

[3] Eq. Rule 73.

take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require."[4]

"Except as otherwise provided in section sixteen of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby."[5]

"Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same."[6]

It has been held: that such a restraining order may be mandatory and require affirmative action;[7] but the usual practice is to grant mandatory orders only to preserve the *status*

[4] Act of Oct. 15, 1914, ch. 323, § 17, 38 St. at L. 737, Comp. St., § 1243a, repealing Jud. Code, § 263, 36 St. at L. 1087, which renacted U. S. R. S., § 718. See Yuengling v. Johnson, 1 Hughes, 607; C., B. & Q. R. Co. v. B., C. R. & N. Ry. Co., 34 Fed. 481; Payne v. Kansas & A. V. R Co., 46 Fed. 546; United Railroads of San Francisco v. City and County of San Francisco et al., 180 Fed. 948; Thullen v. Triumph Electric Co., C. C. A., 212 Fed. 143. For a case where the papers were insufficient, see Mississippi Valley Tr. Co. v. Railway Steel Spring Co., C. C. A., 258 Fed. 346.

[5] Ibid., § 18, Comp. St. § 1243b.

[6] Ibid., § 19, Comp. St., § 1243c.

[7] Pokegama S. R. L. Co. v. Klamath R. L. & I. Co., 86 Fed. 528. *Cf. supra*, § 286.

quo.[8] An injunction suspending or restraining the enforcement, operation, or execution of any statute of a State or order made by an administrative board or commission created by an act under the statutes of a State, or restraining the action of an officer of a State in the enforcement or execution of such statute or order, cannot be issued unless the application for the same as presented to a Justice of the Supreme Court or to a Circuit or District Judge and is heard and determined by three judges, of whom at least one must be a Justice of the Supreme Court or a Circuit Judge, and a majority of such three judges must concur in the grant of such an application.[9] The cases construing the statute are previously discussed.[10]

The practice is similar upon applications for injunctions to restrain the enforcements of orders of the Interstate Commerce Commission [11] or of the United States Shipping Board.[12] It has been held, that the statute forbids a single judge to deny a motion for such an injunction and even to vacate such a restraining order previously issued by himself.[13]

The Act of September 7, 1916, which creates the United States Shipping Board provides, "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission but such suits may also be maintained in any district court having jurisdiction of the parties." [14] The statutory provisions concerning patent,[15] copyright [16] and trademark [17] cases are previously quoted.

§ 292. Notice of application for interlocutory injunction. As a general rule, notice of an application for an injunction must always be given to the person against whom the injunction is

8 Cumberland Telephone & Telegraph Co. v. Railroad Commission of Louisiana, 156 Fed. 834.

9 Jud. Code, § 266, 36 St. at L. 1087, as amended by Public Law 445, 62nd Cong., Third Sess.

10 See § 105d, *supra*.

11 Act of Oct. 22, 1913, ch. 32, 38 St. at L. 220, Comp. St., § 998, *supra*, § 100b.

12 39 St. at L. 737, Comp. St. § 8140o.

13 *Ex parte* Metropolitan Water Co., 220 U. S. 539, 55 L. ed. 575.

14 Act of Sept. 7, 1916, ch. 45, § 3, 39 St. at L. 737, Comp. St., § 8146oo.

15 *Supra*, §§ 146, 277.

16 §§ 156, 278, *supra*.

17 §§ 148, 279, *supra*.

desired; but in very pressing cases, where the mischief sought to be prevented was serious, imminent, and irremediable, or where the mere act of giving notice to the defendant of the intention to make the application might have been of itself productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be complete before the time for making the application should have arrived, the courts have from the earliest time awarded injunctions without notice.[1]

The Clayton Act expressly provides "No preliminary injunction shall be issued without notice to the opposite party."[2] Under the peculiar practice of the Federal courts, a temporary restraining order is the sole relief that can be granted in such a case.[3] Such a restraining order must expire within ten days after its entry unless within the time fixed by the judge it is so extended for a like period.[4] On an application for the restraining order the plaintiff must show by affidavit or by a verified bill that specific facts from which it appears that immediate and irreparable injury, loss or damage will result to him before notice can be served and a hearing had thereon, unless the restraining order is granted.[5] Upon such an application the plaintiff should also state in his affidavit the time when he first learned of the threatened mischief.[6] If the injunction desired be to restrain the infringement of a patent: that he believes that the person to whom the patent was issued was the original inventor thereof, or that the thing or process patented was new or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued,[7] and every material circumstance connected with the case, whether the same bears for or against his application.[8] If his affidavit be defective in any of these particulars,

§ 292. 1 Daniell's Ch. Pr. (5th Am. ed.) 1664; High, Injunctions, § 1578; Kerr, Injunctions, 545; Wing v. Fairhaven, 8 Cush. (Mass.) 363; Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415; Yuengling v. Johnson, 1 Hughes, 607.

2 Act of Oct. 15, 1914, ch. 32, § 17, 38 St. at L. 737, Comp. St., § 1243a.

3 Ibid., *supra*, § 289, 291.

4 Ibid., *supra*, § 291.

5 Ibid.

6 Calvert v. Gray, 2 Cooper's Ch. 171, n.

7 Hill v. Thompson, 3 Meriv. 622; Sturz v De la Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441. See also U. S. R. S., §§ 4886, 4887.

8 Dalglish v. Jarvie, 2 Macn. & G. 231.

according to the English practice, an injunction would not be issued, or if issued the order for it would be discharged.[9] In the absence of any local rule upon the subject, the practice in giving notice of an application for an injunction, and of proceeding at the time when the application is made, are the same when an injunction is asked for as upon any other interlocutory application.

When some of the parties are non-residents, notice to them is sufficient if served upon their resident agent, who on their behalf is committing the acts sought to be enjoined when he also is a party to the bill.[10]

It has been said that an application for an interlocutory special injunction, during term and after the beginning of a suit and before answer, can only be made by motion; but that in vacation a judge may grant such an application upon petition.[11] The usual practice is, however, to apply by motion. It has been held that a mandatory injunction can only be granted upon notice.[12] It has been further held that the evidence which would prevent the issue of an interlocutory injunction will be sufficient to induce the court to dissolve one previously granted.[13] A temporary injunction may be granted after

[9] Dalglish v. Jarvie, 2 Maen. & G. 231, 243, 244, per Baron Rolfe: "The application for a special injunction is very much governed upon the same principles which govern insurances, matters which are said to require the utmost degree of good faith, '*uberrima fides.*' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant."

[10] Veitia v. Fortuna Estates, C. C. A., 240 Fed. 256.

[11] Daniell's Ch. Pr. (5th Am. ed.) 1666; Smith v. Clarke, 2 Dick. 455; Nichols v. Kearsly, 2 Dick. 645.

[12] Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co., 34 Fed. 481.

[13] Cary v. Domestic S. Co., 26 Fed. 38. *Contra*, Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 19 L.R.A. 387, 54 Fed. 730; s. c., 19 L.R.A. 395, 54 Fed. 746, *supra*, § 286.

a final hearing and submission of the case on the merits.[14]

§ 293. Affidavits upon an application for an injunction. The affidavits upon which an injunction is sought are usually sworn to by the plaintiffs or one of them,[1] but may be sworn to by any person acquainted with the facts,[2] in which latter case the affidavit should, it seems, state a good reason for its not being sworn to by one of the plaintiffs.[3] Except in extraordinary cases, the allegations must be sworn to positively and not upon information and belief, unless the sources of the information are stated and some excuse given for the absence of the affidavit of the informant.[4]

It has been said that in the equity courts allegations, merely upon information and belief, unsupported by proof, are not sufficient to sustain an injunction.[5] It is in general necessary that a plaintiff should swear positively to his title.[6] An injunction has been refused when a plaintiff merely swore upon information and belief that he was a remainderman under a settlement.[7] Upon an application for an injunction to stay waste, he must set out his title with particularity. A statement "that the plaintiff was entitled to the fee simple of the estate" has been held insufficient.[8] It has been said that if fraud is relied upon as a basis for an injunction, it must be sworn to positively, and not merely upon information and belief.[9]

14 Cimiotti Unhairing Co. v. American Fur Ref. Co., 117 Fed. 623.

§ 293. 1 Daniell's Ch. Pr. (5th Am. ed.) 1669.

2 Lord Byron v. Johnston, 2 Meriv. 29; Brooks & Hardy v. O'Hara Bros., 8 Fed. 529.

3 Lord Byron v. Johnston, 2 Meriv. 29; Spaulding v. Keely, 7 Sim. 377; Scotson v. Gaury, 1 Hare, 99; Kerr on Inj. 548.

4 Lake S. & N. Ry. Co. v. Felton, C. C. A., 103 Fed. 227; Murphy v. Jack, 142 N. Y. 215, 218; Rosevelt v. Edson, 51 N. Y. Super. Ct. 227.

5 Re United Wireless, 201 Fed. 445, 449; Re Bloss Fed. Cas. No. 1,562; Leavenworth v. Pepper, 32 Fed. 529; Bigbee v. Satterfield, 105 Ga. 841, 32 S. E. 139, to a similar fact is Thompson v. Pack, 219 Fed. 624, aff'd C. C. A., 223 Fed. 641. In re Debs, 158 U. S. 564, 573, the bill filed by a railroad company was verified only by the affidavit of a person not shown to be connected with it, stating that he had read the bill and believed the statements therein contained to be true.

6 Daniell's Ch. Pr. (5th Am. ed.) 1669.

7 Davis v. Leo, 6 Ves. 784.

8 Whitelegg v. Whitelegg, 1 Brown, Ch. C. 57.

9 Brooks & Hardy v. O'Hara Bros., 80 Fed. 529.

The plaintiff should also in the affidavits show some actual violation of his rights, or a sufficient ground to apprehend it.[10]

A verified bill may take the place of an affidavit.[11] Except in the special cases previously described an injunction may be granted though the bill is not sworn to, provided that the accompanying affidavits show a proper case for it;[12] but not unless a proper case is made out by the bill itself.[13] An answer sworn to, positively, has at least the effect of an affidavit.[14]

If the defendant in his opposing affidavits set up as a defense new matter in avoidance of the case shown by the plaintiff, the latter may have leave to file further affidavits in rebuttal; but generally no subsequent affidavits can be filed by the defendant.[15] Rebutting affidavits may also be used to support any allegations of the bill denied in the answer except such as state the plaintiff's title to property affected by the litigation.[16] Affidavits in rebuttal cannot be filed without leave of the court, which, it has been said, should only be granted under special circumstances.[17] The authorities are conflicting as to whether or not the plaintiff's title, if denied in the answer, can be supported by rebutting affidavits.[18]

The court has permitted the use of affidavits which were not entitled and which were made and signed before the bill was filed, when it appeared from their contents that they were made for the purpose of being used in a suit between the parties.[19]

Where an allegation in the bill is not denied in the answer, it

10 Gibson v. Smith, 2 Atk. 182; Jackson v. Cator, 5 Ves. 688; Hanson v. Gardiner, 7 Ves. 305.

11 City of Kankakee v. Am. Water Supply Co., C. C. A., 199 Fed. 757.

12 Smith v. Schwed, 6 Fed. 455.

13 Cooper v. Mattheys, 8 Law R. 413; Wilson v. Stolley, 4 McLean, 272; Leo v. Union Pac. Ry. Co., 17 Fed. 273; Land Co. v. Elkins, 20 Fed. 545; St. Louis T. F. v. Carter & G. P. Co., 31 Fed. 524.

14 Demerest v. Winchester Repeating Arms Co., 257 Fed. 171, 173. See *infra*, § 294.

15 Day v. New Eng. C. S. Co., 3 Blatchf. 154.

16 Brooks v. Bicknell, 3 McLean, 250; Farmer v. Calvert Lith. Co., 1 Flip. 228. See Rule 113 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

17 Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 Fed. 614.

18 Compare Poor v. Carleton, 3 Sumn. 70; Goodyear v. Mullee, 3 Fisher, 420, with Farmer v. Calvert Lith. Co., 1 Flip. 228; Parker v. Sears, 1 Fish. Pat. Cas. 93; U. S. v. Parrott, 1 McAll. 271. See Rule 1907 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

19 Modox Co. v. Moxie Nerve Food Co, C. C. A., 162 Fed. 649.

is taken as admitted for the purposes of a motion for a preliminary injunction.[20]

Documentary proof, if of equal force with affidavits, can also be used in support or in opposition to a motion for an injunction.[21]

Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause; and consequently decrees entered in suits between strangers affecting the validity of a patent in question may be offered in evidence, in support of an application for a preliminary injunction, but not in support of an application for one that is to be perpetual.[22] Hearsay evidence may also be used.[23] In one case statements in a proclamation by the Governor of the State were treated as evidence upon such a motion.[24] In another, campaign speeches by the Governor of the State were treated as evidence of the proper construction of a law.[25] The declarations and conduct of third parties cannot establish a case against a defendant until it has been shown by independent evidence that there was a combination between him and them. The illegality of the combination may then be shown by the declarations alone.[26] In a proper case a motion for a bill of particulars may be required of the party seeking an interlocutory injunction.[27] This relief may be granted upon a motion to vacate an injunction.[28]

§ 294. Rules of decision upon applications for interlocutory injunctions. The issue of an interlocutory injunction is never a matter of right, but rests in the sound discretion of the court. In order to obtain one, the plaintiff must show either that there is no doubt of the wrongful nature of the act sought to be en-

20 Young v. Grundy, 6 Cranch, 51, 3 L. ed. 149. See § 146.

21 Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415.

22 Buck v. Hermance, 1 Blatchf. 322; Matthews v. Ironclad Mfg. Co., 19 Fed. 321.

23 Casey v. Cincinnati Typ. Union No. 3, 12 L.R.A. 193, 45 Fed. 135, 147, where Judge Sage quotes this passage with approval. See Merritt v. Thompson, 3 E. D. Smith (N. Y.) 283.

24 Coeur d' Alene Cons. & M. Co. v. Miners' Union, 19 L.R.A. 382, 51 Fed. 260.

25 Mercantile Tr. Co. v. Texas & P. Ry. Co., 51 Fed. 529, 542.

26 Hitchman Coal & Coke Co v. Mitchell, 245 U. S. 229.

27 Hane v. Crown & Keystone Co., 223 Fed. 439.

28 Ibid.

joined,[1] or that his own claims of right have been acquiesced in without question for a long period of time,[2] or that the injury which will result to himself from a refusal of the injunction will be very great, and that to the defendant from the issue thereof very slight.[3] Otherwise, an interlocutory injunction will be denied him.[4]

When the defendant would suffer by the injunction as much injury as the complainant or greater injury unless the facts are clear, or the motion should be denied.[5] The rule as to balancing

§ 294. [1] Minturn v. Larue, 1 McAll. 370; Buchanan v. Howland, 2 Fish. 341; Doughty v. West, 2 Fish. 553; Irving v. Joint Dist. Council, U. B. of Carpenters, &c., 180 Fed. 896. See Owsley v. Yerkes, 185 Fed. 686.

[2] Varick v. Mayor of N. Y., 4 J. Ch. (N. Y.) 53; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; McKay v. Dilbert, 5 Fed. 587; W. U. Tel. Co. v. Union Pac. R. Co., 3 Fed. 721; Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co., 1 Fed. 745; Cumberland Tel. & Tel. Co. v. Railroad Commission of La., 156 Fed. 23; Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission, 182 Fed. 189.

[3] W. U. Tel. Co. v. St. J. & W. Ry. Co., 3 Fed. 430; W. U. Tel. Co. v. Burlington & S. W. Ry. Co., 11 Fed. 1; Am. U. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188; Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 541; Allison v. Corson, C. C. A., 88 Fed. 581; Dimick v. Shaw, C. C. A., 94 Fed. 266; Cartersville Light & Power Co. v. Mayor, etc., of Cartersville, 114 Fed. 699; Copper King v. Wabash Min. Co., 114 Fed. 991; Denver & R. G. Co. v. U. S., C, C. A., 124 Fed. 156; W. U. Tel. Co. v. Philadelphia, B. & W. R. Co., 124 Fed. 974; Mercantile Tr. & D. Co. v. Columbus Waterworks, 130 Fed. 180; Jones v. Dimes, 130 Fed. 638; Sampson v. Murdock Co. v. Seaver-Radford Co., 129 Fed. 761; Gring v. Chesapeake & Delaware Canal Co., 129 Fed. 996; Harriman et al. v. Northern Securities Co., 132 Fed. 464; Seaboard Air Line Ry. Co. v. Railroad Commission, 155 Fed. 792; Colgate v. James T. White & Co., 169 Fed. 887; Arlington Heights Fruit Co. v. Southern Pac. Co., 175 Fed. 141; Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; De Koven v. Lake Shore & M. S. Ry. Co., 216 Fed. 955; Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 77; Chew v. First Presbyterian Church of Wilmington, 237 Fed. 219; American Smelt. & R. Co. v. Bunker Hill & S. Min. & C. Co. 248 Fed. 172.

[4] Coffeen v. Brunton, 5 McLean, 256; Kryptok Co. v. Stead Lens Co., C. C. A., 190 Fed. 767; Mackey Tel. & Cable Co. v. City of Texarkana, Ark., 199 Fed. 347; Smith v. Cummings, 1 Fish. Pat. Cas. 152; French v. Brewer, 3 Wall. Jr. 346; Pentlarge v. Beeston, 1 Fed. 862; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; Texas & Pac. Ry. Co. v. Interstate Tr. Co., 45 Fed. 5.

[5] Kemmerer v. Midland Oil & Drilling Co., C. C. A., 229 Fed. 872; Brown Drug Co. v. U. S. 235 Fed. 603, 605; Melomoline Co. v. Stromeyer, 240 Fed. 228.

of injuries is not applied when the rights of the parties are clear.[6]

All doubtful questions of fact should ordinarily be resolved against the complainant.[7] An injunction should usually be denied when the proofs are equally balanced.[8]

It has been said that even when an answer under oath has been waived in the bill the injunction must be dissolved or denied upon the presentation of a sworn answer which fully and unequivocally denies upon personal knowledge all the material allegations upon which the complainant's equities rest.[9] In a suit under the act to protect trade and commerce against unlawful monopolies, a preliminary injunction was refused when doubtful questions of law and fact were involved, partly upon the ground that as the United States tendered no bond, more injury would result to the defendant from the issue than to the plaintiff from the refusal of the writ.[10]

An interlocutory injunction may be granted upon evidence not sufficiently strong to justify a permanent injunction upon the final hearing.[11] It is settled that upon a preliminary application for a temporary restraining order all that the judge should, as a general rule, require is a case of probable right, and of probable danger to that right without the interference of the court, and its discretion should then be regulated by the balance of inconvenience or injury to the one party or the other.[12] A

6 Kemmerer v. Midland Oil & Drilling Co., C. C. A., 229 Fed. 872; Marquette Cement Mining Co. v. Oglesby Coal Co., 253 Fed. 107.

7 Photo Drama Motion Picture Co. v. Social U. Film Corp., 213 Fed. 374; T. B. Harms & Francis, Day & Hunter v. Stern et al, 222 Fed. 581; Société Anonyme Du Filtre v. Consolidated Filters Co., 248 Fed. 358.

8 Woodside v. Tonopah & G. R. Co., 184 Fed. 358; Mackey Tel. & Cable Co. v. City of Texarkana, Ark., 199 Fed. 347. See Corcoran v. Nat. Tel. Co. of West Virginia, C. C. A., 175 Fed. 761; Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113.

9 Water Co. of Tonopah v. Public Service Commission, 250 Fed. 304, Demerest v. Winchester Repeating Arms Co., 257 Fed. 162, 172.

10 U. S. v. Jellico M. C. & C. Co., 43 Fed. 898.

11 Ford v. Taylor, 140 Fed. 356; McCarthy v. Bunker Hill & S. Min. & C. Co., et al., 147 Fed. 981; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Central of Georgia Ry. Co. v. Railroad Com. of Ala., 161 Fed. 925; Andrae v. Redfield, 12 Blatchf. 407, Fed. Cas. No. 367. *Contra*, Henry Gas. Co. v. U. S., C. C. A., 191 Fed. 132.

12 Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245, 246, per Baker, J. Citing New Memphis G. & L. Co. v. Memphis, 72 Fed. 952; High,

temporary injunction may be granted to preserve the *status quo* until the final determination in the District Court or upon appeal although the court is of the opinion that on the merits relief should be denied and the bill dismissed.[13]

The rules of decision upon motions for injunctions to restrain the infringements of patents,[14] copyrights,[15] and trade-marks,[16] have been previously described.

It has been said to be no objection to the grant of a preliminary injunction, that it involves the decision of an issue of law which virtually determines the case.[17] An injunction was granted against an illegal ordinance regulating water rates for one year, although an appeal from the order could not be determined before the end of the year.[18]

Where no great financial loss is threatened no injunction will be issued to restrain the execution of an act of Congress, unless the invalidity of the statute is clear beyond a rational doubt.[19]

It is a sufficient ground for refusing an injunction that it compels the defendant to commit an act forbidden him by another court.[20] It is better practice for the court upon such a motion not to adjudge a statute to be a violation of the State constitution before that question has been decided by the State courts,[21] but, when the State law is attacked as an infringement of the Constitution of the United States the Federal court need not await the decision of a State court before acting.[22] Upon a motion to enjoin the continuance of a suit in a State court against a Federal receiver, the Federal court followed the decision by the former tribunal upon the validity of the service of process.[23]

Danger of inconvenience to the public is a ground for refusing a preliminary injunction.[24] A preliminary injunction may also

Injunctions, § 13; Granite Brick Co. v. Titus, C. C. A., 203 Fed. 659; Shera v. Carbon Steel Co., 245 Fed. 589.

13 Louisville & N. R. Co. v. U. S., 235 Fed. 273. See *supra*, §§100b, 105d.

14 *Supra*, § 277.

15 *Supra*, § 278.

16 *Supra*, § 279.

17 Minneapolis General El. Co. v. City of Minneapolis, 194 Fed. 215.

18 Los Angeles C. W. Co. v. Los Angeles, 88 Fed. 720.

19 International Mercantile Marine Co. v. Stranahan, 155 Fed. 428.

20 See Louisville & N. R. Co. v. W. U. Tel Co., C. C. A., 233 Fed. 82.

21 *Supra*, § 100d, *infra*, §§ 375, 377, 477.

22 *Supra*, § 25.

23 See *infra*, §§ 311, 477.

24 Southwestern B. El. L. & P. Co. v. Louisiana El. L. Co., 45 Fed. 893; Cubbins v. Mississippi River Commission, 204 Fed. 299; Marconi Wireless Telegraph Co. v. Simon, 227 Fed. 906; Gaines v. Baltimore

be refused when the plaintiff has been guilty of laches in applying for it; even though his delay has not been such as to disentitle him to a perpetual injunction after the hearing.[25] If an injunction has been obtained by an interlocutory order, and it is desired to continue it provisionally after a hearing, a direction to that effect should be inserted in the interlocutory decree then entered.[26] The court may refuse to continue an injunction when the cause for which it was granted has been removed before the hearing.[27] In such a case, the decree should usually declare that the injunction has properly been issued and award the complainants costs.[28] Upon the argument of a motion for an injunction the defendant can raise any defense to the substance of the bill that would be set up by a demurrer.[29] But not the objection of multifariousness when no motion to dismiss upon that ground is made.[30] Upon an interlocutory application a decision of a Federal court in another circuit will usually be followed,[31] but not necessarily the decision of a State court which was made after the controversy between the parties to the suit in the Federal court had arisen.[32] The court may refuse to grant an injunction although all parties consent that one shall issue.[33]

§ 295. The writ of injunction. Immediately upon the entry of an order for an injunction, the party who obtained it is entitled to have the writ issued from the clerk's office and served.[1] He should attend to this within a reasonable time. Where the

& C. S. S. Co., 734 Fed. 786; Armour & Co. v. Texas & P. Ry. Co., C. C. A., 257 Fed. 185.

25 Gordon v. Cheltenham Ry. Co., 5 Beav. 229; Mundy v. Kendall, 23 Fed. 591; Gideon v. Representative Securities Corp., 232 Fed. 184; Ann Arbor R. Co. v. Fellows, 236 Fed. 387. A delay of several months while the railway company was testing the effect of a reduction of rates, is not such laches. Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321.

26 Daniell's Ch. Pr. (2d Am. ed.) 1902; Gardner v. Gardner, 87 N. Y. 14.

27 Lewis Pub. Co. v. Wyman, 168 Fed. 756.

28 Smith v. Ingersoll Sergeant Rock Drill Co., 7 Misc. (N. Y.) 374, 377; Williams v. United Wireless Teleg. Co., 1 N. Y. Sup. Ct.; Bischoff, J., N. Y. L. J. April 24, 1912, in which the author was counsel.

29 Ladd v. Oxnard, 75 Fed. 703.

30 See Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 550; *supra*, § 143.

31 Dady v. Ga. & A. Ry., 112 Fed. 838; *supra*, § 277.

32 Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113.

33 Nat. Phonograph Co. v. Schlegel, 117 Fed. 624.

§ 295. 1 Daniell's Ch. Pr. (2d Am. ed.) 1816, 1817, 1964.

writ was tested six weeks after the entry of the order granting it and was not served till nearly a year afterwards, the court refused to punish the defendant for disobedience, saying that, after the lapse of so much time, the plaintiff should have applied for leave to use the writ.[2] Like all other writs and process issuing from the courts of the United States, writs of injunction must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court of Appeals must bear teste, from the date of such issue, of the Chief Justice of the United States, or, when that office is vacant, of the associate Justice next in precedence, and those issuing from a District Court must bear teste of the judge, or, when that office is vacant, of the clerk thereof.[3]

"The orders pronounced by the court in cases of special injunctions before answer, have varied at different periods. The form most frequently adopted enjoined the party '*till further order.*' In some cases the injunction has been till '*appearance* and further order;' in other till '*answer* and further order.' But the form at present used, and which is established by a rule laid down by Lord Eldon, is 'till answer *or* further order.' This has been adopted as giving defendant the liberty to move, if necessary, to dissolve upon affidavit, before he has answered the bill."[4]

The writ should contain a concise description of the particular acts or things in respect to which the defendant is enjoined;[5] and should conform to the directions of the order granting the injunction.[6] It is the safer practice when the writ is broader than the order warrants for the defendant to apply to the court for an order setting it aside or modifying it.[7] It seems that he is not justified in disobeying it and raising the objection when a motion is made for an attachment against him.[8] "The defendants ought to be informed as accurately as the case permits what they

2 McCormick v. Jerome, 3 Blatchf. 486.

3 U. S. R. S., §§ 911, 912.

4 Daniell's Ch. Pr. (2d Am. ed.) 1895; Read v. Consequa, 4 Wash. 174. See Bolton v. London School Board, 7 Ch. D. 766, 771; Gardner v. Gardner, 87 N. Y. 14; State v. Wakeley, 28 Neb. 431, 437.

5 Whipple v. Hutchinson, 4 Blatchf. 190. See § 291, *supra*.

6 Sickles v. Borden, 4 Blatchf. 14.

7 Ibid.

8 Ibid.

are forbidden to do."[9] It seems that a writ is insufficient, which designates the acts sought to be enjoined, by a reference to the bill, without describing them.[10]

When a carrier has been adjudged to have violated the interstate commerce law, the court should only enjoin certain specific violations. An injunction should not be granted commanding the carrier, in general terms, not to violate the act in the future in any particular.[11] The injunction should not include a direction, after specific inhibitions, forbidding the defendant to act by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid."[12]

The English practice was to mention in the writ a money penalty to be incurred by the defendant if he disobeyed it; but that does not seem to be necessary here.[13]

The writ should be addressed to the persons whom it is desired to enjoin.[14] It has been said that the writ cannot narrow or broaden the application of the order upon which it is based.[15]

If the injunction is against waste, or forbids the continuance of a nuisance, or some other similarly inequitable act, it is usually addressed to the defendant, his servants, workmen, and agents.[16] No restraint is laid upon the agent, servant or employee

9 Swift & Co. v. U. S., 196 U. S. 375, 401, 49 L. ed. 518, 526.

10 Whipple v. Hutchinson, 4 Blatchf. 190; Sullivan v. Judah, 4 Paige (N. Y.), 444. See *supra*, § 291.

11 N. Y., N. H. & H. R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526.

12 Swift & Co. v. U. S., 196 U. S. 375, 401, 49 L. ed. 518, 526.

13 Low v. Hauel, 1 Wall. Jr. 345.

14 Daniell's Ch. Pr. (2d Am. ed.) 1817.

15 Hitchman Coal & Coke Company v. Mitchell Individually, 245 U. S. 229.

16 Kerr on Injunctions, 559; Daniell's Ch. Pr. (5th Am. ed.) 1673; Humphreys v. Roberts, Seton's Decrees (4th ed.), 173; In re Lennon, 166 U. S. 548, 41 L. ed. 1110. In Dadirrian v. Gullian, 79 Fed. 784: "The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employees. The object of this generaliation is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employee do it for him, nor shall the defendant do it as the agent, servant or employee of another. Potter v. Muller, 1 Bond, 601, Fed. Cas. No. 11,333." See People ex rel. Stearns v. Marr, 181 N. Y. 463, 106 Am. St.

personally, but merely as the agent, servant or employee of the enjoined defendant.[17] Notwithstanding the injunction, upon ceasing to be the agent, servant or employee of the defendant, a person not named in the injunction is free to act for himself in the protection of his own rights, although it involves his doing the very thing forbidden him when in the employ of his former master.[18] He may avoid obedience to a mandatory injunction, which does not name him, by actually ceasing to be an employee of the defendant.[19] He may enter the service of another master, who is a stranger to the suit, and then be as free as the latter from the obligation to obey the court's decree.[20] It has been said: that "those who are followers or companions of defendants, who are strikers, are and will be bound by the writ of injunction issued herein, to the same extent and as fully as if named in the writ."[21] Where an injunction restrained the defendants, "and all other persons having knowledge of this injunction order;" it was held: that it affected only the agents or servants of the defendants, or those acting in combination or collusion with them, or in assertion of their rights or claims; and that persons not in any way connected with them were not restrained, and could not be punished for contempt because they committed the forbidden act.[22]

Rep. 562, 74 N. E. 431, 3 Ann. Cas. 25; *infra*, § 428.

17 Dadirrian v. Gullian, 79 Fed. 784; Slater v. Merritt, 75 N. Y. 268; Wellesley v. Mornington, 17 Beav. 181.

18 Mexican Ore Co. v. Mexican G. M. Co., 47 Fed. 351; Dadirrian v. Gullian, 79 Fed. 784.

19 Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 19 L.R.A. 395, 54 Fed. 746; Dadirrian v. Gullian, 79 Fed. 784.

20 Dadirrian v. Gullian, 79 Fed. 784; People v. Randall, 73 N. Y. 416; Slater v. Merritt, 75 N. Y. 268.

21 Union Pac. R. Co. v. Ruef, 120 Fed. 102, 106. In Anderson v. Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277, it was held that pickets for a labor union, although not made defendants in an injunction suit, are amenable to the injunction restraining the union, and all persons confederated or conspiring with it, from obstructing the business of plaintiff and its employees, where they have actual notice of such injunction.

22 Rigas v. Livingston, 178 N. Y. 20. In State v. Porter, 76 Kan. 411, 13 L.R.A.(N.S.) 462, 91 Pac. 1073, held: that the purchaser of land, with knowledge of an injunction enjoining his grantor and the former's agents, successors, assigns, and all persons whomsoever from maintaining a liquor saloon on such land could be punished for contempt of the injunction. This case was criti-

In a suit to restrain proceedings in another court, the injunction usually is directed against the defendants, his attorneys and agents, even though the bill prays for an injunction against the defendant alone.[23] But the latter's tenants cannot be thus enjoined, unless they have become such after the commencement of the suit or have been made parties to it.[24]

In one case an injunction was granted against all persons acting in concert with the defendants named and under their direction and control.[25]

The writ should be indorsed or subscribed with the name and office address of the plaintiff's solicitor, or with the name and residence of the plaintiff if he appears in person.[26]

§ 296. Dissolution and modification of interlocutory injunctions. The common injunction was dissolved as of course upon the defendant's putting in a sufficient answer to the bill. The practice in such a case was for him to obtain an order *nisi*, upon the return of which the injunction was always dissolved, unless the plaintiff could show that the answer was insufficient for the purpose either of defense or of discovery.[1] A special injunction can only be dissolved by a special motion, either in open court or at a special hearing appointed elsewhere for that purpose by a judge of the court.[2] It has been held: that an order for a perpetual injunction cannot be modified at a subsequent term [3] that after a demurrer put in by him to the bill had been overruled a defendant could only move to dissolve by leave of the court; which was, in one case, only granted upon his affidavit that the demurrer was not interposed for delay, and his giving security to pay all damage to the plaintiff thereby caused.[4]

The motion may be made at any time before decree,[5] even, it

cised in XXI Harv. Law Rev. 220. See *infra*, § 428.

23 Daniell's Ch. Pr. (5th Am. ed.) 1673.

24 Hudson v. Coppard, 29 Beav. 4; Kerr on Inj. 543.

25 U. S. v. Elliott, 64 Fed. 27, 35.

26 Kerr on Inj. 559; Daniell's Ch. Pr. (5th Am. ed.) 1674.

§ 296. 1 Daniell's Ch. Pr. (2d Am. ed.) 1820–1829; Poor v. Carleton, 3 Sumn. 70; New York v. Connecticut, 4 Dall. 1, 3, note 1, 1 L. ed. 715, 716, per Washington, J.

2 Kerr on Inj. 561; Daniell's Ch. Pr. 1675; Wilkins v. Jordan, 3 Wash. C. C. 226; Caldwell v. Walters, 4 Cranch, C. C. 577.

3 L. E. Waterman Co. v. Standard Drug Co., C. C. A., 202 Fed. 167.

4 Woodworth v. Edwards, 3 W. & M. 120.

5 Kerr on Inj. 560; Daniell's Ch.

seems, before the defendant has been served with process,[6] and before he has appeared.[7] Upon the decision of a motion for a preliminary injunction, a temporary restraining order previously issued *ex parte* expires *ipso facto;* and the court has no right to deny a motion for its dissolution.[8] A preliminary injunction restraining the enforcement of a judgment until the matter in controversy shall be "definitely and finally adjudged" remains in force until after such an adjudication so long as the defendant has the right to a review thereof by motion for a new trial or by proceedings by appeal or writ of error.[9]

If at the time of the hearing the court is of the opinion that upon the facts and circumstances then existing the defendant should be enjoined, an injunction will be continued, irrespective of any irregularities connected with its previous issue.[9a] When a special injunction has been granted against several defendants, any of them may move to dissolve it as against himself; but he should in that case serve the others as well as the plaintiff with a notice of his motion.[10] In one case after answer, a notice left at the office of the solicitor for the plaintiff during his absence from the city three days before the motion was held sufficient.[11] If the motion to dissolve is made before answer, it must be supported by affidavits or documentary proof contradicting the statements upon which the injunction was obtained,[12] unless the defendant can show that it is plain upon the face of the plaintiff's bill and affidavits that he was not entitled to the injunction, when the motion will be granted.[13]

When the injunction has been irregularly issued, the defendant should move to discharge the order granting it.[14] If he

Pr. (5th Am. ed.) 1675; Met. G. & S. Exch. v. Chicago B. of T., 15 Fed. 847.

6 Shields v. McClung, 6 W. Va. 79.

7 Menzies v. Rodrigues, 1 Price, 92.

8 Pack v. Carter, C. C. A., 223 Fed. 638, 641.

9 J. L. Owens v. Officer, C. C. A., 244 Fed. 47, 49.

9a Mississippi Valley Trust Co. v. Railway Steel Spring Co., C. C. A., 258 Fed. 347.

10 Thompson v. Geary, 5 Beav. 131; Kerr on Inj. 564. But see Daniell's Ch. Pr. (5th Am. ed.) 1676, note 1.

11 Caldwell v. Walters, 4 Cranch, C. C. 577.

12 Daniell's Ch. Pr. (5th Am. ed.) 1676; Young v. Grundy, 6 Cranch, 51, 3 L. ed. 149.

13 Hudson v. Maddison, 12 Sim. 316; Kidwell v. Masterson, 3 Cranch, C. C. 52; Fenwick Hall Co. v. Town of Old Saybrook, 66 Fed. 389.

14 Angier v. May, 3 W. R. 330;

should move to dissolve it, he might be held to have by so doing recognized its regularity.[15]

Where the application for dissolution was made after answer, it was originally thought that the plaintiff could not show that any of the allegations therein contained were false;[16] but the doctrine has been, in this country at least, exploded,[17] and it is well settled that the plaintiff not only may dispute the truth of such allegations, whether they are positive or negative, but is at liberty to file counter affidavits in reply to new matter contained in the defendant's affidavits or answer.[18] It has been held: that a preliminary injunction will not be dissolved upon an answer admitting the material equities of the bill and setting up new matter in avoidance.[19]

When a stay-order has been made, and simultaneous applications, by the defendant to discharge the stay-order, and by the plaintiff for an injunction, are heard together the plaintiff has the right to open and close the argument.[20] If upon the application to dissolve an injunction the court is not satisfied that the plaintiff is entitled to retain it, it will dissolve the injunction, and may then direct an issue, an action at law, or a reference before the hearing.[21] If, however, it is satisfied that the plaintiff is entitled to the writ, the court will direct the injunction to be continued until the hearing.[22] Formerly where the court dissolved the injunction upon the ground that it appeared upon the face of the bill that the plaintiff was not entitled thereto, and that was the only relief prayed for by him, it could not at the same time dismiss the bill; for the plaintiff had still the right to bring the suit to a hearing.[23]

If the question is left in doubt upon the motion to dissolve, it

Daniell's Ch. Pr. (5th Am. ed.) 1676; Kerr on Inj. 564.

15 Vipan v. Mortlock, 2 Meriv. 476; Kerr on Inj. 564.

16 Daniell's Ch. Pr. (5th Am. ed. 1676, note 4.

17 Poor v. Carleton, 3 Sumn. 70; U. S. v. Parrott, 1 McAll. 271; Orr v. Littlefield, 1 W. & M. 13; Orr v. Merrill, 1 W. & M. 376; Clum v. Brewer, 2 Curt. 506.

18 Day v. New Eng. C. S. Co., 3 Blatchf. 154; Daniell's Ch. Pr. (5th Am. ed.) 1676; Shoemaker v. Nat. Mech. Bank, 1 Hughes, 101.

19 Pere Marquette R. Co. v. Bradford, 149 Fed. 492.

20 Fraser v. Whalley, 2 Hem. & M. 10.

21 Daniell's Ch. Pr. (2d Am. ed.) 1897.

22 Packington v. Packington, 1 Dick. 101; Daniell's Ch. Pr. (5th Am. ed.) 1678.

seems that the motion will be denied.[24] A modification of an injunction may be refused in a case, where if asked before the injunction was issued it might have been allowed but equities have since arisen.[25] The ambiguity of the order granting the injunction is sufficient ground for its dissolution or modification.[26] The defendant's delay in moving to dissolve the injunction may deprive him of his right to have it dissolved.[27]

When a special injunction has been granted after a full hearing, it will not be dissolved except on new evidence.[28] It has been held that a preliminary injunction will not be dissolved after answer upon grounds shown by affidavits, which, from their not having been set up in the answer, cannot be used at the hearing of the whole case.[29] A judge will very rarely dissolve an injunction granted by one of his judicial brethren.[30] It has been said that, in case of the death of the judge who made the order, the motion to dissolve it should be made before two judges.[31]

A temporary injunction may be modified or dissolved by the District Court after it has been affirmed upon appeal.[32] It has been said that a court of first instance has no power to modify or dissolve a perpetual injunction contained in an in-

23 Brooke v. Clarke, 1 Swanst. 550; Blow v. Taylor, 4 Hen. & Munf. (Va.) 159. But see *infra*, § 300.

24 Cooper v. Mattheys, 5 Penn. L. J. 38; s. c., Law R. 413; Fisher v. Lord, 6 West L. J. 137; Woodworth v. Hall, 1 W. & M. 389; Woodworth v. Rogers, 3 W. & M. 135; Sparkman v. Higgins, 1 Blatchf. 205. But see Edison El. Co. v. Westinghouse El. & Mfg. Co., 54 Fed. 504.

25 Sperry & Hutchinson Co. v. Mechanies' Clothing Co., 128 Fed. 1015. It has been said that a modification of the order will usually be refused when its effect would be to change the position of the property affected by the suit. Ulman v. Ritter, 72 Fed. 1000.

26 Dalglish v. Jarvie, 2 Macn. & G. 231.

27 Florence S. M. Co. v. Grover & Baker S. M. Co., 110 Mass. 1; Kerr on Inj. 565; Antisdel v. Chicago H. C. Co., 89 Fed. 308, 311.

28 Woodworth v. Hall, 1 W. & M. 389.

29 Union P. B. M. Co. v. Newell, 11 Blatchf. 549.

30 Cole S. Min. Co. v. Virginia & G. H. W. Co., 1 Saw. 685; Preston v. Walsh, 10 Fed. 315; Reynolds v. Iron S. Min. Co., 33 Fed. 354; Klein v. Fleetford, 35 Fed. 98.

31 Westerly Waterworks v. Town of Westerly, 77 Fed. 783.

32 Edison El. L. Co. v. U. S. El. L. Co., C. C. A., 59 Fed. 501; Andrews v. National F. & P. Works, 61 Fed. 782, 790; s. c., 10 C. C.

terlocutory decree which has been affirmed upon appeal.[33] It is the safer practice for the defendant to obtain a clause in the order of affirmance granting leave to the District Court to modify the injunction order.[34] After an injunction has been dissolved, if evidence subsequently taken shows that it was properly issued, it may be issued anew.[35] The dissolution of an *ex parte* injunction on account of a suppression of material facts does not preclude the plaintiff from applying for another injunction on the merits.[36]

An injunction may also be dissolved if the plaintiff is guilty of gross and inexcusable delay in taking testimony or in bringing the cause to a hearing;[37] or by inequitable conduct,[38] such as a misrepresentation concerning the contents of the injunction made to the trade,[39] and in general if from a change of circumstances its continuance would no longer serve any useful purpose.[40]

The subsequent passage of an act of Congress legalizing a structure which has been enjoined as a nuisance is a reason for the dissolution of an injunction.[41] It has been held that an injunction staying proceedings at law against a bankrupt is dissolved *ipso facto* by his discharge;[42] but remains unaffected by his delay in applying for his discharge.[43] It has been held that at the expiration of a patent the court will dissolve an injunction against its infringement, and leave the complainant no remedy except his claim for damages against the subsequent sale

A., 60, 68; s. c., 24 U. S. App. 81. *Cf.* Standard El. Co. v. Crane El. Co., C. C. A., 76 Fed. 767, 794.

33 Bissell C. S. Co. v. Goshen S. Co., 72 Fed. 545.

34 Hadden v. Dooley, C. C. A., 74 Fed. 429.

35 Tucker v. Carpenter, Hempst. 440.

36 Fitch v. Rochfort, 18 L. J. Ch. 458; High, Injunctions, § 1474.

37 Read v. Consequa, 4 Wash. C. C. 174; Bradley v. Reed, 12 Pitts. L. J. 65; Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415; In re Matter of Schwarz, 14 Fed. 787; *supra*, § 284.

38 Twenty-One Min. Co. v. Original Sixteen to One Mine, C. C. A., 240 Fed. 106 (work similar to that enjoined).

39 Meyers v. Skinner, 186 Fed. 347. See *supra*, § 284.

40 *Re* Jackson, 9 Fed. 493; *Re* Pitts. 9 Fed. 542.

41 Baird v. Shore L. Ry. Co., 6 Blatchf. 461; Hadden v. Dooley, C. C. A., 74 Fed. 429.

42 *Re* Thomas, 3 N. B. R. 7.

43 *Re* Schwartz, 14 Fed. 787, 789.

and use of articles manufactured while the patent was alive in infringement thereof.[44]

An injunction is not dissolved by an amendment of the bill [45] unless the amendment substantially changes the cause of action,[46] or abandons the prayer for the injunction.[47] But it is customary to include in the order allowing an amendment a direction that it be "without prejudice to the injunction." The allowance of a demurrer to the whole bill put an end to an injunction which had previously been obtained; [48] but leave was usually given to amend without prejudice to the injunction, when the demurrer was allowed on account of a defect in form [49] such as multifariousness,[50] or for the omission of an allegation that could readily be supplied even if the same were essential to the jurisdiction.[51] The allowance of a plea did not dissolve an injunction. "There may be some equity shown to continue it. An order for its dissolution must be obtained." [52] An injunction is not dissolved by an abatement or by a defect in the suit, but the defendant must, if he wishes to be freed from the restraint thereby imposed, move that the plaintiff or his representatives be required to revive or take such other steps as may be necessary within a limited time, and that if he fail to do so the injunction may be dissolved.[53] Generally an interlocutory injunction is dissolved by the entry of a final decree which does not continue the same.[54]

44 Westinghouse v. Carpenter, 43 Fed. 894, Miller and Love, JJ.; Am. C. Ry. Co. v. Chicago C. Ry. Co., 41 Fed. 522. But see Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. 356; *supra*, §§ 79, 277.

45 Reed v. Consequa, 4 Wash. C. C. 174; Warburton v. L. & B. Ry. Co., 2 Beav. 253. But see Sharp v. Ashton, 3 V. & B. 144.

46 Atty. Gen. v. Marsh, 16 Sim. 572; Kerr on Inj. 566.

47 Westcott v. Mulvane, 58 Fed. 305.

48 Schneider v. Lizardi, 9 Beav. 461, 468; Frye & Bruhn v. Carstens, C. C. A., 130 Fed. 766.

49 Riverside & A. Ry. Co. v. Riverside, 118 Fed. 736, 746.

50 Rawlings v. Lambert, 1 J. & H. 458; Kerr on Inj. 565, 566; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 550.

51 Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 550.

52 Kerr on Inj. 566; Phillips v. Langhorn, Dick. 148; Ferrand v. Hamer, 4 M. & C. 143.

53 Chowick v. Dimes, 3 Beav. 200; Lee v. Lee, 1 Hare, 622; Chester v. Life Ass'n of Am., 4 Fed. 487; *Cf.* § 362, *infra*.

54 Sweeney v. Hanley, C. C. A., 126 Fed. 97, 99; Gardner v. Gard-

§ 297. The imposition of terms upon the issue, denial, dissolution, or continuance of an injunction and injunction bonds. As the issue of a special injunction is in its discretion, the court may impose terms upon the plaintiff or defendant when granting or refusing the issue, dissolution, or continuance of the same.[1] The usual terms are the giving of a bond or undertaking with good security to indemnify the other party against all loss that may result from the issue or withholding of the injunction.[2] These undertakings were invented by Vice-Chancellor Knight Bruce, and originally they were required only upon *ex parte* injunctions, being designed to protect the court as well as the defendant from improper *ex parte* applications. Later the practice was extended to interlocutory injunctions granted upon notice to the defendant, first in special cases, then generally; and now they are usually required as a matter of course in England and all or nearly all the States of the Union, although in some of the circuits the Federal judges were formerly accustomed to grant injunctions without such a requirement.[3] The reason for the requirement is that upon an interlocutory application but a short time is allowed for the preparation of the case, and it is impossible for the court to obtain a complete knowledge of the facts. Moreover these applications are heard upon affidavits, so that it is impossible to say which side will ultimately prove to be right. Consequently the court reserves the right to indemnify the defendant in case it should have been induced, upon an incomplete state of facts, to make a wrong order.[4] This doctrine was the cause of great injustice and was not usually followed in the State courts.[5]

ner, 87 N. Y. 14. For a case where an injunction was not dissolved by the dismissal of the bill, see Indianapolis & N. W. Tr. Co. v. Consol. Tr. Co., 125 Fed. 247.

§ 297. 1 Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; N. J. & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., 113 Fed. 395; Marvel Co. v. Pearl, 114 Fed. 946; Carpenter v. Knollwood Cemetery, 195 Fed. 96, 100; Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. 153, a trademark case where the complainant was required to give a bond.

2 Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; Northern Pac. R. Co. v. St. P., M. & M. R. Co., 2 McCrary, 260; s. c., 4 Fed. 688.

3 Western Union Tel. Co. v. U. S. & M. T. Co., 221 Fed. 545.

4 Smith v. Day, 21 Ch. D. 421. See Lowenfeld v. Curtis, 72 Fed. 105.

5 See High on Injunctions (4th ed.), § 1619–1634a.

The only case in which prior to the Clayton Act a bond was indispensable was an injunction to restrain proceedings upon a warrant of distress against a delinquent revenue collector or receiver of public money. The Revised Statutes provide: "Any person who considers himself aggrieved by any warrant of distress issued under the foregoing provisions may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond, with sufficient security in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court." [6]

"When the district judge refuses to grant an injunction to stay proceedings on a distress-warrant as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the court within which such district lies, a copy of the proceeding had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction or permit an appeal as the case may be, if, in his opinion the equity of the case requires it. The same proceedings, subject to the same conditions, shall be had upon such injunction in the circuit court as are prescribed in the district court.[7]

The salutary provisions of the Clayton Act provide, "Except

[6] U. S. R. S. § 3636, Comp. St. § 6635.

[7] U. S. R. S. § 3637, Comp. St. § 6636.

as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby."[8]

The section to which reference is made is the section regulating injunctions at the suit of private persons against threatened loss or damage by a violation of the Anti-Trust Laws. This provides that, "When and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."[9]

This provision of the Clayton Act has prevented much injury to the property and business of innocent defendants. The District Courts, however, in some instances have construed it as not applying to proceedings in bankruptcy.[10] It has been held, that when the matter restrained is the continuance of an act which before the injunction was a contempt of the court the statute does not apply and no bond is required.[11] It has been said, that it cannot be presumed "that the Congress intended thereby to limit or condition in any way the power of the Federal court by means of its injunction, any more than by means of proceedings for contempt, to preserve and protect its jurisdiction, acts or title from unlawful impairment or destruction."[12] Before the Clayton Act it was not usual to require security from the United States when a preliminary injunction was granted at their request in a suit in which they are plaintiffs.[13] It was said that a bond should not be required unless the court was not reasonably satisfied of the

8 Act of Oct. 23, 1914, ch. 23, § 18, 38 St. at L. 738, Comp. St. § 1243b.

9 Comp. St. § 8835(o).

10 *Re* Davis S. D. N. Y., June 10, 1918, in which the author was counsel.

11 Swift v. Black Panther Oil & Gas Co., C. C. A., 244 Fed. 20, 29.

12 Sanborn, J., in Swift v. Black Panther Oil & Gas Co., C. C. A., 244 Fed. 20, 29, 30.

13 U. S. v. Jellico, M. C. & C. Co., 43 Fed. 898. But see U. S. v. Dominion Oil Co., 241 Fed. 425.

right to the relief prayed and was satisfied that the granting of the injunction might cause irreparable injury to the defendant.[14] It was held that, where there was proof that the defendant had been guilty of bad faith in connection with the subject of the suit, no bond should be required.[15]

Formerly, the court instead of requiring a bond from the complainant, sometimes imposed, as a condition of the injunction order, that he pay any damages sustained by the defendant in case it should be determined that the injunction should not have issued.[16] In such a case, if complainant avails himself of the writ, he is bound by the condition; and, upon the dissolution of the injunction, he may be directed to pay the defendant's damages.[17] In one case, where no such condition was reserved, upon the dissolution of a restraining order the court directed the complainant to pay the defendant's damages, which it then assessed.[18] Where the defendant to an action at law obtained, after verdict, an injunction staying the proceedings, upon his giving a bond for the payment of the verdict, should the injunction be dissolved and judgment entered, it was held that he waived any previous errors in the action at law and could not sue out a writ of error founded upon them.[19]

Other conditions have been required,[19a] such as the deposit of money in court.[20] An injunction should not be issued to restrain the collection of State taxes, unless the plaintiff first pays what is conceded to be due, or what can be seen to be due on the face of the bill or be shown by affidavit, whether conceded or

14 Carpenter v. Knollwood Cemetery, 195 Fed. 96.

15 Pasteur C. F. Co. v. Funk, 52 Fed. 146, 147.

16 Mica Insulator Co. v. Commercial Mica Co., 157 Fed. 92.

17 Ibid.

18 National Phonograph Co. v. American Graphaphone Co., 136 Fed. 231.

19 Leigh v. Kewanee Mfg. Co., C. C. A., 147 Fed. 693.

19a An injunction to restrain the forfeiture of a street railway franchise was conditioned upon security by the complainant mortgagee; that any defaults in the conditions thereof should be performed; as to money defaults by an ordinary bond; as to defaults in quality of service by an agreement that the mortgagee would either furnish the necessary funds for any new equipment or other improvements required or else consent that receivers' certificates be issued for such purpose. Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865, 874.

20 Consolidated Gas Co. v. Mayor, 146 Fed. 150, and cases cited *infra*.

not.[21] This rule does not apply to injunctions to restrain the collection of municipal taxes such as license fees.[22]

On account of the magnitude of the liability in case the injunction is dissolved and the consequent danger of loss through consequent insolvency of the principal and sureties, interlocutory injunctions to restrain the execution of a statute or order reducing the price charged for a public service usually are, and always should be, accompanied by the provision that the excess over the rate fixed by the statute,[23] or order,[24] should be deposited in court to abide the event of the suit. In some cases, however, such injunctions have been conditioned upon the keeping of an account and the execution of a bond.[25]

Interlocutory injunctions against the enforcement of statutes reducing the charges for freight or passengers have been accompanied by the provision that the railway company should execute a bond, conditioned to pay into the registry of the court, at such times as ordered, money equal to the difference between the amount collected and that which would have been received had the statute been obeyed; and that each ticket buyer should receive a coupon for the payment by the registry clerk of the court of the excess stated, if the act should be finally sustained.[26]

If the language of the order is ambiguous the bond may be examined in determining its meaning,[27] but, the language of the bond cannot narrow or broaden the effect of the order.[28]

The court often withholds an injunction to restrain the infringement of a patent,[29] or copyright,[30] and in other cases,[31] upon the filing of a bond by the defendant. This is the proper

21 State Railroad Tax Cases, 92 U. S. 575, 617, 23 L. ed. 663, 674; National Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469; Albuquerque Nat. Bank v. Perea, 147 U. S. 87, 37 L. ed. 91; Parmley v. Railroad Cos., 3 Dill. 25; Huntington v. Palmer, 8 Fed. 449; *supra*, § 153.

22 See Sperry & Hutchinson Co. v. City of Tacoma, 205 Fed. 241.

23 Buffalo Gas Co. v. Buffalo, 156 Fed. 370; Lincoln Gas Co. v. Lincoln, 223 U. S. 349, 56 L. ed. 466; San Francisco Gas & El. Co. v. City and County of San Francisco, 164 Fed. 884; Pacific Tel. & Tel. Co. v. City of Los Angeles, 192 Fed. 1009.

24 Pac. Gas & El. Co. v. San Francisco, 211 Fed. 202; Arkadelphia Milling Co. v. St. Louis S. Co., 249 U. S. 134.

25 Hunter v. Wood, 209 U. S. 205, 207, 52 L. ed. 747, 748.

26 Arkadelphia Milling Co. v. St. Louis, s. c., 249 U. S. 134.

27 J. L. Owens Co. v. Officer, C. C. A., 244 Fed. 47, 51.

28 Ibid.

29 *Supra*, § 277.

30 *Supra*, § 278.

31 *Supra*, §§ 279, 280.

practice in suits against vendors of articles infringing a patent when a preliminary injunction has been granted against the manufacturer in a suit which will soon be reached for final hearing.[32] Sometimes the injunction is withheld upon the defendant's merely undertaking to keep an account of his sales during the pendency of the suit.[33] In England, injunctions have been withheld in other cases upon the defendants giving undertakings to abide by the further order of the court.[34] The court cannot compel the defendant to give a bond if he prefers to be enjoined.

§ 298. Collection of injunction bonds. It has been held at circuit, that when the court upon the final hearing dissolves an injunction previously granted, or grants an injunction previously denied upon the giving of a bond or undertaking, the successful party can have his damages assessed and the bond or undertaking enforced by the court in the same suit, without being required to bring a new action at law.[1] Where the amount of the recovery is uncertain, the sureties should have notice of the application to enforce the bond.[2] It has been held that the court has the discretionary power either summarily to determine the liability, or to remit the defendant to an action at law.[3] Where a State court first assumes jurisdiction the Federal court should not interfere.[4]

32 Kryptok Co. v. Harris, 216 Fed. 642.

33 Furbush v. Bradford, 1 Fish. Pat. Cas. 317; McCrary v. Penn. C. Co., 5 Fed. 367; McIntyre v. W. U. Tel. Co., 113 Fed. 1022, *supra*, § 277.

34 Atty. Gen. v. M. & L. Ry. Co., 1 (Eng.) Ry. Cas. 436; Jones v. G. W. Ry. Co., 1 (Eng.) Ry. Cas. 684.

§ 298. 1 Lea v. Deakin, 13 Fed. 514; Coosaw Min. Co. v. Farmers' Min. Co., 51 Fed. 107; Lamb v. Ewing, C. C. A., 54 Fed. 269; U. S. Fidelity & Guaranty Co. v. Burke, C. C. A., 238 Fed. 881, *supra*, § 51. See also Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; Leslie v. Brown, C. C. A., 90 Fed. 171; Deakin v. Stanton, 3 Fed. 435; Grundy v. Young, 2 Cranch. C. C. 114; Bentley v. Joslin, Hempst. 218; Moore v. Moore, 25 Beav. 8; Sugden v. Hull, 28 Beav. 263. *Contra*, Curtis, J., In Merryfield v. Jones, 2 Curt. 306; West v. East Coast Cedar Co., C. C. A., 113 Fed. 742. See also Bein v. Heath, 12 How. 168, 13 L. ed. 939; Cimiotti Unhairing Co. v. Am. Fur Refining Co., 158 Fed. 171; aff'd C. C. A., 168 Fed. 529, where the bond provided that the damage should be "ascertained as the court shall direct."

2 Coosaw M. Co. v. Carolina M. Co., 74 Fed. 860; Leslie v. Brown, C. C. A., 90 Fed. 171.

3 Sperry & Hutchinson Co. v. City of Tacoma, 205 Fed. 641; Redlich Mfg. Co. v. John H. Rice & Co., 203 Fed. 723; Baker & Bennett Co. v. N. D. Cass Co., C. C. A., 224 Fed. 439.

4 See Sperry & Hutchinson Co. v.

A District Court has jurisdiction of an action at law upon the bond where it exceeds $3,000, irrespective of the citizenship of the parties, because the suit arises under the laws of the United States[5] and irrespective of the residence of the parties because it is within the ancillary jurisdiction of the court.[6] The liability on the bond is not fixed until the final decree,[7] although the injunction is previously dissolved, since the plaintiff might show upon the final hearing that the writ was in fact justified.[8] It has been held that no action,[9] or proceeding to ascertain and collect the damages,[10] can be maintained upon the bond until that time,[11] and until then the court has power to modify or relax the condition of the bond or to discharge the same when the equities require it.[12] The validity of the injunction bond is not affected by the fact, that it was dated prior to the order, where the sureties justified and the bond was filed after the order was made.[13] Where an appeal from the injunction order was dismissed because the controversy had become moot between the parties, it was held that there could be no recovery upon the bond.[14] The bond or undertaking inures to the benefit of the defendant who suffers injuries, irrespective of the exact time when he has knowledge of the pendency of the action or appears therein.[15] The fact that the defendant is a woman, and that the undertaking is to make good to the defendant "all damages by *him* suffered," does not debar her from recovering thereupon.[16]

City of Tacoma, 205 Fed. 641, *supra*, § 57.

5 Leslie v. Brown, 90 Fed. 171.

6 Louis. & Nash. R. R. Co. v. Garrett, 231 U. S. 300.

7 Nashville, C. & St. L. Ry. v. Railroad Commission of Alabama, 171 Fed. 223; Southern Ry. Co. v. Railroad Commission of Alabama, 196 Fed. 558.

8 Readlick Mfg. Co. v. John H. Rice & Co., 203 Fed. 722.

9 Mississippi Valley Fuel Co. v. Watson Coal Co., C. C. A., 202 Fed. 122.

10 Readlick Mfg. Co. v. John H. Rice & Co., 203 Fed. 722.

11 Nashville, C. & St. L. Ry. v. Railroad Commission of Alabama, 171 Fed. 223; Ashville C. & St. L. Ry. v. Railroad Commission, 171 Fed. 223.

12 Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; Southern Ry. Co. v. Railroad Commission of Alabama, 196 Fed. 558; *Cf.* Allen v. Jones, 79 Fed. 698; Leigh v. Kewanee Mfg. Co., C. C. A., 147 Fed. 693.

13 Sailors' Union of the Pacific v. Hammond Lumber Co., C. C. A., 156 Fed. 450.

14 Clark v. Fairbanks, C. C. A., 249 Fed. 431.

15 Hutchins v. Munn, 209 U. S. 246, 52 L. ed. 776.

16 Hutchins v. Munn, 209 U. S. 246, 52 L. ed. 776.

It is the duty of the court, upon the dismissal of the suit, to determine whether the complainant was entitled to the temporary injunction or to adjudicate upon the liability of the bond.[17] Where the suit had been dismissed and the injunction vacated without a cancellation, it was held that the Federal court could not cancel the bond after a suit had been begun in a State court to collect it.[18] Before the Clayton Act which requires bonds to be given upon the issue of temporary injunction, it was held: that the liability upon an undertaking to secure a temporary restraining order did not extend to damages which arose after a temporary injunction was granted,[19] and that damages arising from the restraint of a permanent injunction, afterwards reversed, could not be recovered against the surety of a bond given to secure a temporary injunction.[20] Where the bond was conditioned that the complainant should "abide the decision of the court and pay all damages and costs which shall be adjudged, against him, because of the granting of said injunction in case said injunction shall be dissolved, then this obligation shall be void; otherwise to remain in full force and virtue;" it was held that the surety was not liable for any amount which the court directed the complainant to pay which was not part of the damages or costs caused by granting the injunction.[21]

When the injunction is sustained in part and dissolved in part, the surety may be liable for the damages caused by so much thereof as was dissolved.[22] But not where the dissolution was because the injunction had fully performed its office and there was no decision that it had been improvidently issued.[23] Then the bond contained the following condition, "Now, therefore, if the said Joseph W. Woolfolk shall abide the decision of said court, and pay all damages and costs which shall be

17 Jewel Tea Co. v. Plant, C. C. A., 240 Fed. 945.

18 Sperry & Hutchinson Co. v. City of Tacoma, 205 Fed. 641.

19 Houghton v. Meyer, 208 U. S. 149.

20 St. Louis I. Mt. & So. Ry. Co. v. MacKnight, 244 U. S. 368; Arkadelphia Milling Co. v. St. Louis Ry. Co., 249 U. S. 134, 139.

21 Woolfolk v. Jones, 216 Fed. 807, reversed on another point Am. Surety Co. v. Jones, C. C. A., 224 Fed. 673.

22 Ibid.

23 Am. Surety Co. v. Jones, C. C. A., 224 Fed. 673.

adjudged against him because of the granting of said injunction, in case said injunction shall be dissolved, then this obligation shall be void; otherwise to remain in full force and virtue."[24] It is the better practice to make the surety a party to an application for the cancellation of the bond.[25] Upon the reversal of the decree for a perpetual injunction, which released the bonds upon the preliminary injunction and discharged the sureties from further liability, if the mandate allows further proceedings, the District Court may enter a decree for damages against the sureties although the part of the decree affecting them was not appealed from, nor referred to in the assignments of error.[26] The State statutes regulating liability upon injunction bonds are not followed by the Federal courts.[27] Only proximate damages can be recovered upon the bond or undertaking. Remote, conjectural and speculative damages, are disallowed.[28] When

24 Woolfolk v. Jones, 216 Fed. 809.

25 Williams v. O'Toole, C. C. A., 211 Fed. 484.

26 Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134.

27 R. M. Rose Co. v. Southern Express Co., 223 Fed. 868; Vrooman v. Burdick, C. C. A., 222 Fed. 900.

28 Smith v. Day, 21 Ch. D. 421; Chicago C. R. Co. v. Howison, 86 Ill. 215; Hotchkiss v. Platt, 8 Hun (N. Y.) 46; Livingston v. Exum, 19 S. C. 223. See Swift & Co. v. Kortrecht, C. C. A., 112 Fed. 709; Baer v. Fidelity & D. Co., 130 Fed. 94. Where the injunction forbade interference with the possession of personal property, it was held that the defendant upon the dissolution could recover all damages caused by his delay in obtaining possession of the property, including any loss caused by a fall in the market price, if it had a market price and could have been sold at once on the market for a sum nearly equal to its value, but not if it had no market price and could not have been sold immediately for a sum "anything like its value;" and that the price which the defendant might have made by the use of the property in his business was too remote and speculative to be recovered. Lehman v. McQuown, 31 Fed. 138. It has been held: that an injunction bond in an action in the District Court of the United States for the District of Louisiana, conditioned that the obligors "will well and truly pay the" obligee, "defendant in said injunction, all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued," which bond was made under an order of the court "that the injunction be maintained on the complaining creditor's giving bond and security to save the parties harmless from the effects of said injunction," is a sufficient compliance with the order of the court, and when construed with reference to the rule prevailing in the Federal courts (contrary to that prevailing in the State courts of Louisiana), that without a bond and in the absence

the injunction forbids the collection of money, interest during the delay thus caused, is usually awarded, besides the added costs of the suit in equity.[29] When the injunction compelled the discontinuance of all the defendant's business he was allowed to recover the rent of his factory, the depreciation in his machinery, equipment, boxes and labels.[30] When the injunction enjoined a house owner from completing alterations, without which the house was only partly habitable, she was allowed to recover on the undertaking the reasonable rental value of the house for the season.[31] Possession of property under claim of title, with the accompanying presumptive right of ownership, carries with it a right to the use and enjoyment of such property until, by due process of law and after full hearing, it has been finally adjudged that such claims of title is unfounded.[32]

When an order restrained the Postmaster General from refusing to transmit mail at second-class rates, the liability on the undertaking was the difference in postage on the matter mailed, while the restraining order was in force.[33]

of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond. Meyers v. Block, 120 U. S. 206, 30 L. ed. 642. For a case where the defendant was not permitted to give bond see Crown Cork & Seal Co. v. N. Y. Specialty Co., 206 Fed. 679; Kintner v. Marconi Wireless Tel. Co., C. C. A., 215 Fed. 104. For a case where it was not required to give bond, see Cincinnati Exhibition Co. v. Marsons, 216 Fed. 269. See *supra*, § 277.

29 Woolfolk v. Jones, 216 Fed. 807.

30 Grushlaw v. Phoenix Knitting Works, C. C. A., 223 Fed. 513. Severed on another point in Am. Surety Co. v. Jones, C. C. A., 224 Fed. 673.

31 Hutchins v. Munn, 209 U. S. 246, 52 L. ed. 776.

32 Cincinnati Exhibition Co. v. Marsons, 216 Fed. 269; Sheffield Gas & El. Co. v. Barker, 231 Fed. 331; Twenty-One Mining Co. v. Original Sixteen to One Mine, C. C. A., 240 Fed. 106, 107; U. S. v. Dominion Oil Co., 241 Fed. 425; Producers' Oil Co. v. U. S., C. C. A., 245 Fed. 651. But see Barber v. Otis Motor Sales Co., 247 Fed. 553. In a suit by a minority stockholder to enjoin a sale of the corporation's assets, where it appeared that the complainant's damage, if any, was purely pecuniary; it was held to be proper for the court to authorize the substitution of a bond by the defendant, instead of a preliminary injunction. Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113. See *supra*, § 145.

33 Houghton v. Meyer, 208 U. S. 149, 52 L. ed. 432.

It has been held by the Supreme Court that the fees of counsel in procuring the dissolution of the injunction cannot be included in the damages upon the bond.[34] This decision is, however, in conflict with the weight of authority in the United States.[35] The court might direct the insertion of a clause in the bond providing that counsel fees should be included in the damages. The liability of the complainant is limited to the amount of the bond.[36] It has been held that no further damages,[37] interest nor costs,[38] can be awarded against him.

It has been held: that where no security is given, the defendant has no remedy to recover damages caused by an injunction improperly issued, unless, perhaps, where the facts will support an action for malicious prosecution.[39] It seems to be doubtful in England, whether the undertaking can be enforced upon the dissolution of the injunction on the ground that the court erred as to the law.[40]

An injunction bond, which is expressed to be solely for the benefit of the defendant, imposes no liability upon the surety for damages caused by the injunction to a person not a party to the suit.[41] But, where the condition was for the payment of all damages and costs which should be adjudged against complainant, the master and stenographer were allowed to recover from the surety their claims.[42] It has been held that a city is the proper party to represent subscribers for the telephone service upon a reference to determine their share in a fund deposited by the telephone company as security upon the issue of an

34 Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43; Covington County v. Stevens, C. C. A., 256 Fed. 328. This rule has been applied to an action upon an injunction bond, given in a court in the territory of Alaska. Lindeberg v. Howard, C. C. A., 146 Fed. 467.

35 See High on Injunctions, § 1685, and cases cited.

36 Cimiotti Unhairing Co. v. Am. Fur Refining Co., C. C. A., 168 Fed. 529; affirming 158 Fed. 171.

37 Ibid.

38 Ibid.

39 Schek v. Kelly, 95 Fed. 941; City of St. Louis v. St. Louis Gaslight Co., 82 Mo. 354. *Contra,* National Phonograph Co. v. Am. Graphophone Co., 136 Fed. 231. See *supra,* § 297.

40 Smith v. Day, 21 Ch. D. 421, 424, 426, 428, 429, 431. But see Novello v. James, 5 De G., M. & G. 876.

41 Hays v. Fidelity & D. Co., C. C. A., 112 Fed. 872.

42 Woolfolk v. Jones, 216 Fed. 807, reversed on another point Am. Surety Co. v. Jones, C. C. A., 224 Fed. 673.

injunction against a reduction of its charges.[43] The surety cannot, pending an appeal from a decree for the defendant to the injunction suit, maintain a bill of *quia timet* to obtain indemnity from the principal before the bond has been paid or the amount of the liability thereupon has been adjudicated.[44]

§ 299. Perpetual injunctions. Perpetual injunctions can only be granted at the entry of a decree.[1] It is irregular to grant one upon affidavit.[2] In patent, trade-mark and copyright cases, however, injunctions that are permanent until the expiration of the plaintiff's monopoly are often granted by an interlocutory decree which also directs a reference to a master for an accounting;[3] but the court has the power to suspend the injunction until an appeal can be heard.[4] A perpetual injunction is either originally granted, or continued. They may be granted originally in all cases in which temporary injunctions might have been granted, and also to restrain the setting up of outstanding terms when it would be inequitable to do so.[5] An application for an injunction to restrain the breach of a covenant to furnish water-power "for all time" was denied because it would be in effect a decree for specific performance under the constant supervision of the courts.[6]

In order to obtain a perpetual injunction, it is not necessary that a provisional injunction should have been asked for.[7] For after the commencement of a suit asking to prevent an act upon the defendant's part, he is said to proceed at his peril, and if the court finally decides in favor of the plaintiff it may order him to undo the result of his acts since he first had notice of the suit.[8] A perpetual injunction may be obtained in a case where a

43 In re Englehard, 231 U. S. 646.

44 Am. B. & Tr. Co. v. Logansport & M. G. Co., 95 Fed. 49.

§ 299. 1 Daniell's Ch. Pr. (2d Am. ed.) 1903.

2 Adams v. Crittenden, 17 Fed. 42.

3 Rumford Chem. Works v. Hecker, 11 Off. Gaz. 330; Brown v. Deere, 6 Fed. 484; s. c., 2 McCrary, 425.

4 Barnard v. Gibson, 7 How. 650, 658, 12 L. ed. 857, 860; Potter v. Mack, 3 Fish. 128; Brown v. Deere, 6 Fed. 487; Munson v. Mayor, 19 Fed. 313.

5 Askew v. Poulterers' Co., 2 Ves. Sen. 89; Duke of Buckingham v. Duchess of Buckingham, 2 Eq. Cas. Abr. 527.

6 York Haven Water & Power Co. v. N. Y. Haven Paper Co., C. C. A., 201 Fed. 220.

7 Daniell's Ch. Pr. (2d Am. ed.) 1900. See also Bailey v. Taylor, 1 R. & M. 73.

8 Charles River Bridge v. Warren Bridge, 6 Pick. (Mass.) 376; Wing

preliminary injunction has been asked for and refused, or obtained and dissolved.[9] If, however, the plaintiff has not previously obtained a preliminary injunction, and at the hearing fails to make out a clear title, he usually will not be allowed to use the facts proved by him, as evidence of a *prima facie* case, entitling him then to a temporary injunction till he can establish his case beyond a doubt;[10] unless indeed, the injunction sought be one that is never granted before a hearing.[11] Perpetual injunctions may continue or extend and make perpetual preliminary injunctions at the hearing. This can only be done by inserting a direction to that effect in the decree.[12] In order to support a decree for a perpetual injunction, it has been said that the court requires that there should be nothing like a doubt in the case.[13] The granting of such an injunction is in the discretion of the court, and, like a provisional injunction, it may be allowed[14] or refused[15] upon terms. On account of the weight as a precedent given to a decree for a permanent injunction in a patent case, the court may refuse to grant one when the case has been compromised and the defendant abandons it at the hearing.[16]

§ 300. Appeals from injunction orders. "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting,

v. Fairhaven, 8 Cush. (Mass.) 363; Winslow v. Nayson, 113 Mass. 411; Smith v. Day, L. R. 13 Ch. D. 651.

9 Daniell's Ch. Pr. (2d Am. ed.) 1900; Bailey v. Taylor, 1 R. & M. 73; Bacon v. Spotteswoode, 1 Beav. 382; Bacon v. Jones, 4 M. & C. 433; Tucker v. Carpenter, Hempst. 440.

10 Bacon v. Spotteswoode, 1 Beav. 382; s. c., on appeal *sub nom.* Bacon v. Jones, 4 M. & C. 433, 438; Daniell's Ch. Pr. (2d Am. ed.) 1901.

11 Daniell's Ch. Pr. (2d Am. ed.) 1901. See *supra*, § 287.

12 Daniell's Ch. Pr. (2d Am. ed.) 1902; Gardner v. Gardner, 87 N. Y. 14. *Supra*, § 296.

13 Whittingham v. Woler, 2 Swanst., 428n; Troy & B. R. Co. v. Boston H. T. & W. Ry. Co., 86 N. Y. 107; Daniell's Ch. Pr. (2d Am. ed.) 1900.

14 Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co., 10 Fed. 210; s. c., 10 Fed. 869.

15 McCrary v. Penn. Canal Co., 5 Fed. 367; Brown v. Deere, M. & Co., 6 Fed. 487.

16 Hayes v. Leton, 5 Fed. 521.

continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond."[1] In the case of an injunction, the appeal will lie from any order granting, continuing, refusing, dissolving, or refusing to dissolve the same.[2]

The Act of June 18, 1910, regulating the practice upon motions for interlocutory injunctions "suspending or restraining

§ 300. [1] Jud. Code, § 129, 36 St. at L. 1087. Under the former statute, which only authorized appeals "from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver," it was held that orders were *not* appealable which denied motions to dissolve an injunction without specifically providing for the continuance of the same. Pioneer Lace Mfg. Co. v. Dodd, C. C. A., 181 Fed. 688; Lewis v. Hitchman Coal & Coke Co., C. C. A., 176 Fed. 549. But that appeals would lie from an order which expressly continued the injunction upon a motion for a rehearing, Armat Moving Picture Co. v. Edison Mfg. Co., C. C. A., 125 Fed. 939, from an order repeating an outstanding injunction without reference to the same, Louis Metzger & Co. v. Berlin, C. C. A., 194 Fed. 426; and from a final order which when dissolving an injunction determined that the complainant had no right to any relief in the suit although it did not in terms dismiss the bill. Bailey v. Willeford, C. C. A., 131 Fed. 242. It was also held that the complainant could not appeal from an order modifying an injunction which it had obtained. Vicksburg Waterworks Co. v. Mayor, etc., of Vicksburg, C. C. A., 153 Fed. 116.

The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit of an appeal from an interlocutory order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, under Code Alaska, § 507, giving the right of appeal from such orders without limitations as to the amount involved, is not limited by the provision of section 504 of such Code respecting appeals from final judgments or orders, which limits such appeals to cases in which the amount or value involved exceeds $500. J. P. Jorgenson Co. v. Rapp, 157 Fed. 732.

[2] Ibid.

the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State,"[3] provides that "an appeal may be taken direct to the Supreme Court of the United States from the order, granting or denying, after notice and hearing, an interlocutory injunction in such case."[4] Upon such an appeal the Supreme Court has jurisdiction to review the whole case including the question, whether the statute or order attacked is obnoxious to the State constitution.[5] The Circuit Court of Appeals has no jurisdiction of an appeal from such an order.[6]

The Act of October 22, 1913, providing for the practice upon application for interlocutory injunctions suspending or restraining the enforcement, operation or execution of setting aside in whole or in part, any order made or entered by the Interstate Commerce Commission, provides: "an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused."[7]

"It was no doubt because of the limited time in which orders of the Commission would operate and that there might be cases in which irreparable injury would result if an interlocutory injunction was not granted, that Congress passed the statute authorizing such appeals.[8]

Otherwise there is no direct appeal to the Supreme Court

3 Act of June 18, 1910, ch. 309, § 17, 36 St. at L. 557, Comp. St. § 1243.

4 Ch. 309, § 17, 36 St. at L. 557, Jud. Code § 266, Act of March 3, 1911, 36 St. at L. 1162, am'd March 4, 1913, ch. 160, 37 St. at L. 1013, Comp. St. § 1243; Looney v. Crane Co., 245 U. S. 178, 187; see *supra*, § 105d.

5 Louisville R. R. Co. v. Garrett, 231 U. S. 298, 304; Van Dyke v. Geary, 244 U. S. 39, 42; City of Cincinnati v. Cincinnati & Hamilton Tr. Co., 245 U. S. 446; see *supra*, § 25.

6 Jackson v. Cravens, C. C. A., 238 Fed. 117.

7 Act of Oct. 22, 1913, 38 St. at L. 220, ch. 32, Comp. St. § 998; see *supra*, § 100b.

8 Louisville & Nashville R. R. Co. v. U. S., 238 U. S. 110. Per Lamar, J.

of the United States from any order granting a preliminary injunction.[9]

But the Circuit Courts of Appeals can certify to the Supreme Court any question involved upon said appeal, even a question of jurisdiction;[10] and the Supreme Court may by certiorari bring the decision of the Circuit Courts of Appeals before it for review.[11] A Circuit Court of Appeals has jurisdiction of such an appeal: when the only question in dispute is one of jurisdiction,[12] when the construction of the Constitution of the United States, or when the validity or construction of a treaty made by the United States, is the sole question involved.[13] It seems that where such a question is combined with other questions of a different character, a Circuit Court of Appeals may, if the constitutional or treaty question is controlling, decline to take jurisdiction of the appeal, or may certify the constitutional or treaty question to the Supreme Court, and after that question is there decided proceed to judgment upon the appeal, or may decide the whole case in the first instance.[14]

Under this act the Circuit Courts of Appeals have jurisdiction to review, not only orders granting preliminary injunctions, but also interlocutory decrees made after a hearing upon the merits

9 Kirwan v. Murphy, 170 U. S. 205, 42 L. ed. 1009.

10 *Re* Tampa S. R. Co., 168 U. S. 583, 42 L. ed. 589.

11 Harriman v. Northern Securities Co., 196 U. S. 641, 49 L. ed. 631.

12 *In re* Tampa S. R. Co., 168 U. S. 583, 42 L. ed. 589; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517; Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n, C. C. A., 165 Fed. 1; Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385; Soler v. Scoville, C. C. A., 253 Fed. 932. But see Carson v. Combe, C. C. A., 86 Fed. 202; Lake Street El. R. Co. v. Farmers' L. & Tr. Co., C. C. A., 77 Fed. 769.

13 Westerly v. Westerly Water Works, 76 Fed. 467; s. c., 22 C. C. A. 278; Mayor, etc., of Macon v. Ga. P. Co., C. C. A., 60 Fed. 781; Hastings v. Ames, C. C. A., 68 Fed. 726; Central Tr. Co. v. Citizens' St. Ry. Co., 82 Fed. 1; Indianapolis v. Central Tr. Co., C. C. A., 83 Fed. 529; Illinois Cent. R. Co. v. Adams, C. C. A., 93 Fed. 852; Seattle Electric Co. v. Seattle, R. & S. Ry. Co., C. C. A., 185 Fed. 365.

14 Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 861, 863; Cincinnati, H. & D. R. Co. v. Thiebard, 177 U. S. 615-620, 44 L. ed. 911-913; Pike's P. P. Co. v. Colorado Springs, C. C. A., 105 Fed. 1, 7.

which grant perpetual injunctions and refer the cases to a master to ascertain profits and damages.[15] Such appeals are entitled to a preference upon the calendar.[16]

It was held that a docket entry in a suit to enjoin the infringement of a patent, "Opinion—decree for complainants," did not constitute a decree for an injunction, although the opinion filed directed that an injunction be granted; and that no appeal could be taken until a decree was entered.[17] It has been held that an appeal will not lie from an order granting an injunction in the alternative unless the defendant gives a bond, which has been given.[18] In such a case, where no bond was filed by the defendant and the complainant filed one required as a condition to the writ, an appeal was entertained by the Circuit Court of Appeals, although the order was affirmed.[19]

The phrase "upon a hearing in equity," is not used in its technical meaning of the trial of the cause.[20] As originally used in the statutes, it related to injunctions only. The words seem to have been designed to distinguish a temporary restraining order from an injunction granted upon notice.[21]

No appeal lies from a restraining order, granted without notice.[22] Nor it has been said from an order refusing to dis-

15 Lockwood v. Wickes, C. C. A., 75 Fed. 118; Raymond v. Royal B. P. Co., C. C. A., 76 Fed. 465. But see Standard El. Co. v. Crane El. Co., C. C. A., 76 Fed. 767.

16 Star Brass Works v. General Elec. Co., C. C. A., 129 Fed. 102.

17 Herrick v. Cutcheon, C. C. A., 55 Fed. 6; s. c., 5 C. C. A. 21.

18 United Blue Flame Oil Stove Co. v. Silver & Co., C. C. A., 128 Fed. 925.

19 City of Grand Rapids v. Warren Bros. Co., C. C. A., 196 Fed. 892.

20 Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760, 763; Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n, C. C. A., 165 Fed. 1; Root v. Mills, C. C. A., 168 Fed. 688; Pressed Steel Car Co. v. Chicago & A. R. Co., C. C. A., 192 Fed. 517.

21 Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760, 763.

22 Pressed Steel Car Co. v. Chicago & A. R. Co., C. C. A., 192 Fed. 517. There, an appeal was dismissed from an order providing as follows (518): "This cause having heretofore come on before the court for argument upon the demurrer of defendant to complainant's bill of complaint herein, and the said demurrer having been overruled by the court on the 25th day of May, A. D. 1911, and the demurrant having been given 30 days from said date within which to answer said bill of complaint, now comes the defendant, by Isaac M. Jordan and Russell H. Wiles, its solicitors, and

solve such an order.[23] Nor from an order suspending an interlocutory injunction pending an appeal.[24] Nor from a supplemental injunction restraining a particular suit begun after an interlocutory injunction against all such litigation had been issued.[25] But an order after a hearing of both parties which refuses to dissolve and continues a restraining order is in effect a grant of a preliminary injunction and is appealable.[26] It has been held that an appeal may be taken from an order denying a motion to vacate or dissolve a preliminary injunction,[27] although the injunction was granted after a hearing and the effect is to grant an appeal from the re-hearing.[28] When the complainant sued to restrain the infringement of two copyrights, it was held that a dismissal of so much of his bill as referred to one copyright was in effect a refusal of an injunction and consequently appealable.[29] Where a cross bill seeks a stay of proceedings in a different suit from that in which it is filed, an order dismissing such cross bill is in effect a denial of an injunction and is appealable.[30] But when the cross bill prays a

suggests to the court that heretofore, by oral agreement of counsel in open court, the defendant has refrained from prosecuting its suit at law against the complainant pending on the law side of this court and referred to and described in said bill of complaint, but that it does not wish to be further bound by said agreement of its counsel. Thereupon, in consideration of the premises and upon reading the bill of complaint, it is hereby ordered that the defendant, Pressed Steel Car Company, its agents and attorneys, be and it is hereby enjoined and restrained from further proceedings in said suit against the complainant described in the bill of complaint herein, being No. 30,039 on the law side of this court, until the further order of the court.''

23 Pack v. Carter, C. C. A., 223 Fed. 638.

24 H. Ward Leonard v. Maxwell Motor Sales Co., 246 Fed. 945.

25 Looney Attorney General v. Eastern Texas R. R. Co., 247 U. S. 214.

26 Davis v. Hayden, C. C. A., 238 Fed. 734; Western Union Telegraph Co. v. U. S. & M. T. Co., 221 Fed. 545.

27 American Grain Separator Co. v. Twin City Separator Co., C. C. A., 202 Fed. 202; Mississippi Valley Trust Co. v. Railway Steel Co., C. C. A., 258 Fed. 346.

28 Am. Grain Separator Co. v. Twin City Separator Co., C. C. A., 202 Fed. 202.

29 Historical Pub. Co. v. Jones Bros. Pub. Co., C. C. A., 231 Fed. 638.

30 Emery Central Trust & Safe Deposit Co., C. C. A., 204 Fed. 965.

stay of proceedings in the original suit upon which it is dependent, such dismissal is a denial, not of an injunction, but of a stay, and has been held not to be appealable.[31] After an appeal by defendant from a decree enjoining the infringement of a patent and directing an accounting while adjudging that other claims were invalid, the plaintiff filed in the court below a waiver of the right to an accounting, whereupon the court against defendant's protest entered a final decree to the same effect as the former except that it stated that there is no reference nor an accounting, nor recovery of profits, claims, or damages. It was held that the District Court had no right to enter this second decree after defendant's appeal and that the plaintiff's appeal therefrom should be dismissed, because it was beyond the power of the District Court to enter a final decree at that time.[32]

If the defendant wishes to bring before a court of review the question as to the propriety of an *ex parte* injunction or receivership, he must move to set the same aside. But an interlocutory order staying proceedings in an action at law is equivalent to an injunction, and if granted after hearing is appealable.[33] Whenever proof, by affidavits or otherwise, is submitted to the court and counsel on both sides are heard, the order granting an injunction or appointing a receiver, after a consideration of the same, is appealable.[34] It seems that in every case where counsel appears in opposition to a motion for an injunction or receiver, there is a hearing and the order is appealable.[35] An appeal was entertained in such a case, although counsel for the defendant appeared specially to object to the jurisdiction and were heard upon the merits as *amici curiæ*.[36] It has been held that an *ex parte* order appointing a receiver is appealable.[37]

31 Emery Central Trust & Safe Deposit Co., C. C. A., 204 Fed. 965.

32 Draper Corp. v. Stafford Co., C. C. A., 255 Fed. 554, 555.

33 Griesa v. Mutual Life Ins. Co., C. C. A., 165 Fed. 48.

34 Shubert v. Woodward, C. C. A., 167 Fed. 47; Root v. Mills, C. C. A., 168 Fed. 688.

35 Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n, C. C. A., 165 Fed. 1.

36 Shubert v. Woodward, C. C. A., 167 Fed. 47.

37 Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760. *Contra*, Root v. Mills, C. C. A., 168 Fed. 688; where it was held that, by moving to modify such an ex parte order, the defendant acquiesced in

The fact that the order or decree which grants an injunction also gives other relief, such as an accounting, which, if granted alone, could not be reviewed until the final decree, does not prevent a review of the entire order.[38] But it has been held that upon an interlocutory order granting an injunction appeal from the court cannot consider objections to the scope of the accounting.[39] The defendant cannot appeal from an interlocutory decree granting an accounting without an injunction because of the infringement of a patent which has expired.[40] Upon an appeal by complainant from so much of a decree as denied him part of the injunctive relief sought, the defendant, without a cross appeal, cannot have the injunction contained in the decree reviewed.[41] It has been held that a party who has not been enjoined cannot take such an appeal.[42]

The Circuit Court of Appeals can in every case reverse the whole order and dismiss the bill or grant such other final relief on the merits as the case before it may justify.[43] Such final disposition of the case will not, however, ordinarily be made, unless the case has been submitted for a final determination of the merits, or unless all the evidence has been taken by deposition, or unless the pleadings or the undisputed facts show that there can either be no right to relief or no defense to the

the same, and that such application constituted a hearing, and that upon the denial of the latter motion the time to appeal began to run.

38 Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810; *Re* Tampa S. R. Co., 168 U. S. 583, 42 L. ed. 589; Highland Glass Co. v. Schmertz Wire Glass Co., C. C. A., 178 Fed. 944; Sheffield Car Co. v. D'Arey, C. C. A., 194 Fed. 686.

39 Lederer v. Garage Equipment Mfg. Co., C. C. A., 235 Fed. 527. See Hallowell v. Commons, C. C. A., 210 Fed. 801; Chadeloid Chemical Co., C. C. A., 243 Fed. 606, 607.

40 Am. Sulphite Pulp Co. v. Carthage Sulphite Co., C. C. A., 224 Fed. 501.

41 Ward Baking Co. v. Weber Bros., C. C. A., 230 Fed. 142.

42 Stearns-Roger Mfg. Co. v. Brown, C. C. A., 114 Fed. 939, 942.

43 Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810; *Re* Tampa Suburban R. R. Co., 168 U. S. 583, 42 L. ed. 589; Metropolitan Co. v. Kaw Valley District, 223 U. S. 519, 56 L. ed. 533; Highland Glass Co. v. Schmertz Wire Glass Co., C. C. A., 178 Fed. 944; La Hogue Drainage Dist. No. 1 of Iroquois County, Ill. v. Watts, C. C. A., 179 Fed. 690; Henry Gas Co. v. U. S., C. C. A., 191 Fed. 132; Sheffield Car Co. v. D'Arey, C. C. A., 194 Fed. 686; Texas Traction Co. v. Barron G. Collier, C. C. A., 195 Fed. 65; Louisville & N. R. Co. v. Western U. Tel. Co., C. C. A., 207 Fed. 1.

bill.[44] The fact that previously to the granting of an injunction a demurrer to the equity of the bill had been overruled and an answer filed, does not prevent the consideration of that question by the appellate court in such a case.[45] Unless it is clear that it is impossible for the complainant to succeed, when his bill fails to state facts authorizing equitable relief, the case should be remanded with leave to amend or to move the court below for permission to amend.[46]

Upon an appeal from an order granting or continuing an injunction the Circuit Court of Appeals will ordinarily not review disputed questions of fact arising from contradicting affidavits when there has been no cross-examination, especially before issue is joined.[47] But it has been held that this rule does not apply to an appeal from an order granting an injunction restraining the enforcement of a statute regulating railroad rates.[48] Upon an appeal from an order enjoining the infringement of a patent which had been adjudged valid in a previous suit, where the record contained only the affidavits used upon

[44] Highland Ave. & B. R. Co. v. Columbian Eq. Co., 168 U. S. 627, 42 L. ed. 605; Eagle Glass Mfg. Co. v. Rowe, 245 U. S. 277; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517; U. S. Rubber Co. v. Am. O. L. Co., C. C. A., 82 Fed. 248; Stearns-Roger Mfg. Co. v. Brown, C. C. A., 114 Fed. 939. But see Fidelity I. T. & S. D. Co. v. Dixon, C. C. A., 78 Fed. 205. Nor in a suit to enjoin the infringement of a patent which contains a large number of claims not previously adjudicated. Nat. El. Signaling Co. v. Telefunken Wireless Tel. Co., C. C. A., 200 Fed. 591. Where the injunction was granted by the District Court because of a prior adjudication between other parties, without considering the questions upon the merits, the appellate court will usually make the same disposition of the matter upon an appeal. Fireball Gas Tank & I. Co. v. Commercial Acetylene Co., C. C. A., 198 Fed. 650. See § 364, *infra*.

[45] Henry Gas Co. v. U. S., C. C. A., 191 Fed. 132.

[46] Southern Express Co. v. Long, C. C. A., 202 Fed. 462.

[47] Kerr v. New Orleans, C. C. A., 126 Fed. 920; Railroad Commission v. Rosenbaum, C. C. A., 130 Fed. 110; James v. Wild Goose Mining & Trading Co., 143 Fed. 868; McCarthy v. Bunker Hill & Sullivan Mining and Concentrating Co., C. C. A., 164 Fed. 927; King Lumber Co. v. Benton, C. C. A., 186 Fed. 458.

[48] Railroad Commission of Alabama v. Central of Georgia Ry. Co., C. C. A., 170 Fed. 225. This exception was not applied to an appeal from an injunction against a municipal ordinance regulating telephone charges. City of Owensboro v. Cumberland Telephone & Telegraph Co., C. C. A., 174 Fed. 739.

the motion below, it was held that the question of infringement was presented for review.[49]

The Circuit Court of Appeals may,[50] but rarely will, review the exercise of its discretion by the District Court upon the grant or continuance of an injunction or the appointment of a receiver;[51] unless there has been a misapplication of the law to the conceded or indisputable facts when the case will be reviewed anew;[52] but if there is no equity in the bill it will dissolve the injunction[53] or the receivership,[54] as the

[49] Ferry-Hallock Co. v. Herman, C. C. A., 178 Fed. 550.

[50] Charles E. Hires Co. v. Consumers' Co., C. C. A., 100 Fed. 809.

[51] Bartholomew v. Union Paper & Bag Co., C. C. A., 113 Fed. 289; U. S. Gramaphone Co. v. Seaman, C. C. A., 113 Fed. 745; Stearns-Roger Mfg. Co. v. Brown, C. C. A., 114 Fed. 939; Am. Fur Ref. Co. v. Cimiotti Unhairing Co., C. C. A., 118 Fed. 838; Harding v. Corn Products Refining Co., C. C. A., 168 Fed. 658; City of Owensboro v. Cumberland Telephone & Telegraph Co., C. C. A., 174 Fed. 739; Kings County Raisin & Fruit Co. v. U. S. Consol-Seeded Raisin Co., C. C. A., 182 Fed. 59; City of Shelbyville, Ky. v. Glover, C. C. A., 184 Fed. 234; Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166; King Lumber Co. v. Benton, C. C. A., 186 Fed. 458; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321; Texas Traction Co. v. Barron G. Collier, C. C. A., 195 Fed. 65; City of Grand Rapids v. Warren Bros. Co., C. C. A., 196 Fed. 892; Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72; Crescent Specialty Co. v. National Fireworks Distributing Co., C. C. A., 219 Fed. 130; Kansas City, Mo. v. Sanitary Street Flushing Mach. Co., C. C. A., 224 Fed. 964; Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs, C. C. A., 229 Fed. 140; Lion Tractor Co. v. Bull Tractor Co., C. C. A., 231 Fed. 156; Puritan Cordage Mills v. Sampson Cordage Works, C. C. A., 231 Fed. 671; Thompson v. Balke, C. C. A., 245 Fed. 841; City Council of Augusta v. Postal Telegraph-Cable Co., C. C. A., 246 Fed. 440; City of Chicago v. Fox Film Corporation, C. C. A., 251 Fed. 883; City of Amarillo v. S. W. Tel. & Tel. Co., C. C. A., 253 Fed. 638.

[52] Cumberland Telephone & Tel. Co. v. City of Memphis, C. C. A., 200 Fed. 657; Greenberg v. Lesamis, C. C. A., 203 Fed. 678; Winchester Repeating Arms Co. v. Olmstead, C. C. A., 203 Fed. 493; Hanover Star Milling Co. v. Allen & Wheeler Co., C. C. A., 208 Fed. 513; Fair & Carnival Supply Co. v. Shapiro, C. C. A., 253 Fed. 738; Stromberg Motor Devices Co. v. Zenith Carburetor Co., C. C. A., 254 Fed. 91; Weber Electric Co. v. Connecticut Electrical Mfg. Co., 257 Fed. 427.

[53] New Albany Waterworks v. Louisville Banking Co., C. C. A., 122 Fed. 776; Kerr v. New Orleans, C. C. A., 126 Fed. 920; Continuous Glass Press Co. v. Schmertz Wire

case may be, even it has been held when the point is not suggested in the assignment of errors[55] nor raised in the court below.[56] Where the bill states a case that might justify relief, the defendant is amply protected by a bond and a dissolution of the injunction would cause irreparable injury to the complainant; the Circuit Court of Appeals will rarely disturb the *status quo* until after the final decree.[57]

It has been said that the Circuit Court of Appeals should not consider questions concerning the scope of the injunction which were not called to the attention of the court below.[58]

"The rule that the granting or refusing of a preliminary injunction ordinarily rest in the sound discretion of the trial court, and a review thereof by an appellate court is limited to the inquiry whether there is an abuse of discretion in granting the writ, is based largely upon the consideration that the object and purpose of the preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs according to the course and principles of equity."[59] "But no such consideration obtains where the trial court dissolves a preliminary injunction. The granting of an injunction to preserve the *status quo* may be a substantial and persuasive reason for continuing it in force. It follows that when a preliminary injunction has been dissolved the appellate court will not be limited to the question whether the trial court has abused its

Glass Co., C. C. A., 153 Fed. 577; Bush v. Pioneer Mining Co., C. C. A., 154 Fed. 480; Shelbyville v. Glover, C. C. A., 184 Fed. 234; Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321; Southern Express Co. v. Long, C. C. A., 202 Fed. 462; Louisville & N. R. Co. v. W. U. Tel., C. C. A., 207 Fed. 1.

54 Northern Securities Co. v. Harriman, C. C. A., 134 Fed. 331; s. c., aff. 196 U. S. 641, 49 L. ed. 631; Cabaniss v. Reco Min. Co., C. C. A., 116 Fed. 318.

55 Cabaniss v. Reco Min. Co., C. C. A., 116 Fed. 318, 323.

56 Shubert v. Woodward, C. C. A., 167 Fed. 47.

57 Coram v. Ingersoll, C. C. A., 133 Fed. 226. See City of Grand Rapids & Warren Bros. Co., C. C. A., 196 Fed. 892.

58 Shubert v. Woodward, C. C. A., 167 Fed. 47.

59 Blount v. Société Anonyme du Filtre Chamberland Systeme Pasteur C. C. A., 53 Fed. 98; Kings & County Raisin & Fruit Co. v. U. S. Con. Seeded Raisin Co., C. C. A., 182 Fed. 59.

discretion in dissolving the injunction, but may inquire into all of the circumstances connected with the proceedings as they appear of record, and the effect the dissolution of the injunction may have on the rights of the parties." [60]

The fact, that a railroad company attacking orders reducing its rates will lose but little by delay pending an appeal, may be a reason for the refusal of the court of first instance to interfere.[61] "If the new rate goes into effect pending this appeal, the railroad company will lose some money, and the loss will be practically irreparable, but the amount will not be very large, and we think that to impose that possible loss is a less evil than to permit the railroad company to have longer benefit of the restraining order as the result of its own mistake in presenting its case the first time." [62]

That the facts are doubtful is sufficient reason for the refusal of the court of review to grant or to continue an interlocutory injunction.[63]

Where the court refuses to read or hear affidavits and letters that are pertinent evidence in opposition to an application for an injunction, they must be considered by the Circuit Court of Appeals.[64] Where, on the hearing of a petition for injunction against infringement, affidavits used on a prior hearing are referred to and used, they should, under the circumstances of this case, be incorporated in the record on an appeal.[65] Such an appeal does not affect the jurisdiction of the District Court to proceed with the cause in every respect not involved in the appeal.[66]

60 Bothwell v. Fitzgerald, C. C. A., 219 Fed. 408, 414. 415 Per Morrow, J.

61 Louisville & Nashville R. R. Co. v. Kentucky R. R. Commission, 214 Fed. 465, 470, 472.

62 Louisville & N. R. Co. v. Kentucky R. R. Commission, 214 Fed. 472, 273. Per Warrington and Denison, J.

63 Standard Plunger Elevator Co. v. Stokes, 200 Fed. 770; Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275.

64 New Albany Waterworks v. Louisville Banking Co., C. C. A., 122 Fed. 776. See Tunstall v. Stearns Coal Co., C. C. A., 192 Fed. 808; N. J. Patent Co. v. Schaefer, 178 Fed. 276.

65 Staples & Hanford Co. v. Lord, C. C. A., 148 Fed. 15.

66 Cuyler et al. v. Atlantic & N. C. R. Co., 132 Fed. 568; Footte v. Parsons Non-Skid Co., C. C. A., 196 Fed. 951.

The Judicial Code provides: "that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court or the appellate court, or a judge thereof, during the pendency of such appeal: Provided, however, That the court below may, in its discretion, require as a condition of the appeal an additional bond."[67] Where the judge who granted the preliminary injunction was absent from the district and another judge to whom an application was duly made declined to act, it was held that the former on his return might allow the appeal *nunc pro tunc*.[68]

Where the court below has refused a stay or *supersedeas* the court of review may grant one on proper terms.[69] Ordinarily it will not interfere.[70] The grant of a *supersedeas* upon such an appeal is within the discretion of the court below;[71] but a judge of the Circuit Court of Appeals, may, upon appeal to his court from an order granting an interlocutory injunction, stay its operation.[72] This will rarely be done where the judge who granted the order appealed from denied a stay.[73] The fact, that if effect should be given to the injunction, the question would become moot, was held to be a reason for granting such a stay when the plaintiff could be compensated for pecuniary damages and the public might be injured by the injunction.[74]

Upon an appeal from an order denying an interlocutory injunction restraining an enforcement of an order of the Interstate Commerce Commission, an injunction, pending an appeal, was granted, where it was proved that in the event of a reversal great and irreparable injury in the meantime would result to the petitioning railroad company by reason of the diversion of traffic caused by the enforcement of the order by the Com-

67 Judicial Code § 129, 36 St. at L. 1134, Comp. St. § 1121.

68 J. D. Randall Co. v. Foglesong Mach. Co., 200 Fed. 741. But see *infra*, § 698.

69 Omaha Council Bluffs Str. Ry. Co. v. Interstate Commerce Commission, 222 U. S. 582.

70 City of Shelbyville v. Glover, C. C. A., 184 Fed. 234, 240.

71 Ibid.

72 Hough, J., in Masses Pub. Co. v. Patten, C. C. A., 245 Fed. 702.

73 Chadeloid Chemical Co. v. H. B. Chalmers Co., C. C. A., 242 Fed. 71.

74 Masses Pub. Co. v. Patten, C. C. A., 245 Fed. 702.

mission and also by reason of the expense and disbursement of business caused by the change of the former practice to comply with the Commission's order, while on the other hand it did not clearly appear that any particular individual would suffer material financial injury.[75] A stay or *supersedeas* may be allowed upon the filing of a bond by the appellant [76] but such a bond is not indispensable.[77] The allowance of an appeal does not deprive the lower court of power to hear a motion to require an increase of such a bond pursuant to leave reserved in the order of allowance, nor to require an account of sales pending the appeal nor to make other orders purely administrative in their nature.[78] The pendency in another jurisdiction of another suit between the parties is no ground for the dismissal of an appeal,[79] nor, unless it would conclusively determine their rights in the case where the appeal is taken, is it a cause for the stay of the argument of such an appeal.[80] Where the appeal is taken in open court, there need be no summons nor severance.[81] If it is necessary to bring in parties not duly served with the citation, the defect may be corrected in the court of review.[82] Where the controversy between the parties had been substantially settled,[83] and where the injunction had become no longer effective pending

75 Louisville & N. R. Co. v. U. S., 227 Fed. 273, to the same effect, Louisville & N. R. Co. v. Siler, 186 Fed. 176, 203. See Interstate Commerce Commission v. Louisville & N. R. Co., 101 Fed. 146, 148.

76 Cotting v. Kansas City Stock-Yards Co., 82 Fed. 850, 857. *Infra*, Chapter XVI on Writs of Error and Appeals.

77 Omaha Council Bluffs Str. Ry. Co. v. Interstate Commerce Commission, 222 U. S. 582.

Pneumatic Scale Corporation v. Automatic Weighing Mach. Co., C. C. A., 200 Fed. 572. There the complainant failed to apply for a bond in the court below, and it was held that the appellate court would not require one to be filed because of matters of which such complainant had knowledge when the stay was granted.

78 Byrd Mfg. Co. v. Colman, C. C. A., 205 Fed. 905.

79 Keene v. New Idea Spreader Co., 231 Fed. 701.

80 Ibid.

81 Williams v. City Bank & Trust Co., C. C. A., 186 Fed. 419.

82 Ibid. Guaranty Trust Co. of N. Y. v. International Steam Pump Co., C. C. A., Ind. Ct., 231 Fed. 594. See Fransioli v. Pres-to-Lite, C. C. A., 234 Fed. 63; Scattergood v. Am. Pipe & Construction Co., 247 Fed. 712; Pac. Coast Pipe Co. v. Conrad City Water Co., C. C. A., 245 Fed. 846.

83 Victor Talking Mach. Co. v. American Graphophone Co., C. C. C., 192 Fed. 1023.

an appeal,[84] the order was affirmed without passing upon the equity of the case of the party who obtained the writ.

Upon the affirmance of a decree for an injunction and a reference for an accounting, it was held that the mandate determined nothing connected with the reference or the damages.[85]

[84] Louisiana Agricultural Corporation v. Pelican Oil R. Co., 256 Fed. 822.

[85] Hallowell v. Commons, C. C. A., 210 Fed. 801.

CHAPTER XIX.

RECEIVERS.

§ 301. Definition of receiver. A receiver is an officer appointed by a court of equity to assume the custody of property pending litigation concerning the same. The effect of the appointment of a receiver is to put the property in his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession to the property.[1] In England the term is usually applied only to those appointed to receive the rents and profits of land and get in outstanding property; and a person selected to carry on or to superintend a trade or business is usually denominated "a manager," or a "receiver and manager."[2] But in the United States both classes of officers are called receivers. The Revised Statutes authorize the Comptroller of the Currency to appoint in certain cases a receiver of a national banking association, whose powers and duties are in many respects analogous to those of a receiver appointed by a court of equity.[3]

§ 302. When receivers will be appointed. A receiver may be appointed to provide for the safety of property pending litigation to determine the title thereto; to preserve property in danger of being dissipated or destroyed by those having the legal title to the possession thereof; to preserve the property of infants during their minority, when they have no guardian and their parents are dead or unfit to be trusted therewith; to preserve the property of idiots and lunatics when it is impossible

§ 301. [1] Union Bank v. Kansas C. Bank, 136 U. S. 223, 236, 34 L. ed. 341, 346. See High on Receivers (4th ed.), sect. 1; Equitable Tr. Co. v. Great Shoshone & T. F. W. P. Co., C. C. A., 245 Fed. 697.

[2] Daniell's Ch. Pr. (2d Am. ed.), 2006.

[3] See U. S. R. S. §§ 5234-5237; 19 St. at L. 63; 1st Supp. U. S. R. S. 216; 24 St. at L., ch. 28, p. 8; Price v. Abbott, 17 Fed. 506; *supra* 81 and 94, *infra*, § 302c.

to obtain a proper person as committee; and when the appointment is authorized by statute.[1]

A receiver may be appointed to provide for the safety of property pending litigation to determine the title thereto, whether the litigation is in a court of equity,[2] or probate,[3] or of bankruptcy,[4] in a foreign court,[5] or sometimes, though very rarely, in a court of law.[6] Such an appointment should not be made unless the defendant is insolvent or irreparable injury might otherwise result.[7] A Federal court of equity has no jurisdiction at the suit of a contract creditor without a lien to appoint a receiver of the assets of an individual who is solvent although temporarily embarrassed.[8]

The more usual cases where receivers are appointed are suits in equity to obtain equitable assets, for the foreclosure of a mortgage, and for the dissolution or winding up of the affairs of a partnership. It was the English rule that a receiver could not be appointed at the suit of a first mortgagee, since the latter had it in his power to take possession himself.[9] In this country, however, receivers are frequently appointed in such cases.[10] Ordinarily, a receiver of the effects of a partnership

§ 302. 1 Kerr on Receivers (2d Am. ed.), 3.

2 Davis v. Duke of Marlborough, 2 Swanst. 108; Curling v. Marquis Townshend, 19 Ves. 628; Dill v. Supreme Lodge, Knights of Honor, 226 Fed. 807; Farmers' State Bank v Thompson, C. C. A., 261 Fed. 166. But see Moore v. Bank of Br. Columbia, 106 Fed. 574.

3 King v. King, 6 Ves. 172; Matter of Colvin, 3 Md. Ch. Dec. 279; Robinson v. Taylor, 42 Fed. 803; Underground El. Rys. Co. v. Owsley, 169 Fed. 671; aff'd, C. C. A., 176 Fed. 26, where it was held that the receivership should be provisional until an application to the Surrogate's Court for the appointment of a temporary administrator could be made and determined, and should then terminate, unless such court refused to make such appointment.

4 Sedgwick v. Place, 3 N. B. R. 35; Alabama & C. R. Co. v. Jones, 5 N. B. R. 97; Keenan v. Shannon, 9 N. B. R. 441. See 30 St. at L. 544, 546, § 2.

5 Transatlantic Co. v. Pietroni, Johns. 604.

6 Talbott v. Scott, 4 K. & J., 96; Fingal v. Blake, 2 Molloy, 50; Whitney v. Buckman, 26 Cal. 447; Horton v. White, 84 N. C. 297; Jeffreys v. Smith, 1 J. & W. 298; Robinson v. Taylor, 42 Fed. 803. But see Tornanses v. Melsing, C. C. A., 106 Fed. 775.

7 Am. Manganese Steel Co. v. Alaska Mines Corp., C. C. A., 250 Fed. 614.

8 Davis v. Hayden, C. C. A., 238 Fed. 734.

9 Berney v. Sewell, 1 J. & W. 647.

10 See, for example, Stanton v. Alabama & C. R. Co., 2 Woods, 506;

will not be appointed unless the bill prays a dissolution and shows a proper case for the same.[11] But where suits have been instituted to compel partners to act according to the provisions of instruments into which they have entered, the court will take care that the decree shall not be defeated by anything to be done in the meantime, and may appoint a receiver to protect the property.[12]

Receivers may be appointed to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession, at the suit of beneficiaries, legatees, next of kin, or creditors, where a trustee,[13] executor,[14] or administrator[15] is insolvent and has not given bonds, or is guilty of misconduct; or where two trustees or executors disagree so that it is impossible for them to act together.[16] At the suit of the United States when the bill prays for the cancellation of a land patent,[17] or when proceedings for that purpose is pending in the land office.[18] At the suit of remaindermen,[19] where the holder of the particular estate or party in possession, as the case may be, is guilty of voluntary or permissive waste. At a suit by a remainderman when the holder of a particular estate improperly refuses to renew a leasehold.[20] In the case of trustees, the court will thus interfere whether the trust is express or implied.[21] Upon an interlocutory applica-

Allen v. D. & W. R. Co., 3 Woods, 316, 326.

11 Goodman v. Whitcomb, 1 J. & W. 589; Oliver v. Hamilton, 2 Anst. 453; Daniell's Ch. Pr. (2d Am. ed.) 1966, 1967; Kerr on Receivers (2d Am. ed.), 93.

12 Daniell's Ch. Pr. (2d Am. ed.) 1967; Const. v. Harris, T. & R. 496.

13 Hagenbeck v. Hagenbeck Z. A. Co., 59 Fed. 14; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; Brodie v. Barry, 3 Meriv. 695; Janeway v. Green, 16 Abb. Pr. (N. Y.) 215, note.

14 Utterson v. Mair, 2 Ves. Jr. 95; Scott v. Becher, 4 Price, 346. But see Gladdon v. Stoneman, 1 Madd. 143, n.; Langley v. Hawk, 5 Madd. 46; Kerr on Receivers (2d Am. ed.) 20.

15 Hervey v. Fitzpatrick, Kay, 421; Ware v. Ware, 42 Ga. 408.

16 Ball v. Tompkins, 41 Fed. 486.

17 U. S. v. Whitmire, C. C. A., 188 Fed. 422.

18 U. S. v. Devil's Den Counsel Oil Co., 236 Fed. 973; Folk v. U. S., C. C. A., 233 Fed. 177.

19 Vose v. Reed, 1 Woods, 647, 650.

20 Bennett v. Colley, 2 M. & K. 225; s. c., 5 Sim. 181, 192; Lord Montford v. Lord Cadogan, 17 Ves. 485.

21 Pritchard v. Fleetwood, 1 Meriv. 54; Daniell's Ch. Pr. (5th Am. ed.) 1724.

tion, in a suit to enjoin the infringement of a patent by an insolvent defendant, a Circuit Court appointed a receiver of the profits made by such infringement.[22] A receiver has been appointed to impound dividends paid by stockholders of an insolvent corporation to a suit to apply them to the payment of a tax on oleomargerine.[23] In a proper case a receiver may be appointed in a suit to dissolve a corporation under the Anti-Trust Laws.[24]

A receiver may be appointed over the property of an infant,[25] when the latter has no guardian, or his guardian is insolvent or has been guilty of misconduct,[26] and the infant has no parents, or his parents are unfit to be intrusted with the care of his estate.[27] Receivers may be appointed over the property of idiots and lunatics, when no person can be found disposed to act as committee;[28] or, it seems, when the committee is infirm, or the management of the estate is very onerous, or the committee lives far from the estate.[29]

The statutes of the several States authorize the appointment of receivers in numerous cases, especially in providing for the dissolution of corporations. In so far as State statutes authorize the appointment of receivers, they will usually be followed by the Federal courts, provided at least that they do not deprive a party of a trial by jury to which he would have been entitled at common law; and the Federal courts will also observe the statutory conditions required for

22 Parkhurst v. Kinsman, 2 Blatchf. 78.

23 U. S. v. Capital City Diary Co., 252 Fed. 900.

24 United States v. Great Lakes Towing Co. et al., 217 Fed. 656 (District Court, N. D. Ohio, E. D. June 15, 1914). U. S. v. Capital City Dairy Co., 252 Fed. 900 (District Court, S. D. Ohio, E. D. April 13, 1915).

25 Hicks v. Hicks, 3 Atk. 277; Union Tr. Co. v. Ill. M. R. Co., 117 U. S. 434, 29 L. ed. 963; Sage v. M. & L. R. Co., 125 U. S. 361, 31 L. ed. 694; Kerr on Receivers (2d Am. ed.), 16-18.

26 Pitcher v. Helliar, Dick. 580; High on Receivers, §§ 725-732.

27 Butler v. Freeman, Amb. 301; Kiffin v. Kiffin, cited in 1 P. Wms. 705; Kerr on Receivers (2d Am. ed.), 16-18.

28 Ex parte Warren, 10 Ves. 622; Anon., 1 Atk. 578; Ex parte Radcliffe, J. & W. 639; Kerr on Receivers (2d Am. ed.), 113, 114.

29 Kerr on Receivers (2d Am. ed.), 113, 114, citing Re Birch, Shelf. on Lun. 146; Re Seaman, Shelf. on Lun. 146.

such appointments, but not the State practice.[30] State statutes, forbidding the appointment of receivers or the taking of possession by a mortgagee in certain cases, will not be followed by the Federal courts.[31]

The appointment by a State court of a receiver of the property within the State of a foreign corporation engaged in Interstate Commerce is not a regulation of Interstate Commerce.[32] The rules, under which conflicts between receivers appointed by the State and the Federal courts are regulated, are previously considered.[33]

§ 302a. Appointment of receivers of property of corporations. Independently of statutory authority, a court of equity will ordinarily appoint a receiver of the property of a corporation in only nine classes of cases: Firstly, at the suit of mortgagees,[1] or other holders of liens upon it, or those whose claims

30 Bates v. International Co. of Mexico, 84 Fed. 518; Flash v. Wilkerson, 22 Fed. 689; Fechheimer v. Baum, 37 Fed. 167; Tomlinson & W. Mfg. Co. v. Shatto, 34 Fed. 380; Davis v. Gray, 16 Wall. 203, 219, 220, 21 L. ed. 447, 452, 453; *supra*, § 82. In Dancel v. Goodyear Shoe Machinery Co., U. S. C. C., S. D. N. Y., April 8th, 1905, in which the author was counsel, Judge Lacombe appointed a receiver of the property within the State of a foreign corporation, the defendant to a suit in equity, after a decree for the payment of money by it and the return of an execution unsatisfied. The appointment was made by a petition at the foot of the decree, which complied with the provisions of the New York Code of Civil Procedure and also with the requirements of Federal equity practice. No opinion was rendered.

31 American Nat. Bank v. Northwestern M. I. Co., 89 Fed. 610; *supra*, § 83.

See McKinney v. Kansas Natural Gas Co., 206 Fed. 772; Adler v. Campeche Laguna Corporation, 257 Fed. 789.

32 McKinney v. Kansas Natural Gas Co., 206 Fed. 772.

33 *Supra*, § 55.

§ 302a. 1 Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510, 17 L. ed. 900; Mercantile Tr. Co. v. Missouri, K. & T. Ry. Co., 1 L. R. A. 397, 36 Fed. 221; Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 Fed. 661; Strain v. Palmer, C. C. A., 159 Fed. 628. But see Trust & D. Co. of Onondaga v. Spartanburg Water Works, 91 Fed. 324. For such cases where a receivership was denied, see Farmers' Loan & Tr. Co. v. Central Park, N. & E. R. R. Co., 165 Fed. 503; Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. A court of equity will often appoint a receiver of a railroad in a suit for the foreclosure of a mortgage containing a clause pledging its tolls and income, when it would not do so if no such clause were included in the mortgage. Tysen v. Wabash

against the owner are purely equitable and cannot otherwise be enforced or protected.[3] Secondly, at the suit of judgment creditors seeking equitable assets after executions have been returned unsatisfied, and the return shows that there is no corporate property upon which a levy can be made.[4] Thirdly, at the suit of a creditor with or without a judgment when a receiver has been appointed in another jurisdiction;[5] and in some cases, such an ancillary appointment has been made upon the application of the foreign receiver.[6] Fourthly, at the suit of persons interested in the property, whether as stockholders[7]

R. Co., 8 Biss. 247. "The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property are not to be measured by the same rules as are applied to an ordinary mortgage on a farm or house and lot, to secure one or two notes held by one mortgagee." Allen v. D. & W. R. Co., 3 Woods, 316, 326, per Woods, J.

2 Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Bird v. People's Gas & El. Light Co., 158 Fed. 903.

3 D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780, 783; Farmers' L. & Tr. Co. v. Winona & Str. Ry. Co., 59 Fed. 957; Park v. N. I. V. & S. W. R. Co., 70 Fed. 641; Dancel v. Goodyear Shoe Machinery Co., S. D. N. Y., *supra*, § 302, note 30. Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328; certiorari denied 207 U. S. 594, 52 L. ed. 356.

4 Covington D. Co. v. Shepherd, 21 How. 112, 16 L. ed. 38; Shainwald v. Lewis, 6 Fed. 166, 775; Buckeye E. Co. v. Donau Br. Co., 47 Fed. 6. See Brown v. Lake S. I. Co., 134 U. S. 530, 534, 33 L. ed. 1021, 1024; Sage v. Memphis & L. R. R. Co., 125 U. S. 361, 31 L. ed. 694.

5 Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130, 132, 133; Bowker v. Haight & Freese Co., S. D. N. Y., May 10, 1905, per Lacombe, J., in which the author was counsel. Davis v. Hayden, C. C. A., 238 Fed. 734. See *infra*, § 304.

6 In the Third Circuit, *Re* Haight & Freese Co., May, 1905, per McPherson, J., in which the author was counsel.

7 Evans v. Coventry, 5 De G., M. & G. 911; Powers v. Blue Grass B. & L. Ass'n, 86 Fed. 705. But see Edwards v. Bay State Gas Co., 97 Fed. 942; Hunt v. American Grocery Co., 80 Fed. 70; Becker v. Hoke, 80 Fed. 973; Texas C. C. & Mfg. Ass'n v. Storrow, 92 Fed. 5; Ranger v. Champion C. P. Co., 52 Fed. 609; Aiken v. Colorado River Irr. Co., 72 Fed. 591; Columbia Nat. Sand Dr. Co. v. Washed Bar Sand Dr. Co., 136 Fed. 710. Cullens v. Williamson, C. C. A., 229 Fed. 59, 67. Bassett v. Bickford Bros. Co., 232 Fed. 895; Welsh v. Union Casualty Ins. Co., 238 Fed. 968; Glover v. Manila Gold Min. & Mill Co., 19 S. D. 559, 104 N. W. 261; Wayne Pike Co. v. Hammons, 129 Ind. 368; Supreme Sitting, etc., Order v. Baker, 134 Ind. 293, 20 L. R. A. 210. But see Worth Mfg. Co. v. Bingham, C. C. A., 116 Fed. 785; Parks v. U. S. Bankers' Corporation, 140 Fed. 160.

or creditors, even, it has been held, creditors without judgments or liens,[8] where there is a breach of duty by the directors, and an actual or threatened damage[9] of a serious nature, although there is no insolvency.[10] Fifthly, where a corporation has been dissolved and has no officer to attend to its affairs.[11] Sixthly, where for a long time the corporation has ceased to transact business and its officers have ceased to act.[12] Seventhly,

[8] Sage v. Memphis & L. R. R. Co., 125 U. S. 361, 31 L. ed. 694; Consolidated T. L. Co. v. Kansas C. V. Co., 43 Fed. 204; Doe v. Northwestern C. & T. Co., 64 Fed. 928; Merchants' Nat. Bank v. Chattanooga C. Co., 53 Fed. 314; King v. Pomeroy, C. C. A., 121 Fed. 287; Kentucky, etc., Ass'n v. Galbreaith, 117 Ky. 66, 77 S. W. 371. Nesbit v. North Georgia El. Co., 156 Fed. 979; Maxwell v. McDaniels, C. C. A., 184 Fed. 311; Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262; Dill v. Supreme Lodge Knights of Honor, 226 Fed. 807; Bassett v. Bickford Bros. Co., 232 Fed. 895. *Contra*, Leary v. Columbia R. & S. S. Nav. Co., 82 Fed. 775; Texas C. C. & Mfg. Ass'n v. Storrow, C. C. A., 92 Fed. 5; Syers v. Brighton Br. Co., 11 L. T. (N. S.) 560; Mills Northern Ry. of B. A. Co., 23 L. T. (N. S.) 719; Slover v. Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131, 68 L. R. A. 852; McKee v. City Garbage Co., 140 Mich. 497, 103 N. W. 906. See Pennsylvania Co. for Insurance, etc., v. Jacksonville, T. & K. W. Ry. Co., C. C. A., 55 Fed. 131. That lienors have a right to a receiver in such a case is held in Farmers' L. & Tr. Co. v. Winona & Str. Ry. Co., 59 Fed. 957. See Herrick v. Grand Trunk Ry. Co., 7 Upper Can. 240.

[9] Quoted with approval by Wellborn, J., in Aiken v. Colorado River Irr. Co., 72 Fed. 591, 593. But see Carson v. Allegany Window Glass Co., 189 Fed. 791. Merchants' & Insurers' Reporting Co., v. Jones, C. C. A., 220 Fed. 791; Ames v. Goldfield Merger Mines Co., 227 Fed. 292; Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385; Lowenthal v. Georgia Coast & P. R. Co., 233 Fed. 1010.

[10] Columbia Nat. Sand Dr. Co. v. Washed Bar Sand Dr. Co., 136 Fed. 710. But see Maxwell v. McDaniels, C. C. A., 184 Fed. 311; Carson v. Allegany Window Glass Co., 189 Fed. 791; Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262; Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466. In case of a life insurance company, the court will rarely appoint a receiver when there is no apprehension as to its solvency. Watson v. Nat. Life & Tr. Co., C. C. A., 189 Fed. 872.

[11] The Late Corporation of the Church of J. C. of L. D. S. v. U. S., 136 U. S. 1, 34 L. ed. 478; Lawrence v. Greenwich F. Ins. Co., 1 Paige (N. Y.), 587. See also Hamilton v. Accessory T. Co., 26 Barb. (N. Y.) 46; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140.

[12] Quoted with approval by Wellborn, J., in Aiken v. Colorado River Irr. Co., 72 Fed. 591, 593; Warren v. Fake, 49 How. Pr. (N. Y.) 430.

where the governing body is so divided and engaged in such mutual contentions that its members cannot act together.[13] Eighthly, at the suit of unsecured creditors, where the corporation makes no defense and waives its right to require the complainants to reduce their claims to judgment, upon proof that the corporation is insolvent, that unless the court interferes its business will be interrupted by the levy of judgments and executions, and that the continuance of such business is necessary for the convenience of the public, or possibly when such interruption will greatly depreciate the value of its assets.[14]

[13] Featherstone v. Cooke, L. R. 16 Eq. 298; Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303; D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780. For the appointment of a receiver because of a controversy between bondholders, see Benedict v. St. Joseph & W. R. Co., 19 Fed. 173. For an extraordinary case, where a receiver was appointed because of a dispute with one stockholder, see Arents v. Blackwell's D. T. Co., 107 Fed. 338.

[14] Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403. See Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 37 L. ed. 1113; Sage v. Memphis St. R. Co., 125 U. S. 361, 31 L. ed. 694; Consolidated T. Co. v. Kansas C. T. Co., 43 Fed. 204; Doe v. Northwestern C. & T. Co., 64 Fed. 928; Merchants' Nat. Bank v. Chattanooga C. Co., 53 Fed. 314; Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Enos v. N. Y. & O. R. Co., 103 Fed. 107. But see Leary v. Columbia & P. S. Nav. Co., 82 Fed. 775; Texas C. C. & Mfg. Co. v. Storrow, C. C. A., 92 Fed. 5. "Apart from statutes, moreover, the law of receiverships has gone through a curious course of development with respect to corporations. The rule has been uniformly stated in the books and is still insisted upon that, in the absence of statutory authority, a court of equity has no power to appoint a receiver even of an insolvent corporation. It is said that such a court has no inherent power to wind up a corporation and that it cannot accomplish by indirection that which it cannot do directly. And it is perfectly true that the administration of the affairs of a corporation by a receiver and the distribution of its assets while not destroying its corporate existence do leave it a mere shell. Nevertheless exceptions to the rule have been evolved which are, in some aspects, as broad as the rule itself. One of these exceptions is in the case of creditors' bills. Courts of equity long ago lent their assistance to common law courts to enable particular judgment creditors to reach, through receivers, property beyond the reach of execution. These suits soon broadened in scope and were treated as equitable levies in favor of all judgment creditors entitled to seize the defendant's property—a substitute for separate proceedings. In these suits no distinctions were drawn between corporations and individuals and out of them the practice has grown up and become established of permitting creditors having judgments to apply

Such an appointment has been said to have the same effect as the legislative declaration of a moratorium.[15] Such an appointment cannot be attacked collaterally although made at the suit of a creditor whose lien is trivial or fictitious and the statements in the bill are false or grossly exaggerated.[16] And ninthly, in a few cases receivers have been appointed at the application of the corporations themselves, made before default in the payment of mortgage interest, where it was for the interest of the public that the corporate business, the operation of a railroad, should be continued without interruption. it was hopelessly insolvent, and there was danger of attempts by creditors to gain preference by attachments or otherwise, in such a manner as would have stopped the operation of the railroad.[17]

Receivers will also be appointed in cases authorized by the statutes of the State where the Federal court is held.[18]

Independently of statutory authority insolvency alone is not a sufficient cause for appointment of a receiver for a corporation.[19] It has been held that, in a suit against a corporation, a consent to the appointment of a receiver, signed by the president, will not be recognized where it appears from the pleadings that he is an interested party adverse to the company, and

to courts of equity to take possession of the assets of corporations and undertake through receivers their general administration. And now that which was formerly regarded as the essential thing—the judgment—is unnecessary unless the corporations object. Thus is illustrated anew the vainness of saying what courts of equity *cannot* do. The practice of making such appointments has become particularly well established in the case of quasi public corporations where the interests of the public require continuous and continued operation and where, generally, the bankruptcy act is not available." Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

15 Scattergood v. Am. Pipe & Construction Co., 247 Fed. 712.

16 Pacific Coast Pipe Co. v. Conrad City Water Co., C. C. A., 245 Fed. 81.

17 Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 22 Fed. 138; s. c., 22 Fed. 272; s. c., 22 Fed., 513, 515; s. c., 23 Fed. 513, 29 Fed. 618; Brassey v. N. Y. & N. E. R. Co., 19 Fed. 663. *Cf.* Quincy, Mo. & Pac. Ry. Co. v. Humphreys, 145 U. S. 82, 95, 36 L. ed. 632, 636. *Contra*, Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Hugh v. McRae, Chase 466.

18 Alder v. Campeche Laguna Corp., 257 Fed. 789. McKinney v. Kansas Natural Gas Co., 206 Fed. 772.

19 Alder v. Campeche Laguna Corp., 257 Fed. 789.

no authority from the directors to give the consent is shown.[20] It has been said: that "a managing receivership is never undertaken, except with the view to winding up the affairs of the business and the sale of its property; the business being taken over and continued, in order that the whole may be disposed of in the end as a going concern."[21] It has been held, that a receiver should not be appointed merely for the purpose of bringing a suit.[22] It has been held that a receiver of the assets of a building and loan association may be appointed, when they are insufficient to carry to completion the purposes of its creation; although it has enough to pay all debts that have matured.[23] The court will appoint a receiver of the assets of a foreign corporation in a proper case, when the latter has submitted to the jurisdiction.[24] A court will not usually appoint a receiver of a foreign corporation, which does not submit to the jurisdiction, in a suit founded upon the mismanagement of its officers or directors, who reside elsewhere.[25] A court has no jurisdiction to appoint a receiver of the property of a corporation or other person not a party to the suit.[26] It is doubtful whether the receiver of a corporation can be appointed by a Federal court at a suit of a shareholder whose shares are not

20 Nesbit v. North Georgia El. Co., 156 Fed. 979.

21 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72. The selection of the plaintiff by an officer of the corporation was held to be insufficient to establish collusion. Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262.

22 Zuber v. Micmac Gold Min. Co., 180 Fed. 625, misappropriation of corporate assets; Street Grading Dist. No. 60 of Little Rock, Ark. v. Hagadorn, C. C. A., 186 Fed. 451, to collect unpaid assessments upon real estate pledged for the payment of loans used in public improvements.

23 Gunby v. Armstrong, C. C. A., 133 Fed. 417.

24 Lewis v. American Naval Stores Co., 119 Fed. 391; Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328; Dolan v. Universal Fire Brick Co., N. J. Eq., 104 Atl. 86. But see Scattergood v. American Pipe & Construction Co., C. C. A., 249 Fed. 23. It has been said that this cannot be done when the corporation has no property of a fixed nature within the district. Primos Chemical Co. v. Fulton Steel Corporation, 224 Fed. 454.

25 Republican M. Silver Mines v. Brown, C. C. A., 24 L.R.A. 776, 58 Fed. 644; Leary v. Columbia R. & P. S. Nav. Co., 82 Fed. 775a. Maguire v. Mortgage Co. of America, C. C. A., 203 Fed. 858.

26 Hook v. Bosworth, 64 Fed. 443.

worth more than $2,000.[27] The right to apply for a receivership of a corporation may be lost by laches.[28]

Usually a receiver will not be appointed at the suit of subsequent lienors over property of which a mortgagee is in possession; but an injunction may be issued to prevent the mortgagor from applying the rents and profits to any other purpose than the satisfaction of the mortgage.[29] It has been held that an assignment made by a corporation for the benefit of creditors after the filing of a bill for the appointment of a receiver will not deprive the court of jurisdiction to appoint a receiver.[30]

The appointment of a receiver will not be set aside for collusion, because the complainant brought the suit and made the application at the request of the corporation.[31] Where the defendant corporation appeared and submitted to the jurisdiction, an intervening stockholder or creditor cannot object to the same.[32]

The rules regulating applications for the appointment of receivers over property in the custody of another court have been previously explained.[33] It has been held that a receiver will not be appointed to assist a trust formed to maintain a monopoly, or otherwise to aid in the prosecution of an enterprise against public policy.[34]

§ 302b. Extension of receiverships. When a railroad is in the hands of receivers pending a foreclosure suit, the court may extend the receivership over a portion of the road for the benefit of an intervenor claiming a prior lien thereupon.[1] Where a receiver has been appointed at the suit of a judgment or other creditor, his suit may be consolidated with a subsequent

27 Robinson v. West Va. L. Co., 90 Fed. 770. *Contra*, Towle v. American B. L. & Inv. Soc., 60 Fed. 131. *Supra*, §§ 15, 16.

28 Romare v. Broken Arrow C. & Min. Co., 114 Fed. 194.

29 U. S. v. Marich, 44 Fed. 10.

30 Belmont Nail Co. v. Columbia I. & S. Co., 46 Fed. 8.

31 Dickerman v. Northern Tr. Co., 176 U. S. 181, 44 L. ed. 423; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801; *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

32 *Re* Metropolitan Receivership, 208 U. S. 90, 52 L. ed. 403; Lewis v American Naval Stores Co., 119 Fed. 391. *Supra*, §§ 258-260.

33 *Supra*. § 55. See Morrill v. Am. Reserve Bond Co., 151 Fed. 305.

34 Am. B. & Mfg. Co. v. Klotz, 44 Fed. 721.

§ 302b. 1 Mercantile T. Co. v. Mo., K. & T. Ry. Co., 41 Fed. 8, 9.

foreclosure suit, and the receivership extended for the benefit of the mortgagee;[2] or his receivership, so far as concerns any profits to which the mortgagee is entitled, may be extended for the benefit of such mortgagee.[3] Where a receiver was appointed at the suit of a creditor, with the requisite difference of citizenship, the mortgagee has been allowed to intervene, file a cross-bill to foreclose the mortgage and take the benefit of the receivership, although the mortgagor and mortgagee were citizens of the same State.[4] Where receivers of a railroad covered by

[2] Lloyd v. Chesapeake, C. & S. W. R. Co., 65 Fed. 351.

Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., C. C. A., 251 Fed. 789, 793. Per Sanborn, J.: "The extension of a receivership of an entire system of railroads and its receipts, based upon liens which have attached thereto, over a part of that system and the receipts of that part which are covered by a prior or other mortgage, deprives those secured by the lien of the latter mortgage of no rights or equities which they would have had if a separate receiver of the property covered by their mortgage had been appointed. The legal rights of all parties, the priorities of all liens, remain the same in either case. There was, therefore, no violation of any legal right, or any substantial equity, by the extension of the receivership of Mr. Schaff over the entire property to the part of that property covered by the appellant's mortgage, and the impounding of the earnings, income and profits thereof for the benefit of the bondholders secured by that mortgage, by means of that extension rather than by appointment of a separate receiver therefor. It was discretionary with the court below which course it should pursue, and in view of the facts that the entire railway system was in the possession of the receiver for the benefit of the holders of all liens, thereon, that there were many liens, some upon the entire system, many upon parts thereof respectively, that separate receivers for separate liens would multiply the labor and expenses of the litigation and of the administration and operation of the property, that receivers are but the hands of the court, that the property ordered into the possession of one or many of its receivers must after all be held, administered and disposed of, and the issues arising in all these suits must be decided, by one and the same court, it was not abuse of, but a just and wise exercise by the court below of, its judicial discretion to extend the receivership already in existence of all the railway company's property over that part of its property covered by the appellant's mortgage, and the receipts therefrom, for the benefit of the bondholders secured by that mortgage, and to refuse to appoint a separate receiver therefor."

[3] London-Arizona Consol. Copper Co. v. Gila C. S. Co., 257 Fed. 324.

[4] Park v. N. Y., L. E. & W. R. Co., 64 Fed. 190; s. c., 70 Fed. 641. In another case it was held, that since the receiver already appointed acted for all parties in interest,

a lease had been appointed in a suit, to which the lessee was a defendant and admitted its insolvency, it was held proper to extend the receivership over the property of the lessor upon the latter's petition alleging that it also was insolvent.[5] Where a receiver had been appointed over the property of a corporation which controlled a railroad company through the ownership of a majority of its stock, it was held that he should surrender possession to a receiver of the latter corporation subsequently appointed by a State court.[6]

It seems to be improper to include in an order extending a receivership for the benefit of a mortgagee a direction that the acceptance of the benefit shall be deemed a consent to all administrative orders previously made in the case,[7] but such an order will not be reversed unless it is shown that one of the previous orders was erroneous and prejudicial to the interest of the appellant.[8]

§ 302c. Receivers of National Banking Association. The Revised Statutes provide, "Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business at the offices of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or the cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest,

there was no reason for granting a subsequent motion by the trustees for the extension of the receivership or the appointment of a new receiver. Bird v. People's Gas & El. Light Co., 158 Fed. 903.

5 *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403. The fact that there may be a conflict of interests as to the distribution or application of the earnings of the receivership, was held not to be a reason for the appointment of separate receivers to operate the property of several lessors of the same system of street railroads, s. c., as Pennsylvania Steel Co. v. N. Y. City Ry. Co., 160 Fed. 221; *infra*, §§ 306, 308, 320.

6 Central R. & B. Co. v. Farmers L. & Tr. Co., 56 Fed. 357.

7 Bankers Trust Co. v. Missouri, K. & T. Ry. Co., C. C. A., 251 Fed. 789, 796.

8 Bankers Trust Co. v. Missouri, K. & T. Ry. Co., C. C. A., 251 Fed 789, 798.

and in pursuance of such offer, makes, signs and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission shall forthwith forward such admission of notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest."[1]

"On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited."[2]

"On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdic-

§ 302c. [1] U. S. R. S., § 5226, Comp. St., § 9813.

[2] U. S. R. S., § 5221, Comp. St., § 9814.

tion, may sell or compound all bad or doubtful debts and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

"Provided, That the Comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or National bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited. Such depositary shall pay upon such money interest at such rate as the Comptroller may describe, not less, however, than two per centum per annum upon the average monthly amount of such deposits."[3]

"The Comptroller shall upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct for three consecutive months, calling on all persons who have claims against such association to present the same, and to make legal proof thereof."[4]

"From time to time after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such

[3] U. S. R. S., § 5234 as amended, May 15, 1916, ch. 121, 39 St. at L. 121, Comp. St., § 821.

[4] U. S. R. S., § 5235, Comp. St., § 9822.

association, or their legal representatives in proportion to the stock by them respectively held."[5]

"Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises: and such court after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal."[6]

"Whenever any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes."[7]

"Whenever any association shall have been or shall be placed in the hands of the receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised

5 U. S. R. S., § 5236, Comp. St., § 9823.

6 U. S. R. S., § 5237, Comp. St., § 9824.

7 Act of June 30, 1876, ch. 156, § 1, 19 St. at L. 63, Comp. St., § 9826.

Statutes of the United States and when as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditors shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasury of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof thirty days in a newspaper published in the town, city or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to the vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided: and whenever any of the shareholders of the association shall after the election of such agent, have executed and

filed a bond to the satisfaction of the Comptroller of the Currency conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands and may sell, compromise, or compound the debts due to such association, with the consent and approval of the district or circuit court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle, and adjust such accounts and discharge said agent and the sureties upon said bond.

"And in case any such agent so elected shall refuse to serve, or die, resign, or be removed any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof, for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at

which meeting the shareholders shall elect an agent, voting by ballot in person, or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and the duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or *cestui que* trust. The proceeds of the assets or property of such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To pay any amount or amounts which have been paid by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States: and

"Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."[8]

"Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit

[8] Ibid as amended August 3, 1892, ch. 360, 27 St. at L. 345. March 2, 1897, ch. 354, 29 St. at L. 600, Comp. St., § 9827.

his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of his property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale." [9]

"Such request, if approved by the Comptroller of the Currency shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his payment, should be used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States." [10]

"Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller shall be and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order." [11]

The action of the stockholders of a National Bank in voting

9 Act of March 29, 1886, ch. 28, § 1, 24 St. at L. 8, Comp. St., § 9828.

10 Act of March 29, 1886, ch. 28, § 2, 24 St. at L. 8, Comp. St., § 9829.

11 Act of March 29, 1886, ch. 28, § 3, 24 St. at L. 8, Comp. St., § 9830.

for voluntary liquidation and the appointment of a statutory agent is equivalent to the appointment of a receiver by the comptroller in its effect upon the property and the rights of creditors.[12]

The assets of the bank thereupon become a trust fund to be administered for the benefit *pro rata* of all the creditors equally and a creditor who subsequently obtains a judgment acquires no lien which gives him a preference over the others.[13] Until the Comptroller has acted, a court of the United States may appoint a receiver of the assets of such a corporation.[14] After the appointment by the Comptroller of such a receiver, it is doubtful whether a court of the United States would appoint another; and after the appointment of a receiver by a court of competent jurisdiction, it is doubtful whether the Comptroller of the Currency could thus interfere.[15] A court of equity may appoint a receiver of the assets of a national bank at the suit of unsecured creditors, without a judgment at law, although the Comptroller of the Currency has refused to make such an appointment.[16]

§ 303. Rules regulating the appointment of receivers. It has been said that, in order to obtain the appointment of a receiver, the moving party must show, first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.[1] The appointment of a

12 Merchants' Nat. Bank v. National Bank, 231 Fed. 556.

13 Ibid.

14 Wright v. Merchants' Nat. Bank, 1 Flippin, 568; Irons v. Mfrs. Nat. Bank, 6 Biss. 301.

15 Harvey v. Lord, 10 Fed. 236.

16 King v. Pomeroy, C. C. A., 121 Fed. 287, 289.

§ 303. 1 Chancellor Buckner in Mays v. Rose, Freeman's Ch. (Miss.) R. 703, 718. See also Beecher v. Bininger, 7 Blatchf. 170; Tysen v. Wabash R. Co., 8 Biss. 247. "Mere insolvency arising from no proved fault in the management of a private corporation is not a sufficient ground. There should be some evidence of waste or mismanagement or carelessness or fraud or extravagance, wantonness or collusion; some ground to apprehend that the property will suffer deterioration or serious injury; some-

receiver is always in the discretion [2] of the court, which, however, must be exercised with great circumspection,[3] and is subject to review by an appellate court.[4] It has been said, that the appointment can be made only in accordance with the following rules: "1st. That the power of appointment is a delicate one, and to be exercised with great circumspection. 2nd. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property. 3rd. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and 5th. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." [5]

§ 304. Ancillary receivers. An ancillary receiver is a receiver appointed in aid of a receiver appointed by another court.[1] When a receiver has been appointed by one Federal District Court, the others through judicial comity will usually appoint the same person an ancillary receiver of so much of the same estate as is within their jurisdiction,[2] sometimes join-

thing to show that there is danger of probable loss, or that some rights may be substantially impaired." Brawley, J., in Tr. & D. Co. v. Spartanburg Water Works Co., 91 Fed. 324, 325. See Folk v. U. S., C. C. A., 233 Fed. 177.

2 Owen v. Homan, 4 H. L. C. 997, 1032.

3 Milwaukee & Minn. R. Co. v. Soutter, 2 Wall. 521, 17 L. ed. 903.

4 Tysen v. Wabash R. Co., 8 Biss. 247.

5 Le Grand, C. J., in Blondheim v. Moore, 11 Md. 365.

§ 304. 1 Jennings v. Phil. & R. R. Co., 23 Fed. 569; Williams v. Hintermeister, 26 Fed. 889. As to bankruptcy, see § 612, *infra*.

2 Jennings v. Phil. & R. R. Co., 23 Fed. 569; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 618; Parsons v. Charter Oak L. Ins. Co., 31 Fed. 305; Shinney v. N. A. S., L. & Bld'g Ass'n, 97 Fed. 9; Dillon v. Oregon, S. L. & U. N. Ry. Co., 66 Fed. 622; Lewis v. Am. Naval Stores Co., 119 Fed. 391; Platt v. Philadelphia & R. R. Co., 54 Fed. 569; N. Y., P. & O. R. Co. v. N. Y., L. E. & W. R. Co., 58 Fed. 268; Dillon v. Oregon, S. L. & U. N. Ry. Co., 66 Fed. 622; Coltrane v. Templeton, 106 Fed. 370, 375. See Corn Exchange Bank v. Rockwell, 58 Ill. App. 506; Taylor v. Atlantic G. W. Ry. Co., 57 How. Pr. (N. Y.) 9. But see Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130, 132, 133, Wallace, J.: "When such an application is made,

ing with him, a co-receiver who resides within the ancillary

the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other State that the corporation is insolvent and that a proper case exists in that State for the appointment of a receiver and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each State to the records and judicial proceedings of every other State of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case and whether the proper administration of the assets requires the appointment of a receiver.'' In Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 916, 917, Putnam, J.: ''Now comes the question as to the nature of the bill before me. If this were a bill asking me merely to appoint a receiver *ad interim*, ancillary to an *ad interim* receiver appointed in New Jersey, I should pay no attention to it. But in my view it is a bill asking me to assist in enforcing a final decree made by the Circuit Court for the District of New Jersey, and asking me to gather together assets, or cause them to be gathered together, so that they can ultimately be accounted for where they should ultimately be accounted for; that is, for the Circuit Court for the District of New Jersey. It is like any bill asking the gathering up of assets by an ancillary proceeding for the purpose of causing them to be remitted to be disposed of by the court having jurisdiction at the place of domicile. Such proceedings relate alike to the estates of deceased persons, to corporations, and to all other subject matters where there is occasion for gathering together and administering, marshaling, and forwarding the net results to the court of primary jurisdiction. In my view, it is a proper bill, addressed properly to the equity side of this court, praying final relief of the kind I have described, to which the motion now before us is purely interlocutory in its character, with a view to the temporary administration of the assets until this bill is disposed of on a hearing on the merits. Therefore I find no difficulty in the frame of the bill, except the necessity of making these two subsidiary corporations parties defendant.'' It has been held that, when a receiver has been appointed in a court where proceedings in bankruptcy are pending, the Bankruptcy Court in another district where there are assets may appoint the same person ancillary receiver of property within its district, upon the petition of the original petitioners in bankruptcy. *Re* Schrom (E. D. Ia.), 97 Fed. 760; *Re* Sutter Bros. (S. D. N. Y.), 131 Fed. 654; *Re* Benedict (E. D. Wis.), 140 Fed. 55. *Contra, Re* Williams (E. D. Arkansas), 120 Fed. 38, 40, holding that such an appointment could only be made by a plenary bill in the State courts or the Circuit Courts of the United States; Ross-Meehan Foundry Co. v. Southern Car & Foundry Co. (W. D. Tennessee), 124 Fed. 403, 409, holding that it must be by such a

jurisdiction.[3] The usual practice is to make such an application *ex parte;*[4] but the court may require notice to be given to the persons interested in opposition;[5] and to subsidiary or constituent corporations within the district, a majority of the stock in which is owned by the defendant, when it is sought to have their stock transferred upon their books to the receiver.[6] Public notice by advertisement in daily papers in and outside of the ancillary district, and notice to the United States attorney for the ancillary district, may also be required.[7] The appointment may be vacated after hearing parties interested.[8]

bill in a court of equitable jurisdiction, which may perhaps be a District Court of the United States, but not such a court sitting in bankruptcy. In re Peiser (E. D. Pennsylvania), 115 Fed. 199; a trust company in Pennsylvania was ordered to show cause in "proceedings ancillary to, and in aid of, proceedings in bankruptcy in the District Court for the southern district of New York," why it should not pay property of the bankrupt to the receiver appointed in the New York district. See Ancillary Receivers in Bankruptcy by L. M. Friedman, Harv. Law Rev., XVIII, 519. For a form of a decree and order appointing an ancillary receiver, see Baltimore & O. R. Co. v. Freeman, C. C. A., 112 Fed. 237; Conklin v. U. S. Shipbuilding Co., 124 Fed. 1020. In Bowker v. Haight & Freese Co. (where the writer was counsel), although the corporation was chartered in New York, the Federal court there treated its receivership as ancillary to the proceedings in Massachusetts, where a receiver had been first appointed and the corporation subsequently appeared.

3 Bowker v. Haight & Freese Co., S. D. N. Y., May 10th, 1905. That has been said to be the rule in the First Circuit, Platt v. Phil. & R. R. Co., 54 Fed. 569; Coe v. East & W. R. Co. of Ala., 52 Fed. 531. But not in the district of Maine, where, in the absence of extraordinary circumstances, public notice of the application by publication and otherwise is usually required. Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Haydock v. Fisheries Co., 156 Fed. 988. It has frequently been done in the Second Circuit. Buchanan v. Bay State Gas Co., S. D. N. Y., October 16, 1896. In the same case, in which the author was counsel, ancillary receivers were thus appointed *ex parte* in the Circuit Courts of New Jersey, Pennsylvania and Massachusetts.

4 Bowker v. Haight & Freese Co., S. D. N. Y., May 10th, 1905; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894.

5 Greene v. Star C. & P. Car. Co., 99 Fed. 656; Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Haydock v. Fisheries Co., 156 Fed. 988.

6 Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 914.

7 Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Haydock v. Fisheries Co., 156 Fed. 988.

8 Greene v. Star C. & P. Co., 99 Fed. 656.

The better practice is to move in a new suit instituted by the plaintiff to the bill upon which the original receiver was appointed, or by some other creditor[9] or stockholder,[10] claiming a right to share in the property of which a receiver is desired. When the defendant in the suit where the appointment was originally made, appeared and interposed no objection, it cannot object to the ancillary appointment.[11] It seems that an appearance and a waiver of an objection to the jurisdiction because of non-residence may be made in the name of a defendant corporation by the receiver appointed in the State of its incorporation[12] at least where the officers and directors of the corporation have been enjoined from acting. The court in which application is made for the ancillary appointment may deny the same, if it appears that there was no jurisdiction to appoint a receiver originally.[13] It seems that the application should not be made by the receiver who wishes the ancillary appointment;[14] nor in a summary application where no bill has been filed.[15] It is the safer practice for the bill to show the difference of citizenship or Federal question that will be essential to the jurisdiction over the original appointment: but it might be held that a Federal question sufficiently appeared when the bill was

9 In re Brant, 96 Fed. 257; Greene v. Star C. & P. Co., 99 Fed. 656.

10 Bluefields S. S. Co. v. Steele, C. C. A., 192 Fed. 23. See s. c., C. C. A., 184 Fed. 584, 106 C. C. A. 564.

11 Walker v. United States Light & Heating Co., 220 Fed. 393; Central Life Securities Co. v. Smith, C. C. A., 236 Fed. 170.

12 That was done in all the courts in the case of Buchanan v. Bay State Gas Co., *supra*, note 3. Stone v. Pontiac R. R. Co., N. Y. Sup. Ct., Sp. T., April 12, 1905, see *infra*, §§ 307, 311.

13 Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454, per Ray, J. But see Primos Chemical Co. v. Fulton Steel Corp., 254 Fed. 454, per Hand, J.

14 *Re* Brant, 96 Fed. 257; Greene v. Star C. & P. Car Co., 99 Fed. 656; Mahon v. Ongley El. Co., 156 N. Y. 196. Where receivers appointed in one district obtained their appointment in another district upon a bill filed by them *ex parte*, which prayed for no distinct equitable relief; it was held that that did not give them power to sue in the latter district. Fairview Fluor. Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894. The practice in the Third Circuit has been said by Judge McPherson to permit this, and he required the application to be made in the Matter of Haight & Freese Co., E. D. Pa., May, 1905, in which the author was counsel.

15 *Re* Brant, 96 Fed. 257.

brought to enforce the final decree of a Federal court of equity in another district.[16] The original receiver need not be made a party to the bill,[17] nor is there any necessity for joining another corporation, against which charges are made in the bill, where no relief is asked against it;[18] but, where there is a prayer to have transferred to the name of the receiver shares of the capital stock of another corporation, such corporation should be made a party.[19]

The ancillary appointment depends upon the comity of the court that has jurisdiction of the assets sought to be impounded.[20] It may refuse to give the original receiver an ancillary appointment.[21] And, after such an appointment, it may remove him.[22]

16 Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 914.

17 Phinizy v. Augusta & K. R. Co., 56 Fed. 273.

18 Phinizy v. Augusta & K. R. Co., 56 Fed. 273.

19 Conklin v. U. S. Shipbuilding Co., 123 Fed. 913.

20 Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Kirker v. Owings, C. C. A., 98 Fed. 499; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871. Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 915, 916, per Putnam, J.: "The rule of so-called comity has little influence with me. The best late writer on international law—Dicey—says very truly: 'The term "comity," as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor.' It is rather a scapegoat, an opportunity of escape for the court. I know of few propositions that now come before the courts which are not governed by law, and in this case I must be governed by the law as practiced, and by the precedents, and not by any mere matter of comity. The law as recognized in the Circuit Courts of the United States is that, when the Federal court of jurisdiction at the domicile of the corporation appoints a receiver, or makes a decree winding up a corporation and disposing of its assets, a decree of foreclosure, or any other decree looking to a disposition of its property, thereupon, assuming that to aid another Federal court involves a Federal question which will lawfully support the exercise of jurisdiction by the Federal judiciary, the Circuit Courts in other circuits will exercise ancillary jurisdiction, and assist in carrying out the purpose of the court at the place of domicile." But see Farmers' L. & Tr. Co. v. No. Pac. R. Co., 73 Fed. 26.

21 Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Greene v. Star C. & P. Car Co., 99 Fed. 656; Phinizy v. Augusta & K. R. Co., 56 Fed. 273. Primos Chem. Co. v. Fulton Steel Corp., 254 Fed. 454. But see Farmers' Loan & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26.

22 Atkins v. Wabash, St. L. & P.

It has been held that the suit cannot be maintained merely for the purpose of obtaining a ratification by the court of what has been done in a court of another jurisdiction.[23]

Upon an ancillary receivership, the court that had original jurisdiction is considered as the court of primary jurisdiction and of principal decree; and proceedings in the other courts are usually considered as ancillary and subordinate thereto. In the case of a railway company chartered by the United States, extending through several districts, the court of primary jurisdiction should ordinarily be that where the principal operating offices are situated and there is some material part of the railroad.[24] But where the corporation had recognized the jurisdiction of a court in another district, it was held that that court should be considered the court of primary jurisdiction.[25] Where the first receiver of a State corporation had been appointed, in a district where its business was carried on and a large part of its property situated, and the corporation had acquiesced in the jurisdiction there; it was held that a receiver, subsequently appointed in a district of the State where the corporation was chartered, must be treated as auxiliary and ancillary to the former.[26] The accounting of the receiver is usually first instituted in the court where he was first appointed.[27] He may be directed to file, in the court of ancillary jurisdiction, a certified copy of such accounts and order approving them.[28] The court of ancillary jurisdiction has ordered a sale in the manner

Ry. Co., 29 Fed. 161; Greene v. Star C. & P. Car Co., 99 Fed. 656; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871. But see Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26; Chattanooga T. Ry. Co. v. Felton, 69 Fed. 273.

23 Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894, 897.

24 Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26, 31, as to the rule in districts in the same circuit. See Jud. Code, § 56, quoted, *infra*, § 306. For a case of a difference between the administration in two districts of the same Circuit where the Circuit Judge refused to interfere, see Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135.

25 Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26.

26 Lewis v. Am. Naval Stores Co., 119 Fed. 391, 397; Bowker v. Haight & Freese Co., 157 Fed. 1006.

27 Jennings v. Phila. & R. R. Co., 23 Fed. 569. As to the effect of an order or decree therein in an ancillary jurisdiction, see Coe v. Patterson, 122 App. Div. 76.

28 Central R. & Banking Co. v. Farmers' L. & Tr. Co., 113 Fed. 405, 412.

directed by that of primary jurisdiction, and in opposition to its own views of the proper course.[29]

Where the court of primary jurisdiction exacted a stipulation from the receiver as to his conduct in a suit in the ancillary jurisdiction, the court in the latter enforced observance of such stipulation.[30] The courts of ancillary jurisdiction frequently remit to the court of primary jurisdiction, for relief of claimants to a preferential interest in the fund.[31] They may establish a resident's status as a creditor;[32] but not if the distribution of the estate will be thereby confused or embarrassed.[33] To the latter court also was left the determination of the propriety of continuing a traffic agreement operating in two or more States,[34] of making extraordinary contracts[35] of voting stock in a corporation chartered in the ancillary jurisdiction,[36] and in one case even the propriety of excepting from the receivership assets within the ancillary jurisdiction.[37] It has been held that assets in the hands of ancillary receivers cannot be subjected to the payments of damages for torts committed by the receivers in the primary jurisdiction.[38] The court of ancillary jurisdic-

29 Central Tr. Co. v. U. S. Flour Milling Co., 112 Fed. 371.

30 Wheeling, B. & St. T. Ry. Co. v. Cochran, 85 Fed. 500.

31 Jennings v. Philadelphia & R. R. Co., 23 Fed. 569; Clyde v. Richmond & D. R. Co., 56 Fed. 539; Bowker v. Haight & Freese Co., 140 Fed. 797; Whelan v. Enterprise Transp. Co., 166 Fed. 138; Equitable Trust Co. v. Wabash R. Co., C. C. A., 244 Fed. 66. In Farmers' L. & Tr. Co. v. Northern Pac. R. R., U. S. C. C., S. D. N. Y., N. Y. L. J. May 15, 1902, it was held that the claimant of a lien upon real estate must apply, either to a court of primary jurisdiction, or to a court in the State or district where the real estate is situated.

32 Pfahler v. McCrum-Howell Co., 197 Fed. 684; Whelan v. Enterprise Transp. Co., C. C. A., 166 Fed. 188. But see Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 93; Whelan v. Enterprise Transp. Co., 138 Fed. 138.

33 Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 93; Pfahler v. McCrum-Howell Co., 197 Fed. 684; Whelan v. Enterprise Transp. Co., C. C. A., 166 Fed. 138; Equitable Trust Co. v. Wabash R. Co., C. C. A., 244 Fed. 66.

34 Ames v. Union Pac. Ry. Co., 60 Fed. 966.

35 Way v. J. H. Way & Sons Co., 216 Fed. 719.

36 Am. & British Mfg. Co. v. Internat. P. Co., 173 App. Div. 319.

37 Mercantile Tr. Co. v. Baltimore & O. Ry. Co., 79 Fed. 388.

38 Union Tr. Co. v. Atchison, T. & S. F. R. Co., 87 Fed. 530.

tion has control over the acts of the ancillary receiver within its territorial limits.[39]

It has been said that in general the proceedings in the ancillary jurisdiction should be confined to the conservation of the property there and the transmission of the money into which it is converted to the court of original jurisdiction.[40]

The courts of ancillary administration have the power to retain the assets which they collect and to distribute them independently.[41] They usually apply them to the discharge of local liens,[42] the expenses of the ancillary receivership and to the payment of claims arising out of their management of the property before transmitting any funds to the court of primary jurisdiction.[43]

Before such transmission a bond may be required from the original receiver conditioned for the payment of the fees and expenses of the ancillary receiver and his counsel.[44] In such a case notice should be given to the first of all applications for orders fixing the fees and expenses of the others.[45] Local creditors, without liens or other security, have no absolute right to assets in the hands of the ancillary receiver prior to that of creditors in the other districts;[46] and the ancillary court may order the transmission of all the proceeds of the assets to

39 Chattanooga Terminal Ry. Co. v. Felton, 69 Fed. 273.

40 Way v. J. H. Way & Sons Co., 216 Fed. 719.

41 Kirker v. Owings, C. C. A., 98 Fed. 499; Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130; Miles v. New So. B. & L. Ass'n, 99 Fed. 4; N. Y. Security & Tr. Co. v. Equitable Mtg. Co., 71 Fed. 556.

42 Fletcher v. Harney P. T. M. Co., 84 Fed. 555, where the court of primary jurisdiction expressed its views as to the proper action of the court of ancillary jurisdiction upon claims for taxes. Clyde v. Richmond & D. R. Co., 65 Fed. 336; Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 69 Fed. 658.

43 Kirker v. Owings, C. C. A., 98 Fed. 499. Am. & British Mfg. Co. v. Internat. Power Co., N. Y. Sup. Ct., Sp. Tm., per Hotchkiss, J., N. Y. L. J., June 13, 1917.

44 Am. & British Mfg. Co. v. Internat. Power Co., N. Y. Sup. Ct., Sp. Tm., per Hotchkiss, J., N. Y. L. J., June 13, 1917.

45 Ibid.

46 Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130; Smith v. Taggart, C. C. A., 87 Fed. 94; Parsons v. Charter Oak L. I. Co., 31 Fed. 305. But see Taylor v. Life Ass'n of A., 3 Fed. 465; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26, 31; Kirker v. Owings, C. C. A., 98 Fed. 499; Johnson v. Southern B. & L. Ass'n, 99 Fed. 616. For a case where they were

the court of primary jurisdiction and require unsecured local creditors to present their claims for adjudication there.[47] The proceedings in the courts of ancillary administration are not binding upon that of original jurisdiction;[48] except to the extent to which they affect assets within the territorial jurisdiction of the former courts. The court of primary jurisdiction remitted to the ancillary court the determination of the priority of receiver's certificates issued by the latter.[49] A judgment against an ancillary receiver is not binding upon the court of primary jurisdiction.[50] But it has been held that a suit for services to the ancillary receivers in aiding in the sale of assets may be brought against the same persons as receivers in the court of primary jurisdiction.[51] An ancillary receiver is not justified in sending the assets to the court of original jurisdiction without the permission of the ancillary court and he may be held personally responsible for such conduct.[52]

§ 305. Terms upon the appointment of receivers. As the appointment of a receiver is in its discretion, the court may impose terms upon the party applying for it or may deny the application upon the filing of a bond by the defendant,[1] or by impounding the income of the property.[2] Thus, it may insist as a condition precedent to appointing a receiver to manage a colliery that the moving party advance the funds necessary

not allowed to interfere with the settlement of a suit by the ancillary receivers, see Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85.

47 Ibid.; Jennings v. Phila. & R. R. Co., 23 Fed. 569; Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130; Smith v. Taggart, C. C. A., 87 Fed. 94; Parsons v. Charter Oak L. I. Co., 31 Fed. 305. See So. Banking & Loan Ass'n v. Miller, C. C. A., 118 Fed. 369.

48 Reynolds v. Stockton, 140 U. S. 254, 272, 35 L. ed. 464, 470.

49 Doe v. N. W. Coal & Transp. Co., 78 Fed. 62.

50 Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464.

51 Colonial Tr. Co. v. Pac. Packing & Nav. Co., 142 Fed. 298.

52 Kirkes v. Owings, C. C. A., 98 Fed. 499.

§ 305. 1 Norton v. Hartford, 113 Fed. 1023; Cary Bros. v. Dalhoff Const. Co., 126 Fed. 584; Folk v. U. S., C. C. A., 233 Fed. 177; United States v. Dominion Oil Co., 245 Fed. 425; Producers' Oil Co. v. United States, C. C. A., 245 Fed. 651; Lougee v. Pickrell, 250 Fed. 741; Monte Rico Min. & Mill. Co. v. Fleming, C. C. A., 258 Fed. 106, 107.

2 Producers' Oil Co. v. U. S., C. C. A., 245 Fed. 651.

to continue the business.[3] So a party or person interested in a suit was in England rarely appointed receiver unless he agreed to act without compensation.[4] By analogy to this rule of practice, the Supreme Court of the United States first sustained the principle granting preferences to certain classes of unsecured creditors upon the foreclosure of railroad mortgages.[5]

§ 305a. Preferences in foreclosure suits and in the administration of receiverships. After the payment of the expenses of the receiver's administration,[1] including his compensation [2] that of his counsel,[3] and the money which he has borrowed by receiver's certificates,[4] or otherwise under authority from the court, in the distribution of assets by a receiver the maxim equality is equity is usually followed. A judgment obtained after a receiver has been appointed and taken possession, gives its holder no lien upon the property, of an individual,[5] or a corporation.[6] State Statutes upon the subject are waived.[7]

In accordance with the principle, that he who seeks equity must do equity, the Federal courts when appointing a receiver at the suit of a mortgagee of a railroad or other corporation engaged in public service usually direct that certain claims be paid in preference to those of the plaintiff.[8] "The doctrine is analogous to that of the admiralty allowing certain supplies to a vessel precedence over a mortgage upon the vessel, and rests upon the same principle. The vessel must not be allowed to

3 Gibbs v. David, L. R. 20 Eq. 373.

4 Wilson v. Greenwood, 1 Swanst. 471.

5 Waite, C. J., in Fosdick v. Schall, 99 U. S. 235, 251, 252, 25 L. ed. 339, 342. See also Turner v. Ind., B. & W. Ry. Co., 8 Biss. 315.

§ 305a. 1 *Infra*, § 320, 321.

2 *Infra*, § 322.

3 *Infra*, § 322a.

4 *Infra*, § 309.

5 Williams v. Roat, 73 Fed. 59.

6 Mercantile Tr. Co. v. So. State L. & Tr. Co., 86 Fed. 711.

7 Commonwealth Roofing Co. v. North Av. Tr. Co., C. C. A., 135 Fed. 984; Johnson v. Garner, 233 Fed. 756.

8 Waite, C. J., in Fosdick v. Schall, 99 U. S. 235, 253, 25 L. ed. 339, 342; Farmers' L. & T. Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed. 664, 666; 667. For criticisms of the practice, see Coe v. N. J. Midland Ry. Co., 27 N. J. Eq. 37; Rant v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456; Hollister v. Stewart, 111 N. Y. 644, 663. The doctrine originated in Kentucky. Douglas v. Cline, 12 Bush (Ky.), 613 (1876). For a case where a dividend was paid to general creditors when there was a dispute as to the maturity of the mortgage. See Todd v. Lippincott, C. C. A., 258 Fed. 205.

rot at the wharf. The railway must not be permitted to rust, and its franchise to be forfeited, through failure to operate. Such things, therefore, that are done to avoid such result, working destruction to the mortgage, should be compensated in priority to the mortgage."[9]

The rule has been extended to apply to the administration of the assets of an insolvent railroad which were not mortgaged.[10] It is the better practice to provide for such preferences as a condition in the order for the appointment of the receiver.[11] Even where no such order has been made when the receiver was appointed, if it appears at any time in the progress of the cause that bonded interest has been paid, additional equipment provided, or betterments of the property paid for, out of the earnings during a short[12] time before the default in interest, the court often directs that such debts then incurred be paid out of the income of the receivership after the payment of the receiver's expenses in preference to the claims of creditors secured by a mortgage or other lien;[13] but not unless there was a diversion of the earnings from the payment of operating expenses.[14] The payment by the receivers of rent to another railway company under a lease, made prior to the receivership

9 Caldwell, J., in Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182, 190, 191.

10 Pennsylvania Steel Co. v. N. Y. City Ry Co., 208 Fed. 168, s. c., C. C. A., 216 Fed. 458.

11 Central T. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551. For forms of such orders, see Dow v. Memphis & L. R. Ry. Co., 20 Fed. 260, 266, 267; Central T. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551, 553, 554.

12 Crane Co. v. Fidelity Tr. Co., C. C. A., 238 Fed. 693.

13 In Fosdick v. Schall, 99 U. S. 235, 253, 254, 25 L. ed. 339, 342, 343; Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344; Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 308, 27 L. ed. 117, 125; Union T. Co. v. Souther, 107 U. S. 591, 27 L. ed. 488; Union T. Co. v. Walker, 107 U. S. 596, 27 L. ed. 490; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. 471, 474, with a valuable note; Porter v. Pittsburg Bessemer S. Co., 120 U. S. 649, 30 L. ed. 830; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 42 L. ed. 1068; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458; Douglas v. Cline, 12 Bush (Ky.), 608; Moore v. Donahoo, C. C. A., 217 Fed. 177; Texas Co. v. International & G. N. Ry. Co., C. C. A., 250 Fed. 742.

14 Penn v. Calhoun, 121 U. S. 251, 30 L. ed. 915; St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. Ry. Co., 125 U. S. 658, 31

and adopted by them,[15] and, the payment by the mortgagor of interest to bondholders[16] do not, alone, constitute such a diversion of income as will entitle to a preference a creditor, whose claim was subsequent to the lease and mortgage. It has been held that in no case is a creditor entitled to a preference because of a diversion unless there would have been net earnings applicable to the claim had there been no such diversion.[17]

Although usually they are paid out of the net income of the receivers; in special cases,[18] especially where this income has been used to pay for betterments[19] or mortgage interest by a receiver appointed in the foreclosure suit,[20] or even by a receiver appointed in a prior suit to foreclose a junior lien[21] or to preserve the property for other creditors or stockholders,[22] or by a reorganization committee representing bondholders and stockholders,[23] such claims have been paid out of the proceeds of the foreclosure sale before any payment on account of mortgage bonds; and in some cases it has been made a condition of the sale that the purchaser pay these claims in addition to the nominal amount of his bid.[24]

L. ed. 832; Wood v. Guarantee T. & S. D. Co., 128 U. S. 416, 32 L. ed. 472; Kneeland v. Am. L. & T. Co., 136 U. S. 89, 34 L. ed. 379; Lackawanna I. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 44 L. ed. 475; U. S. Trust Co. v. N. Y. W. S. & B. R. Co., 25 Fed. 800; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 52 Fed. 524; Ruhlender v. Chesapeake, O. & S. W. R. Co., C. C. A., 91 Fed. 5; International T. Co. v. T. B. Townsend B. & C. Co., C. C. A., 95 Fed. 850; Gregg v. Metropolitan Tr. Co., C. C. A., 124 Fed. 721; aff'd 197 U. S. 183, 49 L. ed. 717.

15 Fordyce v. Omaha, Kansas City & E. R. R., 145 Fed. 544.

16 Crane Co. v. Fidelity Tr. Co., C. C. A., 238 Fed. 693.

17 Fordyce v. Omaha, K. C. & E. R. R., 145 Fed. 544.

18 Miltenberger v. Logansport, C. C. L. W. R. Co., 106 U. S. 286, 311, 313, 27 L. ed. 117, 126, 127; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 365-367, 42 L. ed. 1068, 1071, 1072; Blair v. St. Louis, H. & K. R. Co., 22 Fed. 471, 475; Kneeland v. Bass F. & M. Works, 140 U. S. 592, 35 L. ed. 543.

19 Ibid.

20 Ibid.

21 Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 370, 42 L. ed. 1068, 1073.

22 Ibid. See cases in note 47, *infra*.

23 Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 148 Fed. 41.

24 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 548.

The doctrine has been extended so as to provide for preferences to those who have furnished supplies and performed labor, and to railroad companies with connecting lines, who have claims for the settlement of ticket, freight and supply accounts,[25] and to loans incurred within a short time before the receivership, irrespective of whether there has been a diversion of income for the benefit of the mortgage bondholders;[26] but not to claims for

25 Virginia & A. Coal Co. v. Central R. Co., 170 U. S. 355, 365, 42 L. ed. 1068, 1071; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 311, 312, 27 L. ed. 117, 126, 127; Central Tr. Co. v. Chicago, A. & N. Ry. Co., 232 Fed. 936; Equitable Trust Co. v. Wabash R. Co., C. C. A., 255 Fed. 66.

26 Chicago & A. R. Co. v. U. S. & Mex. Tr. Co., 225 Fed. 940. Claims for preferences for *car rent* are usually disallowed. Thomas v. Western Car Co., 149 U. S. 95, 37 L. ed. 663; Grand Trunk Ry. Co. v. Central Vt. R. Co., 90 Fed. 163; Pullman's Palace Car Co. v. Am. L. & Tr. Co., 84 Fed. 18; Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., 154 Fed. 629. Where a balance is due upon the purchase price of *cars* or *locomotives* delivered to the railroad company under a contract of conditional sale, and the seller reclaims them or the receiver rejects them, a claim for the value of their use or for the injury done to them while in the possession of the railroad is not entitled to a preference. Fosdick v. Schall, 99 U. S. 235, 255, 25 L. ed. 339, 343; Huidekoper v. Loc. Works, 99 U. S. 258, 25 L. ed. 344; Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 97, 34 L. ed. 379, 383. If, however, the receiver retains them with the assent of the seller, the balance of the purchase money, or at least the reasonable value of their use by the receiver, may be a preferred claim to that of a prior mortgagee at whose suit the receiver was appointed. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 103, 34 L. ed. 379, 385; Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344; Frank v. Denver & R. G. Ry. Co., 23 Fed. 123. But not the value of their use by a former receiver appointed at the suit of a judgment creditor to which the mortgagee was a party. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 97, 34 L. ed. 379, 383. But see Kneeland v. Bass F. & M. Works, 140 U. S. 592, 35 L. ed. 543; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. ed. 117. And where the value of the purchase price is allowed a preference, it is inferior to the claims of laborers for services rendered immediately before the appointment of the receiver and subsequently to the delivery of the rolling stock to the company. Frank v. Denver & R. G. Ry. Co., 23 Fed. 123. In one case a consolidated mortgage covered leases of branch lines and nearly all of the capital stock of the lessor companies, with a covenant by the trustee that in case of default it would take possession of the mortgaged property and then "operate such railroads and conduct the business.

balance due for repairs of cars, losses, damages and over

* * * and receive all tolls, rents, income and profits from said railroad and other property, * * * and from such rents to pay all expenses of taking possession of said railroads and other property and operating said railroads and conducting said business, * * * and all taxes due upon any of the mortgaged property, and all amounts due for interest or principal of any of the bonds or other obligations of the railway company secured by mortgages or pledges prior in lien to this mortgage; and after deducting such expenses and payments and retaining a reasonable compensation for the services of the trustee in connection with the making of said entry and taking possession of said railroads and other property, and operating the same, and conducting the said business, to apply the net income to the payment of any interest previously due or becoming due during such possession on bonds secured by this mortgage." The trustee further covenanted "to cause all of the railroads and other property thus secured by this mortgage, including all shares of capital stock and bonds held in trust under the provisions hereof, to be sold as one property at public auction," &c. The mortgagor lessee had covenanted to pay *interest* upon the bonds of the lessors of the branch lines *as rent*. The earnings of the branch line were insufficient to pay the rent. It was held that the first covenant constituted a contract by the trustee in case it took possession of the railroads of the mortgagor, either directly or through a receiver, to pay the *interest on the bonds of the branch roads*, as obligations of the mortgagor, before the net income was applied to the payment of interest on the bonds secured by the consolidated mortgage; and that the holders of these bonds had an equity upon the net earnings of the entire system superior to that of the holders of bonds and coupons under the consolidated mortgage. Mercantile Tr. Co. v. St. Louis & S. F. Ry. Co., 71 Fed. 601, 608, 609, s. c., as Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254. But see Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863. Coupons on bonds of a lessor, due for *rent* when a receiver of the lessee was appointed, were denied a preference in Central Tr. Co. v. Charlotte, C. & A. R. Co., 65 Fed. 264. See St. Louis, A. & T. H. R. Co. v. Cleveland, C. & C. I. Ry. Co., 125 U. S. 658, 31 L. ed. 832. Rent of a terminal property was allowed a preference in Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. 710. Creditors of a lessor railroad were given an equitable lien upon the amount of its earnings collected by the lessee. Terre Haute & L. R. Co. v. Cox, C. C. A., 102 Fed. 825.

Upon the foreclosure of a consolidated mortgage, the court ordered the receivers to pay *interest* upon bonds secured by mortgage upon a vital portion of the system although there was some doubt whether the mortgage foreclosed was not a superior lien. Park v. N. Y., L. E. & W. R. Co., 64 Fed. 190. See also Lloyd v. Ches. O. & S. W. R. Co., 65 Fed. 351. It was held

charges,[27] nor to amounts subsequently due under a traffic contract repudiated by the receiver,[28] nor to the claim of another railway company for a proportionate share of the cost of maintaining flagmen at a crossing,[29] nor to a claim for compensation for the use of a bridge.[30] Nor to the claims of transportation companies connecting with an insolvent steamship line,[31] although freight collected by the receiver for them after his appointment must be repaid by him.

The reason of this preference to other railway companies was the danger that these creditors might refuse to transact business with the debtor and thus damage the public as well as the property.[32] Since the Interstate Commerce Law now forbids

otherwise, however, in the case of mortgages upon parts of the consolidated road which could be separated from the rest without a serious depreciation. Cleveland, C. & S. R. Co. v. Knickerbocker Tr. Co., 64 Fed. 623. Where the receivers appointed under a consolidated mortgage had paid *interest on prior divisional mortgages*, taxes, operating expenses, debts for equipment, and for that purpose had incurred a preferential indebtedness, it was held: that the consolidated mortgagee could not in the subsequent foreclosure in the same suit of mortgagees on different parts of the lien have that preferential debt apportioned between its own and the divisional mortgages, or require an account of the receipts and disbursements of each division before the extension of the receivership to the division of mortgages so as to displace in its favor the liens of some of those mortgages; but that these debts were primarily a charge upon the interest of the consolidated mortgagee. N. Y. S. & Tr. Co. v. L., E. & St. L. Con. R. Co., 102 Fed. 382. See Am. Brake S. & F. Co. v. Pere Marquette R. Co., C. C. A., 205 Fed. 14.

27 Baker v. Central Trust Co. of New York, Carpenter, C. C. A., 235 Fed. 17.

28 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 168.

29 City Trust Co. v. Sedalia Light & Traction Co., 195 Fed. 845. *Contra*, Missouri K. & T. Ry. Co. v. City Trust Co., C. C. A., 209 Fed. 45.

30 Louisville Bridge Co. v. Chicago, I. & L. Ry. Co., C. C. A., 253 Fed. 631.

31 Whelan v. Enterprise Transp. Co., 175 Fed. 212.

32 Miltenberger, J. Logansport, C. & S. W. R. Co., 106 U. S. 286, 311, 312, 27 L. ed. 117, 126, 127. "It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repair, and for unpaid ticket and freight balances, the outcome of indispensable business rela-

such a refusal there seems to be no longer any justification for the preference except a blind adherence to precedent. *Cessante ipse ratione cessat ipsa lex.*[33] Claims for excessive charges paid by shippers, when presented by them or by a State commission or by the surety on a supersedeas bond, may be allowed a preference for such payments unlawfully increased the property which will be distributed among the mortgagees or other creditors.[34]

Taxes real and personal [35] including, perhaps, franchise taxes [36] are usually allowed a preference in accordance with the State statutes. Their payment is not a diversion of the earnings to the detriment of the claimants for labor and supplies.[37] The preference includes the fees due the officer for collection and interest until the time of the entry of the order for payment.[38] Claims for money advanced to pay taxes are also allowed a preference.[39]

It has been held that a city is not entitled to a preference

tions, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodations of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien.''

33 Carbon Fuel Co. v. Chicago C. & L. R. Co., C. C. A., 202 Fed. 172, 174. See Chicago & A. R. Co. v. U. S. & Mex. Tr. Co., 225 Fed. 940.

34 Love v. North Am. Co., C. C. A., 229 Fed. 103. U. S. & Mex. T. Co. v. Kansas City, M. & O. Ry. Co., 240 Fed. 504.

35 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209; Midland Guaranty & Trust Co. v. Douglas County, C. C. A., 217 Fed. 358; Texas Co. v. International & G. N. Ry. Co., C. C. A., 5th Ct., 237 Fed. 931; Bear River Paper & Bag Co. v. City of Petoskey, C. C. A., 241 Fed. 53; Union Trust Co. v. Great Eastern Lumber Co., C. C. A., 248 Fed. 46.

36 The annual franchise tax, which accrued subsequent to the receivership, was held to be a preferred lien so long as the corporation remained undissolved. Conklin v. U. S. Shipbuilding Co., 148 Fed. 129. *Contra*, Franklin Tr. Co. v. State of New Jersey, C. C. A., 181 Fed. 769, Putnam, J., dissenting, where it was imposed by a foreign State, in which it was domiciled but did not transact business.

37 Texas Co. v. International & Tex. Ry. Co., C. C. A., 237 Fed. 931.

38 Bear River Paper & Bag Co. v. City of Petoskey, C. C. A., 241 Fed. 53.

39 Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. 246; U. S. Tr. Co. v. Mercantile Tr. Co., C. C. A., 88 Fed. 140; Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209.

in the payment of a claim for the amount due for annual compensation for a street railway franchise.[40]

Betterments, as distinguished from repairs, are less often allowed a preference [41] even if made by a receiver, when the mort-

[40] Penn. Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 768, 771; s. c., C. C. A., 216 Fed. 458, 473.

[41] Laekawanna I. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 44 L. ed. 475; Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; s. c., C. C. A., 124 Fed. 721; Am. L. & Tr. Co. v. E. & W. R. Co., 46 Fed. 101; Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. 246; Illinois Tr. & Sav. Bank v. Doud, C. C. A., 105 Fed. 123, but see dissenting opinion of Caldwell, J.; Niles Tool Works v. Louisville, N. A. & C. Ry. Co., C. C. A., 112 Fed. 561, 563; Central Trust Co. v. Colorado Ry., Light & Power Co., 200 Fed. 85; Addison v. Lewis, 75 Va. 701, 713. Thus a claim for the *construction of a bridge* was denied a preferenee. Int. Tr. Co. v. T. B. Townsend B. & Cr. Co., C. C. A., 95 Fed. 850. *Contra*, Cleveland, C. & S. Ry. Co. v. Kniekerboeker Tr. Co., 86 Fed. 73; Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 704. So were claims for *railroad ties;* Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; s. c., C. C. A., 124 Fed. 721; for *ballast cars.* The enlargement and improvement of a *power plant.* John A. Roebling's Sons Co. v. Idaho Ry., Light & P. Co., C. C. A., 243 Fed. 527. *Service extensions,* Ibid.; *ballast cars.* Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., C. C. A., 154 Fed. 629; Fordyee v. Omaha, Kansas City & E. R. R., 145 Fed. 544; for *air brakes,* which were plaeed upon the cars in obedienee to an aet of Congress; State Tr. Co. v. Kansas City, P. & G. R. Co., 129 Fed. 455; for the priee of *machinery* used in the eonstruetion of ear shops upon a railroad leased to the mortgagor and not eovered by the mortgage. Niles Tool Works v. Louisville, N. A. & C. Ry. Co., C. C. A., 112 Fed. 561, 564. See Fordyee v. Kansas City & E. R. R., 145 Fed. 544. For the price of *gas meters* which were held *to be not* a part of the operating expenses of a gas company. Reyburn v. Consumers' Gas F. & L. Co., 29 Fed. R. 561.

Preferences were *allowed* for debts incurred by the purchase of an *electric generator,* Man. Tr. Co. v. Sioux City C. Co., 76 Fed. 658; and for a new *gear wheel and pinion* upon a cable railway. Central Tr. Co. v. Clark, C. C. A., 81 Fed. 269. In Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. 704, 705, per Treat, J., Blair v. St. L., H. & K. R. Co., 22 Fed. 471, per Brewer, J.; s. c.

In re Merriwether, 22 Fed. 769, 770, per Treat, J.; s. c., 23 Fed. 704, per Brewer, J., *betterments* were allowed a preferenee. There was, however, a Missouri statute (Mo. R. S., § 3200) whieh may have affeeted these deeisions. For the construction of the railroad lien law of Illinois, see Sanders v. Southern Traction Co. of Illinois, 253 Fed. 511. Where a reeeiver had completed, under an order of the court, a building partly eonstrueted for the mortgagor upon property not

covered by the mortgage, it was held that the entire cost of the construction should be paid by the receiver before he made any payment to the mortgagee. Girard I. & T. Ry. Co. v. Cooper, 162 U. S. 529, 40 L. ed. 1062. So in Virginia Passenger & Power Co. v. Lane Bros. Co., C. C. A., 174 Fed. 513, improvement of water power. Illinois Tr. & Sav. Bank v. Doud, 52 L.R.A. 481, 105 Fed. 123, 148, 149, per Sanborn, J.: "When a careful examination and analysis of the facts and opinions in all the cases in the Supreme Court upon the subject of preferential claims in suits to foreclose mortgages of *quasi-public* corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a *quasi-public* corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises. A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remained unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The broad language of the dicta in Fosdick v. Schall, that 'necessary operating and managing expenses, proper equipment, and useful improvements' are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited by the later decisions of the Supreme Court." But see dissenting opinion of Caldwell, J.

gagee was not a party to the suit.[42] The later cases hold that in a case of a betterment, where there is no statutory lien,[43]

Cf. Farmers' L. & Tr. Co. v. Am. Waterworks Co., 107 Fed. 23.

42 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209; Fordyce v. Omaha, K. C. & E. R. R. 145 Fed. 544; Merchants' L. & Tr. Co. v. Chicago Rys. Co., 158 Fed. 923.

43 Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; Fordyce v. Omaha, K. C. & E. R. R., 145 Fed. 544; Union Trust Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193; Virginia Passenger & Power Co. v. Lane Bros. Co., C. C. A., 174 Fed. 513; Spencer v. Taylor Creek Ditch Co., C. C. A., 194 Fed. 635; Central Trust Co. v. Colorado Ry., Light & Power Co., 200 Fed. 85; Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172, 174; John H. Roebling's Sons Co. v. Idaho Ry. Light & P. Co., C. C. A., 243 Fed. 527; First Trust Co. v. Illinois Cent. R. Co., C. C. A., 252 Fed. 965; Moore v. Donahoo, C. C. A., 217 Fed. 177; Continental & C. T. & S. Bank v. North Platte Val. Irr. Co., 219 Fed. 438; Chicago & A. R. Co. v. U. S. & Mex. Tr. Co., 225 Fed. 940; Martin Metal Mfg. Co. v. U. S. & Mex. Tr. Co., C. C. A., 225 Fed. 961; U. S. & Mex. Tr. Co. v. Beaty, C. C. A., 243 Fed. 344; Nealand v. Am. Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 953, 34 L. ed. 379. "The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims, which, by the rulings of this court have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that liens can be displaced. We emphasize this fact of

there has been no diversion of income, there can be no preference, out of the proceeds of the sale, unless immediate payment is necessary in order to keep the railroad in operation. The fact that a connecting railroad may be compelled under the Interstate Commerce Law to transact business with the receiver,[44] or that the mortgagee has delayed the institution of a foreclosure suit,[45] does not affect this rule.

The rule has been applied to an application for a decree of strict foreclosure instead of a sale, whereupon the decree was granted saving the rights of intervenors who held claims which in the case of a receivership would have been entitled to a preference.[46] The rule includes claims incurred by contracts made with a corporation to which was leased the railroad foreclosed, for the benefit of the latter, and cases where the latter has permitted the former to manage and operate its railroad under color of a lease or by virtue of the ownership or control of a majority of its stock.[47] It must appear, however, in all cases, that the creditor allowed the debt to be incurred in the belief that it would be paid from the current earnings of the railroad and that he did not rely solely upon the personal credit of the corporation with whom he made the contract,[48] and that the debt

the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers has unlimited discretion in this matter of the displacement of vested liens.''

44 Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172.

45 Ibid.

46 Burnham v. Bowen, 111 U. S. 776, 782, 783, 28 L. ed. 596, 598, 599. Where the parties to a foreclosure suit waived a sale, and entered an order by consent leasing the property to another railroad and appointing a receiver of the rent, the court directed that all floating unsecured creditors should be paid out of the rent before its application in discharge of the claims of the bondholders. Farmers' L. & Tr. Co. v. Mo., I. & N. Ry. Co., 21 Fed. 264.

47 Virginia & A. Coal Co. v. Central R. R. & B. Co., 170 U. S. 355, 42 L. ed. 1068; Clark v. Central R. R. & B. Co., 66 Fed. 803. But see Felton v. Cincinnati, C. C. A., 95 Fed. 336; Southern Ry. Co. v. Ensign Mfg. Co., C. C. A., 117 Fed. 417. Such claims may also be given a preferred lien upon the whole property of the lessee or controlling company. Central of Ga. Ry. Co. v. Hitchcock, C. C. A., 91 Fed. 209; Clyde v. Richmond & D. R. Co., 56 Fed. 539.

48 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 290, 44 L. ed. 458, 472; Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co., 176 U. S. 298, 44 L. ed. 475; Virginia &

was one fairly to be regarded as part of the operating expenses of the railroad, to be paid from current receipts,[49] and, it has been held, that it was incurred before the diversion.[50]

It is not necessary to prove that the creditor when he furnished the supplies knew of this right and relied thereupon.[51]

The expectation of a claimant that the debt due him will be payed out of the current income is not in itself sufficient to entitle him to a preference.[52]

In a proper case the disbursements or liabilities of a prior receiver appointed at the suit of a stockholder or junior incumbrancer may be thus given a preference when they were essential to the maintenance of the mortgaged property.[53] The mere fact that money loaned to the mortgagor was expended in paying interest upon the mortgage bonds and operating expenses so as to enable the railway company to maintain itself as a going concern is insufficient to entitle the lender to a preference.[54]

A. Coal Co. v. Central R. R. & B. Co., 170 U. S. 355, 42 L. ed. 1068, and cases cited; Southern Ry. Co. v. Ensign Mfg. Co., C. C. A., 117 Fed. 417. For a case where the evidence was held to be insufficient to sustain the defenses by sureties that the payee of a note had agreed to apply thereupon the proceeds of mortgage given by the maker collateral see Continental Gin Co. v. Stocker, C. C. A., 245 Fed. 343.

49 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 44 L. ed. 458, 475; Fordyce v. Kansas City & N. Connecting R. Co., 145 Fed. 566.

50 Fordyce v. Omaha K. C. & E. R. R., 145 Fed. 544.

51 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 168.

52 U. S. & Mex. Tr. Co. v. Kansas City, Mex. & Orient Ry. Co., C. C. A., 225 Fed. 961; John A. Roebling's Sons Co. v. Idaho Ry., Light & P. Co., C. C. A., 243 Fed. 727.

53 Kneeland v. Bass F. & M. Works, 140 U. S. 592, 35 L. ed. 543; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. ed. 117; Pennsylvania Co. for Insurance v. J. T. & K. W. Ry. Co., 93 Fed. 60; Reinhart v. Augusta M. & Inv. Co., 94 Fed. 901; Central of Ga. Ry. Co. v. Hitchcock, 91 Fed. 209; Ætna Life Ins. Co. v. Leonard, C. C. A., 186 Fed. 148; Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co., 189 Fed. 282. *Cf.* Central Appalachian Co. v. Buchanan, C. C. A., 90 Fed. 454. But see Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 34 L. ed. 379; Am. L. & Tr. Co. v. South Atl. & O. R. Co., 81 Fed. 62; Ruhlender v. Ches., O. & S. W. R. Co., 91 Fed. 5; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. 202; Haehnlen v. Drayton, C. C. A., 192 Fed. 300.

54 Morgan's La. & Tr. R. & S. S. Co. v. Texas C. Ry. Co., 137 U. S. 171, 34 L. ed. 625; Contr. & B. Co. v. Continental Tr. Co., C. C. A.,

In accordance with these principles the practice arose in the Seventh Circuit to impose as a condition upon the appointment of a receiver in a suit for the foreclosure of a railroad mortgage, that debts for materials and supplies and labor furnished to the mortgagor within the six previous months be paid out of the net income or in some cases, out of the proceeds of the sale of the road, before the debt secured by the mortgage.[55]

108 Fed. 1. See George v. St. Louis C. & W. Ry. Co., 44 Fed. 117. Where a claim to a preference is made because money was loaned the mortgagor at the request of the bondholders, a request made by all the bondholders should be shown. In re Kelly v. Green Bay & Minn. R. Co., 5 Fed. 846.

[55] In re Kelly v. Green Bay & Minn. R. Co., 5 Fed. 846. See Union Tr. Co. v. Souther, 107 U. S. 591, 593, 27 L. ed. 488; Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. 471, 474. *Preferences* have thus been given to claims for *coal and other fuel*. Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Clark v. Central of Ga. R. & B. Co., C. C. A., 66 Fed. 803; Va. & A. Coal Co. v. Central of Ga. R. & B. Co., 170 U. S. 355, 42 L. ed. 1068; City Trust Co. v. Sedalia Light & Traction Co., 195 Fed. 845; United States & Mexican Trust Co., C. C. A., 240 Fed. 592; (in some cases allowed, in others disallowed) Pennsylvania Steel Co. v. N. Y. City Ry. Co., 216 Fed. 468. See High on Receivers (4th ed.), §§ 394a-394L, *contra*, Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172. *Locomotives and cars*. Fosdick v. Schall, 99 U. S. 235, 238, 25 L. ed. 339; Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344; Frank v. Denver & R. G. Ry. Co., 23 Fed. 123; Union Trust Co. of New York v. Forty-Second St., M. & St. N. Ave. Ry. Co., 179 Fed. 981. But see Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 93 Fed. 532; McGonkey v. Toledo & O. C. Ry. Co., 146 U. S. 536, 36 L. ed. 1079; Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172; *car springs and spirals*, Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; *jackscrews*, Southern Ry. Co. v. Chapman Jack Co., 117 Fed. 424; Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172; *repairs*, Fosdick v. Schall, 99 U. S. 235, 238, 25 L. ed. 339; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 311, 27 L. ed. 117, 126; Guaranty Trust Co. of New York v. Philadelphia & L. V. Traction Co., 160 Fed. 761. *Contra*, Taylor v. Delaware & E. R. Co., C. C. A., 213 Fed. 622. Repairs by another railway company to a crossing of their tracks, see Missouri, K. & T. Ry. Co. v. City Trust Co., C. C. A., 209 Fed. 45; *rails*, Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458; *board and rations furnished employees*, Finance Co. v. Charleston, C. & C. R. Co., 49 Fed. 693; Northern Pac. R. Co. v. Lamont, C. C. A., 69 Fed. 23; but see Newgass v. Atlantic & D. Ry. Co., 56 Fed. 676; *telegrams*, Newgass v.

Atlantic & D. R. Co., 72 Fed. 712; *furniture, care, heat and light of stations,* Northern Pac. R. Co. v. Lamont, C. C. A., 69 Fed. 23; *globes, burners and wicks,* Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 216 Fed. 468; as to *electric power,* see Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co., 189 Fed. 282; *advertising,* Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 148 Fed. 41; *contra,* Central Tr. Co. v. East Tenn., V. & G. R. Co., C. C. A., 80 Fed. 624. A claim for *oil* necessary for use in operating a railroad, furnished before a default in interest, was subordinated to the lien of the mortgagees; but a claimant for oil furnished since such default was given an equitable lien superior to the mortgagees, when the claimant had accepted a promissory note of the railroad company on account of part of both classes of indebtedness; which note he surrendered to the receiver upon petitioning for the payment of his claim. Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. 703. Claims for *oil lubricants* and *sand* used in the operation of a railroad were allowed a preference over those of general creditors. Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 216 Fed. 468. *Not* for the payment of judgments against the insolvent made by *sureties* upon *appeal* and *supersedeas* bonds. Blair v. St. Louis R. & K. Ry. Co., 23 Fed. 521; Whitely v. Central Tr. Co., C. C. A., 76 Fed. 74, 34 L.R.A. 303; U. S. Fidelity & Guaranty Co. v. U. S. & M. Trust Co., C. C. A., 234 Fed. 238; Equitable Trust Co. v. Birmingham, E. & B. R. Co., 238 Fed. 655; although the appeals were taken a few months before the appointment of the receiver and the payment made after the appointment, Blair v. St. Louis, H. & R. Ry. Co., 23 Fed. 521. *Contra,* Farmers Loan & Trust Co. v. Northern Pac. R. Co., 68 Fed. 36, 39; City Trust Co. v. Sedalia Light & Traction Co., 196 Fed. 845, 849. But a preference was given when the bond holders or their trustee induced the surety to execute the bond or acquiesced in the execution with knowledge that the mortgagor was insolvent. Union Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. ed. 825; Jones v. Central Trust Co., C. C. A., 73 Fed. 568. And when the money or property released by the bond could be traced into the possession of the receiver. Love v. North Am. Co., C. C. A., 229 Fed. 103. Preferences have been allowed to sureties upon *appeal* and *replevin bonds* given on behalf of a receiver, Union Tr. Co. v. Morrison, 125 U. S. 591, 31 L. ed. 825; or of a mortgagee, Jones v. Central Tr. Co., C. C. A., 73 Fed. 568, or, it has been held, of a mortgagor, in order to save the property. City Tr. Co. v. Sedalia Light & Traction Co., 195 Fed. 845. *Contra,* Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 485; Central Tr. Co. of New York v. Third Ave. R. Co., C. C. A., 180 Fed. 710. The Circuit Court of Appeals for the Second Circuit held that the New York Labor Law which gives a preference to the wages of employees upon the receivership of a New York corporation does not apply to a receiver appointed in a foreclosure suit nor

give such laborers preference over mortgagees. Schmidtman v. Atlantic Phosphate & Oil Corp., C. C. A., 230 Fed. 769. Under State statutes preferring the claim of persons who perform labor upon the property, the services of a civil engineer who superintended the construction, Central Tr. Co. v. Richmond N. I. & Br. Co., 51 Fed. 723; and of a managing agent and a superintendent of trains, who occasionally ran cars, cleaned cars, repaired tracks, and acted as "general utility man," were held to be included, Gilchrist v. Helena, H. S. & S. R. Co., 58 Fed. 708; but that of a man who had charge of the office and receipts and entered in a book the time of the workmen as handed in to him was not. Ibid 59. The claim of a secretary for a balance of salary due him within the prescribed time has been thus preferred. Olyphant v. St. Louis & O. S. Co., 22 Fed. 179. But see Wells v. Southern Min. Ry. Co., 1 Fed. 270; Addison v. Lewis, 75 Va. 701, 712, 713; Union L. & T. Co. v. Southern Cal. M. R. Co., 51 Fed. 106. No case as yet extends the preference to the salary of a president. Nat. Bank of Augusta v. Carolina, K. & W. R. Co., 63 Fed. 25; Title Ins. & Tr. Co. v. Home Telephone Co., 200 Fed. 263. A president forfeits any right he may possess to such a preference by publishing in the annual report a statement that his salary has been paid. Addison v. Lewis, 75 Va. 701, 713. A contract for future employment is not binding on the receiver. Keeler v. Atchison, T. & S. F. R. Co., 92 Fed. 545. In the following cases the *fees of attorneys* and counsel for services immediately before the receivership were allowed a preference: Finance Co. v. Charleston C. & C. Co., 52 Fed. 526; Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. For a case where the claim of attorneys for services rendered before the six months' period was denied a preference but allowed payment out of any funds not subject to the mortgage, see Chadbourne v. Equitable Trust Co., C. C. A., 225 Fed. 980. Fees for the services of attorneys and counsel have been *disallowed* a preference where rendered more than a year (Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521), and more than two years, before the receiverships although the services had increased the value of the property. Finance Co. v. Charleston C. & C. Co., 52 Fed. 526. Fees for services performed partly more than six months before the receivership, but principally within that time, were allowed a preference when they had increased the fund. Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. So it seems would be services of counsel for the corporation in preparing bills to be filed by creditors, under which were appointed original and ancillary receivers, and for advice therewith connected, although he did not act as attorney of record. Linen Thread Co. v. A. Booth & Co., C. C. A., 192 Fed. 515. When the order of appointment gives a preference to "wages of employees," counsel fees due an attorney who was not employed as general counsel are not

This is called "the six months rule."[56] Other Circuits adopt a similar practice.[57]

included. Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. But see Gurney v. Atlantic & G. W. Ry. Co., 58 N. Y. 358. Attorneys are denied preferences for services in attempting to set aside the appointment of a receiver that had previously been made, Barker v. Southern Building & Loan Ass'n, 181 Fed. 636; for the payment, at the request of the president of the company, a few weeks before its default, under a promise of reimbursement within a few months, of judgments and other claims against it for wages and injuries to cattle, Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521; and for the payment as sureties upon *appeal bonds* of judgments and for services in securing a preference to unsecured creditors, Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. Railroad mortgages usually provide for the payment, prior to the bonds, of the fees and expenses of the trustee; but where the inaction of the trustee has compelled the institution of litigation by a bondholder or other person interested, the trustee's counsel fees may be disallowed. So when the services were unnecessary. Bound v. S. C. R. Co., 62 Fed. 536. When on account of the inaction of the trustee or otherwise a necessary suit was instituted by a bondholder or other beneficiary to preserve the fund, the *counsel fees* of the plaintiff may be *allowed* a preference. Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; *infra*, § 421. The counsel fees of the attorney for the mortgagor *cannot* be awarded a preference, unless the mortgage so provides. Mercantile Trust Co. v. Missouri K. & T. Ry. Co., 41 Fed. 8, 10; Union Loan & Trust Co. v. Southern Cal. M. R. Co., 51 Fed. 106. *Cf.* Mason v. Pewabic Min. Co., C. C. A., 66 Fed. 391. *Contra*, Bound v. S. C. R. Co., 43 Fed. 404. The fees, counsel fees and other debts of a receiver, and a master appointed in a former suit by shareholders or junior incumbrances, may be *allowed* a preference. Pennsylvania Co. v. J. T. & K. W. Ry. Co., 93 Fed. 60; Reinhart v. Augusta, M. & Inv. Co., 94 Fed. 901. *Contra*, Am. L. & Tr. Co. v. South Atl. & O. R. Co., 81 Fed. 62. A preference was denied to so much of a judgment as included costs incurred before the receivership. Williams v. Groat, 73 Fed. 50; Texas Co. v. International & G. N. Ry. Co., C. C. A., 5th Ct., 237 Fed. 931; out of net income, N. Y. Tr. Co. v. Detroit, T. & I. Ry. Co., C. C. A., 251 Fed. 514; Intercontinental Rubber Co. v. Boston & M. R. R., 245 Fed. 127.

[56] In re Kelly v. Receiver of G. B. & M. R. Co., 5 Fed. 846, 851, note. Title Ins. & Tr. Co. v. Home Telephone Co., 200 Fed. 263.

[57] Atkins v. Petersburg R. Co., 3 Hughes, 307; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. 471, 474; Olyphant v. St. Louis O. & S. Co., 22 Fed. 179; Taylor v. Phila. & R.

This rule is not arbitrary but the allowance of such a preference is held to be discretionary.[58] In the Second Circuit a four months rule was adopted in the order appointing receivers of the New York Street Railway System.[59] Three months is not an uncommon limitation of time.[60] The fixation in the order of appointment of a period, incurrence within which shall give a preference to claims for operating expenses, does not deprive the court of power to allow a preference to claims for supplies previously furnished.[61] Where current accounts furnished periodically down to the date of the receivership include charges for deliveries made shortly before the period fixed, the preference may be extended to include them.[62]

Claims due eight,[63] and eleven [64] months, and even two years,[65] before the receivership; in one case claims for loans to the amount of more than $3,000,000 advanced upon collateral for operating expenses of the railroad within two years before the receivership;[66] a claim for materials furnished three years before the appointment, for which a note was given sixteen months

R. Co., 7 Fed. 377; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. 195; Central Tr. Co. v. Eastern T. & G. R. Co., C. C. A., 80 Fed. 624; Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; *Re* Metropolitan Ry. Receivership, 208 U. S. 90, 52 L. ed. 403.

58 Central Tr. Co. v. Chicago T. & N. Ry. Co., 232 Fed. 939.

59 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 168.

60 Fosdick v. Schall, 99 U. S. 235, 238, 25 L. ed. 339; Hale v. Frost, 9 U. S. 389, 25 L. ed. 419; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 308, 27 L. ed. 117, 125; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 366, 42 L. ed. 1068, 1072. But see Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

61 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 168; Central Trust Co. v. Chicago, A. & N. Ry. Co., 232 Fed. 989.

62 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 168.

63 Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320. *Contra*, Spencer v. Taylor Creek Ditch Co., C. C. A., 194 Fed. 635.

64 Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 286, 44 L. ed. 458, 571.

65 Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 30 Fed. 332, 334, per Brewer, J.; Farmers' L. & Tr. Co. v. Kansas City, W. & N. R. Co., 53 Fed. 182, per Caldwell, J. See Atkins v. Petersburg R. Co., 3 Hughes, 307. But see Duncan v. Mobile & O. R. Co., 2 Woods, 542; Addison v. Lewis, 75 Va. 701, 713, 714.

66 Ibid.

before the receivership;[67] and in one case, those who advanced money, after a default in interest two years before the receivership, to pay the arrears of wages due striking laborers, under a promise from the president of the mortgagor that they would be repaid out of the current earnings of the road, have been given a preference.[68] And by Judge Caldwell, "The debts due from a railroad company for ticket and freight balances, and for work, labor, materials and machinery, fixtures, and supplies of every kind and character done, performed or furnished in the construction, extension, repair, equipment, or operation of said road and its branches in the State of Kansas, and liabilities incurred by said company in the transportation of freight and passengers, including damage to person or property, which have accrued since the execution of the mortgage set out in the bill of complaint," about two years and three months before the receivership;[69] were allowed a preference.

Because, perhaps, of the fact that of the persons injured their poverty has prevented the presentation of their equities with sufficient force, the Federal courts of first instance have usually held that judgments and claims against a railroad company for personal injuries are not entitled to a preference[70] not even over the claims of lessors for rent and of other general creditors.[71] It was so held as to such claims not reduced to judg-

67 Hale v. Frost, 99 U. S. 389, 25 L. ed. 419.

68 Atkins v. Petersburg R. Co., 3 Hughes, 307.

69 Farmers' L. & Tr. Co. v. Kansas City, W. & N. R. Co., 53 Fed. 182, 184.

70 Farmers L. & Tr. Co. v. Kansas City W. & N. R. Co., 53 Fed. 182, 184; Farmers' L. & Tr. Co. v. Northern Pac. R. Co., C. C. A., 79 Fed. 227; Farmers' L. & T. Co. v. Nestelle, C. C. A., 79 Fed. 748; Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471; Front St. C. Ry. Co. v. Drake, 84 Fed. 257; Farmers' L. & T. Tr. Co. v. Longworth, C. C. A., 103 Fed. 336; Hampton v. Norfolk & W. Ry. Co., C. C. A., 127 Fed. 662; Central Tr. Co. v. Warren, C. C. A., 121 Fed. 323; Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209; Atchison, T. & S. F. Ry. Co. v. Osborn, 148 Fed. 606; Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 485; s. c., C. C. A., 216 Fed. 458, 472. *Contra,* Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135; Dow v. Memphis & L. R. Co., 20 Fed. 260, 266, 267.

71 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 485, aff'd C. C. A., 208 Fed. 167. *Contra,* Dow v. Memphis & L. R. Co., 20 Fed. 260, 266, 267. Claims for *damages by fire* to adjoining property caused before the appointment of the receiver have been

ment until after the receivership.[72] But such claims have been allowed a preference out of income that accrued in the hands of a receiver before the institution of a foreclosure suit, although the judgment for the tort was subsequently obtained.[73] Claims under an Employers Liability Act[74] were allowed a preference because they were in the nature of wages.[75] This barbarous doctrine of discrimination against those who suffer most from the insolvency, together with the decisions, that such claims, at least when not reduced to judgment before the adjudication,[76] cannot be proved against the assets of a bankrupt,[77] often makes the cripples and the blind the only creditors who are not paid. Although followed by a few of the Circuit Courts of Appeals,[78] it has never been approved by the Supreme Court of the United States. Judge Lacombe in the Second Circuit although he felt bound by these precedents, refused to sanction a re-organization which did not give the tort creditors an interest in the new corporation upon the same terms as the bondholders.[79] It has been abrogated by statutes in several States.[80]

denied a preference. In re Dexterville M. & B. Co. v. Case, 4 Fed. 873; Hiles v. Case, 14 Fed. 141; s. c., 9 Biss. 549. *Contra*, Am. Waterworks & El. Co. v. Towle, C. C. A., 245 Fed. 706.

72 Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471; St. Louis Tr. Co. v. Riley, C. C. A., 30 L.R.A. 456, 70 Fed. 32; Farmers' L. & Tr. Co. v. Green B., W. & St. P. Ry. Co., 45 Fed. 664; Fidelity Ins. & S. D. Co. v. Norfolk & W. Ry. Co., 114 Fed. 389. See Central Tr. Co. v. East Tenn., V. & G. R. Co., 30 Fed. 895.

73 Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471, 477; s. c., C. C. A., 84 Fed. 274.

74 N. J. P. L. 1911, p. 134.

75 Wood v. Camden Iron Works, 221 Fed. 1010.

76 *Re* Yates, 114 Fed. 365.

77 *Re* Yates, 114 Fed. 365, *Re* N. Y. Tunnel Co., 156 Fed. 688, s. c., C. C. A., 166 Fed. 284; Brown v. United Button Co., C. C. A., 149 Fed. 48, 8 L.R.A. 961.

78 St. Louis Tr. v. Riley, C. C. A., 8th Ct., 70 Fed. 32, 30 L.R.A. 456; Farmers' L. & Tr. Co. v. Nestelle, C. C. A., 79 Fed. 748; Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471; Farmers' L. & Tr. Co. v. Longworth, C. C. A., S. D., 103 Fed. 336; Central Tr. Co. v. Warren, C. C. A., 9th Ct., 121 Fed. 323; Atlantic Tr. Co. v. Dana, C. C. A., 8th Ct., 128 Fed. 208; Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 2nd Ct., 216 Fed. 458.

79 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 168, 185.

80 For the construction of the Arkansas Statute, see North Am. Co. v. St. Louis S. F. & R. Co., 246 Fed. 260. As to the Iowa statute, Central Tr. Co. v. Central Iowa Ry. Co., 38 Fed. 889. Upon that of the North Carolina statute, see

In determining the relative rights of contractors without liens for supplies furnished to a street railway company it was held that they were entitled to a preference over the rest when the material furnished by them was charged to operation and shown by its order, its quantity and nature, and the department for which it was intended to be of such a character; also when it was of that character or delivered to the engineer of the maintenance of way or other superior officer of operation and not charged to construction stores and also where although charged to construction stores it was actually used for the purpose of operation and quantity and character thereto adapted.[81]

A creditor does not lose his preference by taking notes of the railroad company for several months;[82] nor by renewing the notes after the receiver's appointment;[83] nor by reducing his claim to judgment, even though the judgment is entered pending

Finance Co. v. Charleston, C. & C. Ry. Co., 61 Fed. 369; Fidelity I. Tr. & S. D. Co. v. Norfolk & W. R. Co., 90 Fed. 175; s. c., 114 Fed. 389. As to South Carolina statute, see Southern Ry. Co. v. Bonkright, C. C. A., 30 L.R.A. 823, 70 Fed. 442; Phinzy v. Augusta & K. R. Co., 63 Fed. 922; Central Trust Co. v. Madden, C. C. A., 70 Fed. 451; Central Tr. Co. v. Charlotte, C. & A. R. Co., 65 Fed. 257; State v. Port R. & A. Ry. Co., 84 Fed. 67. As to the Tennessee statute, Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 70 Fed. 764. As to the Vermont statute, Grand T. Ry. Co. v. Central Vt. R. Co., 91 Fed. 696. Claims for the value of *a right of way*, including damages to easements, even when reduced to judgment, are *allowed* a preference which is analogous to a vendor's lien. Mercantile Tr. Co. v. Pittsburgh & W. R. Co., 29 Fed. 732; Central Tr. Co. v. Hennen, C. C. A., 90 Fed. 593; Central Tr. Co. v. Louisville & T. Ry. Co., 81 Fed. 772; Fordyce v. Kansas City & N. Connecting R. Co., 145 Fed. 566. *Cf.* Wright v. Kentucky & G. E. Ry. Co., 117 U. S. 72, 29 L. ed. 821; Central Tr. Co. v. Wabash St. L. & P. Ry. Co., 32 Fed. 187.

81 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 229 Fed. 465.

82 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 286, 44 L. ed. 458, 471; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Central T. R. Co. v. Texas & St. L. Ry. Co., 23 Fed. 703. Preferences were refused where notes were originally taken for six months, with the right of renewal for the same term, and the payment had been extended for more than five years, Lackawanna L. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 317, 44 L. ed. 475, 484; and where the notes were endorsed by a third party upon whose credit the money or supplies were advanced. Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 93 Fed. 532.

83 Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596.

the receivership in a suit begun previously,[84] but it was held that he waived his preference by filing under the State statute after the receiver's appointment a notice of a mechanic's lien.[85]

The delivery by the mortgagor of a voucher for the payment of the claim does not give the owner thereof a preference, although it expended the money represented by the voucher for charges that might have been preferred,[86] nor does an attachment obtained after a mortgage had been executed but before the bonds thereunder had been issued;[87] nor recovery of a judgment after a receivership.[88]

In the allowance of interest upon preferred claims, it has been held that the decisions of the State court need not be followed, although they would be binding in actions at common law.[89] It seems that interest will be allowed when stipulated for in the contract;[90] but it has been held that when it is not stipulated for by contract, nor expressly authorized by statute, it cannot be allowed during the delay necessary for the settlement of the receivership.[91]

Nor subsequently to the appointment of the receiver.[92] A purchase of the property of the insolvent who promises to pay preferential claims is liable for interest from the date of his purchase.[93]

In the case of taxes it was held that interest ran until the order for payment, but not subsequently.[94]

84 Central Tr. Co. v. Clark, C. C. A., 81 Fed. 269.

85 State Trust Co. v. Kansas City, P. & G. R. Co., 129 Fed. 455.

86 First Trust & Savings Bank v. Southern Indiana Ry. Co., 195 Fed. 330.

87 *Re* Sunflower State Refining Co., 183 Fed. 834.

88 Mercantile Tr. Co. v. So. State L. & Tr. Co., 86 Fed. 711; Williams v. Groat, 73 Fed. 59.

89 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721, 778.

90 Hitner v. Diamond State Steel Co., 176 Fed. 384; Tredegar Co. v. Seaboard Air Line Ry., C. C. A., 183 Fed. 289. See Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

91 Tredegar Co. v. Seaboard Air Line Ry., C. C. A., 183 Fed. 289. There the receivership was prayed by the insolvent, but a cross-bill asking similar relief was filed by a trustee.

92 New York Trust Co. v. Detroit, T. & I. Ry. Co., C. C. A., 251 Fed. 514; Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 216 Fed. 458.

93 Moore v. Donahoo, C. C. A., 217 Fed. 177.

94 Bear River Paper Bag Co. v. City of Petoscy, C. C. A., 241 Fed. 53.

An assignee of a preferred claim has all the rights of his assignor.[95] A surety upon a supersedeas bond was given subrogation to the preferential rights of the owners of the claims which he paid;[96] but usually a guarantor who pays a debt has no more right to a preference than the original creditor.[97] A purchaser under a decree which provides for the payment of preferred claims cannot contest their right to a preference;[98] and upon their payment he is not entitled to be subrogated to the rights of the claimants.[99] Where payment had been made on account of advances, some of which were entitled to a preference and some not, it was held that in the absence of a prior application by the parties, the mortgagee could procure their application upon the preferred claims.[100] This doctrine applies to the foreclosure of any mortgage except those made by railway, telegraph, or other

95 Union Tr. Co. v. Walker, 107 U. S. 596, 27 L. ed. 490; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Union Tr. Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193. Where, before the appointment of a receiver, a bondholer accepted a compromise which scaled down the indebtedness; in pursuance thereof surrendered his bonds, under an agreement to receive in exchange new bonds secured by a subsequent mortgage; and did receive enough to replace the greater part of those which he surrendered; but there were a few for which no new bonds issued,—apparently because none were engraved for so small an amount;—it was held that his unadjusted claim for this balance remained secured by the old mortgage, and was superior to those under the subsequent mortgage given to secure the new bonds. Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 524. But where rails had been sold to an individual upon his own credit for the use of the railroad by its lessee, a preference against the interest of the lessor was denied. Rhulender v. Ches., O. & S. W. R. Co., C. C. A., 91 Fed. 5. For a case where it was held that a party who paid a preferred claim became an equitable assignee of the preference, see Kneeland v. Luce, 141 U. S. 491, 35 L. ed. 830. For one where it was held that he did not, see U. S. Tr. Co. v. Western C. Co., C. C. A., 81 Fed. 454.

96 Love v. North Am. Co., C. C. A., 229 Fed. 103.

97 Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. 246; Blair v. St. Louis, H. & K. Ry. Co. (Norton, Intervenor), 23 Fed. 523. But see Union Tr. Co. v. Morrison, 125 U. S. 591, 31 L. ed. 825; Peoples v. Peoples Bros., 254 Fed. 489.

98 Swann v. Wright's Ex'r, 110 U. S. 590, 28 L. ed. 252. St. Louis S. W. Ry. Co. v. Stark, 55 Fed. 758; *infra*, § 394g; Laughlin v. U. S. Rolling Stock Co., 64 Fed. 25.

99 Morgan's L. & T. R. & S. S. Co. v. Moran, 91 Fed. 22.

100 Illinois T. & S. Bank v. Ottumwa El. Ry. Co., 89 Fed. 235.

companies to which are delegated the right of eminent domain or which are engaged in public service,[101] is a mooted question. It applies to a mortgage made by an electric light company.[102] It has been extended to a receivership of a mine,[103] but not to a building company.[104] It is doubtful whether it applies to a holding company which has the control of a system of street railroads.[105]

It has been held that pending a receivership in a Federal court, where parties are entitled to a lien, and can secure it by proceedings under a State statute, they are not required to go to the expense of such proceedings, but the Federal court will act as though all needful steps had been taken to establish the lien;[106] and that "where like demands are presented from other States in which no statutory lien thereon exists, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis."[107] The right to a preference may be lost by laches;[108] but it need not be asserted when the claim is first proved.[109] Laches, during which preference claims have arisen, may deprive a general creditor of his right to compel a receiver in a foreclosure suit to surrender property not covered

101 Wood v. Guarantee Tr. & S. D. Co., 128 U. S. 416, 32 L. ed. 472; Rabt v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456; Reyburn v. Consumers' Gas, F. & L. Co., 29 Fed. 561; Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. 436; Fidelity I. & S. D. Co. v. Shenandoah Iron Co., 42 Fed. 372; U. S. Investing Corporation v. Portland Hospital, 40 Or. 523, 67 Pac. 194, 56 L.R.A. 627.

102 Illinois Tr. & Sav. Bank v. Ottumwa El. Ry. Co., 89 Fed. 235.

103 Reinhart v. Augusta M. & I. Co., 94 Fed. 901. But see Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co., 42 Fed. 372.

104 Central Trust Co. v. Union Terminal Co., 253 Fed. 429. See Rabt v. Attrill, 106 N. Y. 423, 6 Am. Rep. 456.

105 Westinghouse El. & Mfg. Co. v. Brooklyn Rapid Transit Co., C. C. A., 260 Fed. 550. See *infra*, § 309.

106 Brewer, J., in Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. 673, 674, 675; Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861; Commonwealth Roofing Co. v. North Am. Tr. Co., C. C. A., 135 Fed. 984. But see Hassall v. Wilcox, 130 U. S. 493, 32 L. ed. 1001.

107 Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862.

108 Lockport Felt Co. v. United Box Board & Paper Co., 189 Fed. 767; First Trust & Savings Bank v. Southern Indiana Ry. Co., 195 Fed. 330, where a sale had taken place.

109 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 187 Fed. 287.

by the mortgage.[110] In one case, a preference was denied, when a majority of the creditors of the same class had waived their right to the same.[111] Where a receiver was appointed because the taxes upon the mortgaged premises were unpaid, there being no proof then of any other danger to the security of the mortgagee and the mortgage not covering the rents; it was held that after payment of such taxes and the expense of the receivership, the balance of the rents collected by him must be paid to the owner of the equity of redemption although a foreclosure sale had meanwhile taken place and resulted in a deficiency.[112] It was held that intervening petitions filed by judgment creditors, after the appointment of a receiver under a creditor's bill, operated as equitable levies and created equitable liens for the satisfaction of the same out of the income and property of the corporation from the date of their filing, subject to prior liens and superior equities;[113] and that where a foreclosure suit had been begun, subject to the appointment of such receiver a mortgagee could properly assert its right to possession intervention in the receivership, and that such intervention gave it a prior right to the income earned by the receiver over subsequent intervening judgment creditors whose judgments were obtained after the receiver was appointed, when the mortgage covered all the defendant's property and income, although the existing receivership had not been formally extended for the benefit of the mortgagee prior to the judgment creditor's intervention.[114]

§ 305b. Practice upon application for such preference. A claimant to a preference of a class for which no provision has been made by a previous order or decree cannot regularly apply upon a motion, but he should plead his claim in a petition for an intervention,[1] or in a proper case in an original bill,[2] an original bill is the proper practice when a preference is sought over the lien of a mortgagee which is not a party of the suit.[3]

110 State Tr. Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398.

111 Empire State Surety Co. v. Carroll County, C. C. A., 194 Fed. 593.

112 So. Building & L. Ass'n v. Carey, C. C. A., 114 Fed. 288.

113 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209.

114 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209.

§ 305b. 1 Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. 561.

2 Louisville & N. R. Co. v. Memphis G. L. Co., C. C. A., 125 Fed. 7.

3 Texas Co. v. International & G. N. Ry. Co., C. C. A., 237 Fed. 931.

When there are net earnings in the hands of the receiver claimants entitled to a preference may apply for payment without waiting the termination of the receivership.[4] But they must allege and prove that the receivers have sufficient funds to pay them.[5] It has been held that pending a receivership in a Federal court, where parties are entitled to a lien, and can secure it by proceedings under a State statute, they are not required to go to the expense of such proceedings, but the Federal court will act as though all needful steps had been taken to establish the lien;[6] and that "where like demands are presented from other States in which no statutory lien therefor exist, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis."[7]

The right to a preference may be lost by laches;[8] but it need not be asserted when the claim is first proved.[9] Laches, during which preferential claims have arisen, may deprive a general creditor of his right to compel a receiver in a foreclosure suit to surrender property not covered by the mortgage.[10] A preference was denied, when a majority of the creditors of the same class had waived their right to the same.[11]

Where a receiver was appointed because the taxes upon the mortgaged premises were unpaid, there being no proof then of any other danger to the security of the mortgagee and the mortgage not covering the rents; it was held that, after payment of such taxes and the expense of the receivership, the balance of the rents collected by him must be paid to the owner of the

4 Texas Co. v. International & G. N. Ry. Co., C. C. A., 237 Fed. 921.

5 Loveland & Hinyan Co. v. Blair, C. C. A., 222 Fed. 207.

6 Brewer, J., in Central Tr. Co. v. Texas, & St. Ry. Co., 23 Fed. 673, 674, 675; Treat, J., in Blair v. St. Louis, H. & R. Co., 19 Fed. 861; Commonwealth Roofing Co. v. North Am. Tr. Co., C. C. A., 135 Fed. 984. But see Hassell v. Wilcox, 130 U. S. 493, 32 L. ed. 1001; Appeal of James Rees & Sons Co., C. C. A., 237 Fed. 555 (in admiralty).

7 Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862.

8 Lockport Felt Co. v. United Box Board & Paper Co., 189 Fed. 767; First Trust & Savings Bank v. Southern Indiana Ry. Co., 195 Fed. 330, where a sale had taken place.

9 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 187 Fed. 287.

10 State Tr. Co. v. Kansas City, P. & G. Co., 120 Fed. 398.

11 Empire State Surety Co. v Carroll County, C. C. A., 194 Fed. 593.

equity of redemption although a foreclosure sale had meanwhile taken place and resulted in a deficiency.[12]

It was held that intervening petitions filed by judgment creditors, after the appointment of a receiver under a creditor's bill, operated as equitable levies and created equitable liens for the satisfaction of the same out of the income and property of the corporation from the date of their filing, subject to prior liens and superior equities;[13] and that where a foreclosure suit had been begun, subject to the appointment of such receiver, a mortgagee could properly assert its right to possession by intervention in the receivership, and that such intervention gave it a prior right to the income earned by the receiver over subsequent intervening judgment creditors, whose judgments were obtained after the receiver was appointed, when the mortgage covered all the defendant's property and income, although the existing receivership had not been formally extended for the benefit of the mortgagee prior to the judgment creditor's intervention.[14] It has been held that an averment, that when an action had occurred the railroad was being operated by a company acting as the agent of the bondholders, was a conclusion of law too vague and general to show with sufficient certainty that it was well founded;[15] that an averment, upon information and belief, that within twelve or eighteen months before the complainant's bill was filed there had been a diversion of a gas company's earnings to the payment of interest on its mortgage bonds and for the improvement of the plant, which failed to allege the dates or amounts of such diversion or that they occurred within the time when the indebtedness to the complainant arose, was insufficient because of its lack of certainty;[16] but that, where the pleader avers the receipt by the receiver of earnings properly applicable to his claim, he need not allege that such earnings had not been disbursed, since such fact, if it existed, was a matter of defense.[17] The attorneys of both the

12 So. Building & L. Ass'n v. Carey, C. C. A., 114 Fed. 288.

13 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209.

14 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. See § 302b, *supra*.

15 Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471.

16 Louisville & N. R. Co. v. Memphis Gas Light Co., C. C. A., 125 Fed. 97.

17 Veatch v. Am. L. & T. Co., C. C. A., 84 Fed. 274.

receiver and the complainant should have notice of the hearing of such claim before a master.[18] An application for a preference may be denied with leave to renew until other claims to preferences have been decided and the determination of litigation which may increase the assets.[19] An entry upon the books of the mortgagor showing the claim to be good is, in the absence of suspicious circumstances, *prima facie* proof.[20] The consent of the receiver cannot prevent any creditor who is a party to the record from taking an appeal from an order granting a preference to another.[21] Authority given to the receiver in the order to pay a certain class of claims as preferences protects him in case he makes such payments, but is not an adjudication which gives them a right to demand such priority, should the court subsequently determine that they are not entitled thereto.[22] An order directing a receiver to carry out his corporation's contracts does not necessarily give those who claim damages for a breach of those contracts a preference over lienholders.[23] An order granting a preference may be set aside at any time before the final decree.[24]

§ 306. Property over which receivers may be appointed. A receiver may be appointed to preserve and take possession of every kind of property, whether the same be what is termed corporeal or incorporeal, which can be seized by execution at law or which constitutes equitable assets.[1] Thus receivers have been appointed to collect and hold the profits of a rectory,[2] of

18 Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862.

19 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 182 Fed. 155.

20 Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862, Treat, J.; s. c., 22 Fed. 471, 472, Brewer, J.

21 Empire State Surety Co. v. Carroll County, C. C. A., 194 Fed. 593.

22 Gregg v. Met. Tr. Co., 197 U. S. 183, 149 L. ed. 717; Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172, 175; Chicago & A. R. Co. v. United States & Mexican Trust Co., 225 Fed. 940.

23 Olyphant v. St. Louis O. & S. Co., 28 Fed. 729.

24 Atchison, T. & S. F. Ry. Co. v. Osborn, C. C. A., 148 Fed. 606.

§ 306. 1 Davis v. Gray, 16 Wall. 203, 217, 21 L. ed. 447, 452; Davis v. Duke of Marlborough, 2 Swanst. 108, 127; Blanchard v. Cawthorne, 4 Sim. 566. See Palmer v. Vaughan, 3 Swanst. 173; Meriwether v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200.

2 Silver v. Bishop of Norwich, 3 Swanst. 112; White v. Bishop of Peterborough, 3 Swanst. 109.

a college fellowship,[3] of a patent for an invention,[4] of the offices of a master forester in a royal forest,[5] and of a county clerk of peace;[6] of the tolls of a turnpike;[7] to manage and collect the profits of mines,[8] plantations,[9] a theatre,[10] a newspaper,[11] a hotel,[12] a ship,[13] a line of telegraph,[14] a wireless telegraph system,[15] and a railroad;[16] to exercise the right to sell

3 Feistel v. King's College, 10 Beav. 491.

4 Parkhurst v. Kinsman, 2 Blatchf. 78. See *supra*, § 302.

5 Blanchard v. Cawthorne, 4 Sim. 566.

6 Palmer v. Vaughan, 3 Swanst. 173.

7 Knapp v. Williams, 4 Ves. 430, note; Dumville v. Ashbrooke, 3 Russ. 98, note.

8 Jefferys v. Smith, 1 J. & W. 298; Tornanses v. Melsing, C. C. A., 106 Fed. R. 775, 784, Ross, J.: "In the case of a vein or lode mine, with tunnels, drifts, and shafts in which there are timbers to be placed, replaced, or repaired, or water to be controlled, it sometimes happens that the appointment of a receiver becomes necessary to take possession of and operate the mine pending the litigation, in order to preserve the property; but even in that class of cases the necessity for a receiver is not of frequent occurrence. This is well shown in the case of Bigbee v. Summerour, 101 Ga. 201, 28 S. E. 642. So, too, in the case of placer mining claims valuable only for the oil contained in them, where it becomes necessary for the proper preservation of the claim that the ground be worked to prevent its substance from being drawn off by the operation of wells on adjoining ground, or where it is shown that a receiver is necessary in order that the annual work required by law may be performed for the benefit of the party who may ultimately be adjudged entitled to the ground."

9 Morris v. Elme, 1 Ves. Jr. 139.

10 Const. v. Harris, T. & R. 496, 528.

11 Chaplin v. Young, 6 L. T. (N. S.) 97; Kelley v. Hutton, 17 W. R. 425.

12 Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456; Cater v. Woodbury, 3 App. D. C. 60.

13 Cronenwett v. Boston & A. Tr. Co., 95 Fed. 52. In this case the receiver, who had been appointed under a creditor's bill against an insolvent corporation, was directed to distribute the insurance money after the vessel's loss in accordance with the priorities that would be recognized by a court of admiralty.

14 United L. Tel. Co. v. Boston S. D. & T. Co., 147 U. S. 431, 37 L. ed. 231.

15 Williams v. United Wireless Tel. Co., N. Y. Sup. Ct. June 20th, 1911, Cohalan, J., in which the author was counsel.

16 Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692; Davis v. Gray, 16 Wall. 203; 21 L. ed. 447; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; *infra*, § 308. Before the passage of a statute allowing it to be done, the English court held that a receiver could not be appointed to manage a railroad, Gardner v. London, C. & D. Ry. Co., L. R. 2 Ch. App. 201; but such an appointment is authorized without statutory authority in this

a conditional right of membership in an exchange;[17] to exercise options to buy land;[18] and to take possession of the estate of an intestate with power to apply for letters of administration.[19] After the repeal of the charter of the city of Memphis, a receiver was appointed to take possession of all its property which could be subjected to the payment of its debts.[20] But the Supreme Court refused to direct such a receiver to levy taxes,[21] or to

country, and even in England a receiver might always be appointed to receive the tolls of a railroad. Hopkins v. W. & B. C. Co., L. R. 6 Eq. 437; Jones on Railroad Securities, § 456. A lugubrious picture of the result of such appointments was drawn by Miller, J., in Barton v. Barbour, 104 U. S. 126, 137, 138. See also the language of the Governor of Texas quoted in Mercantile Tr. Co. v. Texas & P. Ry. Co., 51 Fed. 529, 533, 537.

17 Powell v. Waldron, 89 N. Y. 328; In re Ketchum, 1 Fed. 840; In re Werder, 15 Fed. 789; Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Platt v. Jones, 96 N. Y. 24.

18 Twin City Power Co. v. Barrett, C. C. A., 126 Fed. 302.

19 *Re* Mayer, L. R. 3 P. & D. 39.

20 Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197.

21 "1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose, and hose-carriages, engine-houses, engineering instruments and generally everything held for governmental purposes, cannot be subject to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city such property passes under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn. 2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality has not been generally accepted. 3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature. 4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief." Chief Justice Waite in Merriwether v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200. Upon the first three propositions the court was unanimous. The fourth was decided by a majority only. See a criticism of this case

collect those already levied.[22] Where an order appointing a receiver of a railroad company directed that "all the books, vouchers and papers touching the operation of the railroad," and "all and every part of the properties, interest, effects, moneys, receipts, earnings" of the railroad, should be delivered to the receiver, it was held, that the order included the company's seal and all records of its past transactions and books relating to its previous history.[23] A receiver of a corporation is entitled to remittances by its officers to its general account received by a bank subsequent to his appointment and the bank can assert no lien against the same.[24]

The receiver appointed in a suit to foreclose a mortgage has no right to collect or retain the income earned before his appointment, although paid subsequently to such appointment,[25] unless the mortgage expressly pledges the rents and profits or the mortgagee has previously demanded possession to which he was entitled.[26] The extension of a receivership under a creditor's suit so as to protect the rights of mortgagees does not, except under similar circumstances, give the mortgagee a right to the rents and profits previously earned.[27] Where a lease required the lessee to pay as rent dividends upon the stock of the lessor a receiver appointed in a foreclosure suit acquired no right to an installment which fell due before his appointment.[28]

A court has power to appoint a receiver of the property of a foreign corporation within the State.[29] Where obedi-

by Judge Baxter in Garrett v. Memphis, 5 Fed. 860.

22 Thompson v. Allen County, 115 U. S. 550, 558, 29 L. ed. 472, 475.

23 American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 52 Fed. 937.

24 Horn v. Pere Marquette R. Co., 151 Fed. 626, 627. But see Chapman v. Mills & Gibb, 241 Fed. 715.

25 Hook v. Bosworth, 64 Fed. 443; Chicago & A. R. R. Co. v. U. S. & Mex. Tr. Co. C. C. A., 225 Fed. Fed. 940; Re Brose, C. C. A., 254 Fed. 664; London-Arizona Consol. Copper Co., v. Gila C. S. Co., 257 Fed. 324; Ball v. Improved Property Holding Co. of New York, C. C. A., 220 Fed. 637.

26 Chicago & A. R. R. Co. v. U. S. & Mex. Tr. Co. C. C. A., 225 Fed. 940; Re Brose, C. C. A., 254 Fed. 664; London-Arizona Consol. Copper Co. v. Gila C. S. Co., 257 Fed. 324. See Ball v. Improved Property Holding Co. of New York, C. C. A., 220 Fed. 637.

27 Ibid.

28 Pennsylvania Steel Co. v. New York City Ry. Co., 225 Fed. 96.

29 De Bemer v. Drew, 57 Barb. 438; Murray v. Vanderbilt, 39 Barb. 140; Barclay v. Quicksilver Min. Co., 9 Abb. Pr., N. S., 283. See,

ence to its decree can be compelled by process against the person of a defendant, it seems that a court of equity may appoint a receiver of property, real or personal, situated beyond its territorial jurisdiction.[30] The Judicial Code provides: "Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie

also, s. c., 6 Laus. 25; Redmond v. Hoge, 3 Hun (N. Y.) 171; Popper v. Supreme Council, 61 App. Div. (N. Y.) 405; Rousens v. Manufacturing & Selling Co., 99 App. Div. (N. Y.) 214.

30 Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96; Stewart v. Laberee, C. C. A., 185 Fed. 471. The English Court of Chancery has appointed receivers of property in India, Logan v. Prince of Coorg, Seton on Decrees, 5th ed., 681; Keys v. Keys, 1 Beav. 425; China, Honlditch v. Donegal, 8 Bligh N. S. 301; Italy, Hinton v. Galli, 24 L. J. Ch. 121; New South Wales, Underwood v. Frost, Seton on Decrees, 5th ed., 681; Canada, Tyler v. Tyler, Seton on Decrees, 5th ed., 682; the West Indies, Bunbury v. Bunbury, 1 Beav. 318, 331.

or be.''[31] It has been held that this authorizes the Circuit Judge or the Circuit Court of Appeals not to disapprove the appointment but to disapprove only the receiver's control of property outside of the district in which he was appointed.[32] A proceeding to obtain such disapproval was dismissed because of the expiration of the thirty days.[33] Otherwise, in the absence of a statute vesting the assets of the corporation in him, it is doubtful whether a receiver appointed by a court of the defendant's domicile has any power over assets in another State.[34]

31 Jud. Code, § 35, 36 St. at L. 1087.

32 Re Brown, C. C. A., 242 Fed. 452, 455, Per Aldrich, J.: ''We accept the view that this petition for disapproval is based upon the theory that the disapproval if it results at all, is to result from a finding in this proceeding that the appointment in Massachusetts was procured by fraud, and we are compelled to accept this view because no other ground is suggested. If the statute should be construed as contemplating outside disapproval upon such ground, a disapproval might follow, and as a result there would be the anamalous, if not grotesque, legal situation of an outside collateral disapproval on the ground of fraud on the original decree, which would mean no receivership in the outside district, while under the express provisions of section 56, the Massachusetts end of the receivership would be operative. Such would be an unworkable situation, and one presenting a diversity of management which would be disastrous to a corporation whose property the subject of the suit, lies within different states in the same judicial circuit.

''There might be business relations which would justify disapproval of outside jurisdiction and control by the original receiver or personal, prudential, and perhaps other reasons, not going to the merits of the question whether there should be a receivership, why the same receiver should not act in all outside districts, and reasons which might become the ground not for inquiring into the legality of the original receivership decree, but grounds for disapproval of its outside operativeness.

''While the scope or the extent of the territorial operativeness of a receivership appointment under section 56 in one district of a circuit, where the property lies within different states in the same judicial circuit, is made subject to the disapproval of a Circuit Judge and of Circuit Courts of Appeals, it is clear that the plain adequate, and sole intended review of the legality of the receivership decree is by appeal by the aggrieved party under section 129 of the Judicial Code direct from the court making the order to the Circuit Court of Appeal for the circuit.''

33 *Re* Brown, C. C. A., 242 Fed. 452.

34 Keatley v. Furey, 226 U. S. 399, 403, 404, 57 L. ed. —; Chipman v. Manufacturers' Nat. Bank, 156 Mass. 147, 148, 149.

It has been held that where a State is divided into several districts and the statutes permit process in one to be served in another, a receiver appointed in one district has power over all property in the State.[35] Until an ancillary appointment has been made a receiver has no power over property in another Circuit except by the comity of the court there held.[36] It has been held that the title of a receiver dates from the time of his appointment and the filing of the same in the clerk's office, cutting off all rights or liens that accrued between then and the time when the order was transcribed by the clerk and the bond filed;[37] but that it does not relate back to the time when the order was signed.[38]

§ 307. Powers of receivers in general. The powers of a receiver, in the absence of any special authority given in the order for his appointment, are very limited. He can take possession of the property which he is appointed to receive.[1] If any of it is land under lease, he can accept attornment and payment of rent and arrears of rent from the tenants.[2] He can give notice to quit to tenants from year to year;[3] and in States where the remedy by distress still exists, he may distrain for rents not more than one year in arrear.[4] He may also pay out small sums of money in customary repairs of the property which he holds in trust,[5] and insure it against fire.[6] He may occupy

35 Horn v. Pere Marquette R. Co., 151 Fed. 626, 631.

36 Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871; Kirker v. Owings, C. C. A., 98 Fed. 499; Greene v. Star C. & P. Car Co., 99 Fed. 656; Morrill v. Am. Reserve Bond. Co., 151 Fed. 305. *Supra*, § 93, *infra*, §§ 304, 306. For cases where foreign receivers have been allowed to collect domestic assets without ancillary appointments, see Farley v. Talbee, 55 Fed. 892; *supra*, § 93, *infra*, § 311.

37 Horn v. Pere Marquette R. Co., 151 Fed. 626, 627.

38 Wilcox v. National Shoe & Leather Bank, 67 App. Div. 466.

§ 307. 1 Daniell's Ch. Pr. (2d Am. ed.) 1987, 1988.

2 Codrington v. Johnstone, 1 Beav. 520; McDowell v. White, 11 H. L. C. 570.

3 Doe v. Reed, 12 East, 57, 59.

4 Pitt v. Snowden, 3 Atk. 750; Brandon v. Brandon, 5 Madd. 473; Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452.

5 Atty. Gen. v. Vigor, 11 Ves. 563; Daniell's Ch. Pr. (2d Am. ed.) 1990.

6 Thompson v. Phœnix Ins. Co., 136 U. S. 287, 293, 294, 34 L. ed.

leased property for a reasonable time until he has sufficient information to enable him to determine whether to retain or abandon the lease,[7] but not, it has been held, when the landlord was entitled to possession before his appointment.[8] Beyond this, he can do nothing without express authority of the court.[9] He cannot sue to recover debts or other property belonging to the estate,[10] nor even, it seems, defend suits or actions brought against him,[11] nor spend any money whatever which belongs to the estate, except such very small sums as are above referred to,[12] without an order authorizing him to do so, made at or subsequent to his appointment. If, however, he does any of these things without leave and the court determines that the money thus expended has been beneficial to the estate, his expenditures for that purpose may be allowed him.[13] Otherwise, he must make good all loss thereby occasioned.[14] It seems that an unauthorized contract made by him with a stranger may be ratified by an order of the court made before the stranger has given notice of his intention to abandon it.[15] A fire insurance company which has received a premium from a receiver cannot in an action on the policy dispute his authority to insure the property;[16] but it has been held that the holder of a note assigned to him by receivers after it was due, could not recover its amount unless he proved that the court had authorized the assignment.[17]

408, 411, 412; Brown v. Hazlehurst, 54 Md. 26, 28.

7 Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454, *infra*, § 313.

8 Odell v. H. Batterman Co., C. C. A., 223 Fed. 292.

9 Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639.

10 Wynne v. Lord Newborough, 1 Ves. Jr. 164; s. c., Brown, Ch. C. 88; Green v. Winter, 1 J. Ch. (N. Y.) 60.

11 Swaby v. Dickon, 5 Sim. 629.

12 Atty. Gen. v. Vigor, 11 Ves. 563.

13 Tempest v. Ord, 2 Meriv. 55; Blunt v. Clitherow, 6 Ves. 799; Thompson v. Phœnix Ins. Co., 136 U. S. 287, 294, 34 L. ed. 408, 412.

14 Atty. Gen. v. Vigor, 11 Ves. 563.

15 Koontz v. Northern Bank, 16 Wall. 196, 21 L. ed. 465; Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639. *Cf.* Girard L. A. & Tr. Co. v. Cooper, 51 Fed. 332. See *Re* Hollingsworth & Whitney Co., C. C. A., 242 Fed. 253; Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454.

16 Thompson v. Phœnix Ins. Co., 136 U. S. 287, 294, 295, 34 L. ed., 408, 412.

17 The Clara A. M'Intyre, 94 Fed. 552.

It seems that an order giving a receiver authority to sell carries with it authority to execute and deliver to the purchaser a deed;[18] but if not, a subsequent confirmation by the court of a sale irregularly made validates from that time a deed previously executed by the receiver.[19] When a receiver who has been ordered to sell the property on a specified day was restrained from making a sale it was held that a sale subsequently made after the dissolution of the injunction but no other order upon the subject nor second notice of sale was a nullity.[20] Under any order authorizing the receiver of a bank to sell at a private sale all assets which were in his judgment bad and doubtful, "consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank, and other personal and chattel property and evidence of indebtedness, for cash," it was held that this did not give him power to sell a contract with the State for the purchase of tide lands to which as owner of the adjacent upland the bank was entitled.[21] It has been held that a "purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the courts to sell the property; that a sale was made under such authority, that the sale was confirmed by the court; and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by an order of the court, it would in that case pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case, or of the officer in enforcing its process."[22]

Unless the court has directed that the sale be made free of

[18] Koontz v. Northern Bank, 16 Wall. 196, 201, 21 L. ed. 465, 468.

[19] Koontz v. Northern Bank, 16 Wall. 196, 21 L. ed. 465.

[20] Dull v. Le Fevre, 222 Fed. 471.

[21] Baker v. Schofield, 221 Fed. 322, 323.

[22] Mr. Justice Field in Koontz v. Northern Bank, 16 Wall. 196, 202, 21 L. ed. 465, 468.

incumbrances, as is frequently done in bankruptcy,[23] the purchaser at a receiver's sale takes the property subject to all paramount liens.[24]

The court may authorize a receiver to complete the construction of a railroad,[25] or other public work,[26] under a contract with the person over whose estate he was appointed, and, even it has been held in a case of a corporation not engaged in public service,[27] to continue for a limited time the defendant's business.[28] This power should be exercised with great care and caution.[29] It is the proper practice to serve upon the mortgagee notice of the application for such authority, which should rarely be given when the mortgagee objects.[30] He may be authorized to borrow money and to issue as security receiver's certificates for that purpose.[31]

An order authorizing a receiver to make a contract is con-

23 See Chapter XXXIV, *infra.*

24 Black v. Manhattan Trust Co., 213 Fed. 692.

25 Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639; La Crosse Railroad Bridge, 2 Dillon, 465.

26 Patterson v. Patterson, 182 Fed. 952. The receiver of a water company may be authorized to increase his charges for water when they are not limited by statute or ordinance. C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 348. When he furnished water to a city for the use of the fire department, without a contract as to the price, it was *held* that he should be paid a fair compensation for the service, a just proportion of the operating expenses, taxes and costs of administration, and of a just and reasonable return on the cost of reproducing the plant and its growing value. Ibid.

27 First Nat. Bank v. Detroit Trust Co., C. C. A., 248 Fed. 16; Butterworth v. Degnon Contract Co., C. C. A., 214 Fed. 772.

28 Gay v. Hudson River El. Power Co., 173 Fed. 1003; Butterworth v. Degnon Contract Co., C. C. A., 214 Fed. 772. Where authority was given to contract to supply electrical power for a term of five years. An order directing that receiver of a hotel to carry on and manage the business of the hotel as previously carried on, was held to authorize him to incur the customary debts in carrying on that business. Cate v. Woodbury, 3 App. D. C. 60; s. c., Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447.

29 First Nat. Bank v. Detroit Trust Co., C. C. A., 248 Fed. 16.

30 Kennedy v. R. R. Co., 5 Dill 592, Fed. Cas. No. 7,707; Dempsey v. Baltimore & O. R. Co. 219 Fed. 619, 620; Fidelity Title & Tr. Co. v. Kansas National Gas Co., 219 Fed. 614.

31 Kennedy v. St. Paul & P. Ry. Co., 2 Dillon, 448, see § 309 *infra.*

strued strictly in favor of the estate.[32] After the execution of a contract has been authorized by the court, the order will not ordinarily be revoked except in case of fraud.[33] A receiver cannot accomplish by estoppel or waiver what he has no power to do directly.[34] Without authority from the court a receiver cannot by receipt of rent or otherwise bind the parties or a subsequent purchaser to recognize a lease.[35]

The court may, however, either in the original order of appointment or subsequently, give a receiver very extensive powers. It is usual in the order appointing a receiver to give him power to bring and defend suits or actions affecting the estate. Authority to appear in and defend a suit gives the receiver power to execute a forthcoming bond or such other bond as is required in the litigation.[36] He may be authorized to perform an agreement for the settlement of a death claim made by the corporation before his appointment.[37] Other and much more extensive authority, such as to borrow money needed for the proper administration of his trust, and issue as security therefor certificates giving their owner a first lien upon the estate;[38] to contract for the construction of a bridge;[39] to levy an assessment upon stockholders;[40] to pay a faithful and deserving employee his wages during the time that he is kept from work by the result of an injury received while at work

32 Farmers' L. & T. R. Co. v. Logansport, C. & S. W. Ry. Co., 4 Fed. 184.

33 Wabash, St. L. & P. Ry. Co. v. Central Trust Co., 22 Fed. 269. But see Weeks v. Weeks, 106 N. Y. 626.

34 Van Dyck v. McQuade, 85 N. Y. 616; Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. 653, 659. But see Central Tr. Co. v. Ohio Central R. Co., 23 Fed. 306; Armstrong v. Armstrong, L. R. 12 Eq. 614; Koontz v. Northern Bank, 16 Wall. 196, 21 L. ed. 465; Stanton v. Ala. & C. R. Co., 31 Fed. 585.

35 Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. 653, 659. See *infra*, §§ 311, 313.

36 United States F. & G. Co. v. First Nat. Bank, C. C. A., 239 Fed. 227.

37 Harmon v. Blackwell, C. C. A., 232 Fed. 440.

38 Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; *infra*, § 309. An order authorizing a receiver to borrow money to expend in building an unfinished portion of a railroad does not authorize him to contract for municipal aid in such construction. Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639.

39 La Crosse Railroad Bridge, 2 Dill. 465.

40 Kirkpatrick v. Am. Alkali Co., 135 Fed. 230.

for the receiver, without contributory negligence, but for which the receiver is not responsible;[41] and in Ireland, to spend money in relieving and giving employment to poor tenants, for the reason that they may be enabled in the future to pay their rent more regularly,[42] have been given to receivers. The order appointing a receiver of land usually contains a clause empowering him to set and let the same.[43] Even with this, it seems that without special authority he cannot let any part thereof so as to bind the estate for a longer period of time than is authorized by the Statute of Frauds,[44] but that a lease made for a longer time would bind a tenant who had accepted it.[45] It is the safer practice for the receiver not to employ a rent collector until he has authority from the court.[46] Where the board of directors may assess the stockholders, the receiver may be empowered to do the same.[47]

Ordinarily a receiver has not the right to use a patent under a license to an individual over whose estate he was appointed.[48] Where the license was given to a co-partnership it enures to the benefit of the receiver of the firm.[49] It has been held that the same rule applies to a receiver of a corporation.[50] A receiver of a dissolved corporation may sustain a bill to compel the assignment to him of a patent by the legal owner when the corporation had the equitable title to the same.[51] The court may authorize a receiver of a corporation to make any contract within the corporate powers, provided, at least, that it does not bind the property after the receivership is terminated.[52]

41 Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 33 Fed. 701; s. c., Blaener, Intervenor, 41 Fed. 319, limited by Thomas v. East Tenn., V. & G. Ry. Co., 60 Fed. 7. But see Hoyt v. Thompson, 5 N. Y. 320.

42 Jackson v. Jackson, 2 Hogan, 238.

43 Daniell's Ch. Pr. (2d Am. ed.) 1989.

44 Kerr on Receivers (2d Am. ed.) 210, 211.

45 Dancer v. Hastings, 4 Bing. 2; Kerr on Receivers (2d Am. ed.) 211.

46 Peters v. John Kress Brewing Co., N. Y., Sp. Tm., N. Y. Co. Dec. 13, 1905.

47 Maxwell v. Akin, 89 Fed. 178.

48 Curran v. Craig, 22 Fed. 101.

49 Montrose v. Mabie, 30 Fed. 234.

50 Schmidt v. Central Foundry Co., 218 Fed. 466.

51 McCulloh v. Association Horlogerie Suisse, 45 Fed. 479.

52 South Carolina & G. R. Co. v. Carolina C. E. & C. Ry. Co., C. C. A., 93 Fed. 543, 553.

§ 308. Powers of receivers of railroads. Very extensive powers are often granted to the receivers of railroads.[1] And in a carefully considered opinion, Mr. Justice Bradley said: "It may be laid down as a general proposition, that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court or to the master appointed in that behalf, for advice and authority in any matter of importance, which may require a considerable outlay of money in lump; and except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet with his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance and obtain his authority for the purchase or improvement proposed."[2]

§ 308. [1] Davis v. Gray, 16 Wall. 203, 219, 220; Cowdrey v. Railroad Co., 1 Woods, 331, 336. See Railroad Receivers in Federal Courts, by Judge Caldwell, 44 Am. Law Rev. 161.

[2] Cowdrey v. Railroad Co., 1 Woods, 331, 336. This language has been thus construed in a case in a State court: "This rule, it will be observed, simply prescribes what expenditures, out of the fund in his hands as receiver, the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract, without the authority of the court, which will bind the trust, or which the court will be bound to recognize without re-

It has been held that the receiver is not obliged to obtain special authority from the court to make contracts for ordinary supplies or accommodations needed for the operation of the railroad; such as equipment, repairs, the use of the roundhouses and terminals, and the employment of an agent to solicit business and to contract to transport goods over other lines or by connecting boats;[3] and that such contracts, although subject to review by the court, will not be set aside unless the charges are unreasonable, unusual, or extravagant. The receiver is justified in paying claims for the loss of freight upon proof by the affidavits of the shippers without any application to the court, where that is the usual course of business by railway and express companies.[4] A loan to a receiver whom the court has not authorized to borrow money will be denied priority.[5] A receiver cannot make a permanent traffic agreement without the authority of the court.[6] It has been held that the court has power to authorize the receiver of a railroad company under proceedings for a foreclosure, to ratify a contract previously made by the corporation giving a telegraph company certain privileges upon its road; and that the contract thus ratified will be binding upon purchasers of the railroad at a foreclosure sale;[7] that such a receiver may be authorized to make such expenditures as are necessary to render the operation efficient and to perfect

gard to its necessity or propriety. A receiver may, undoubtedly, appropriate moneys in his hands belonging to the trust to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them or disregard them entirely. This, in my judgment, is the only safe rule which can be adopted.'' Van Fleet, V. C., Lehigh Coal & Nav. Co. v. Central R. of N. J., 35 N. J. Eq. 426, 429. To a similar effect is Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963.

3 No. Pac. Ry. Co. v. Am. Trading Co., 195 U. S. 439, 461, 49 L. ed. 269, 279; South Carolina v. Port Royal & A. Ry. Co., 89 Fed. 565, 572, 574.

4 Central Tr. Co. v. Colorado Mid. Ry. Co., 89 Fed. 560, 564.

5 Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 477, 29 L. ed. 963, 978; § 309, *infra*.

6 Investment Co. of Phila. v. Ohio & N. W. Ry. Co., 4 Fed. 378.

7 W. U. Tel. Co. v. Atl. & Pac. Tel. Co., 7 Biss. 367.

the service, in return for which the franchises were given,[8] complete the construction of a line of railroad, and to borrow money for that purpose,[9] to purchase a lien upon part of its property, to assume a lease of a connecting railway,[10] even without notice

[8] Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 455. This includes the completion of car houses, which were being rebuilt and enlarged on some of the lines held by the receiver. Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 180 Fed. 704, where it was said that the apportionment of the expense between the different mortgagees should be determined on a final accounting.

[9] Kennedy v. St. P. & P. Ry. Co., 2 Dill. 448; *infra*, § 309. See also Smith v. McCullough, 104 U. S. 25; Allen v. D. & W. R. Co., 3 Woods, 316. In such a case, notice to the lienors should be given. Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786. It has been held that a railroad receiver may be authorized to pledge securities which are the property of the corporation as collateral for a loan, and to incur liability for the expenses of a scheme to refund the corporate indebtedness. Clarke v. Central R. & B. Co., 54 Fed. 556.

[10] Farmers' L. & Tr. Co. v. Burlington & S. W. Ry. Co., 32 Fed. 805. See also Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 259; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863; Easton v. Houston & T. C. Ry. Co., 38 Fed. 784. The rules which should regulate a receivership of a consolidated railroad holding leased lines with separate mortgages upon the different branches, as well as a general mortgage upon the whole system, were thus stated in an opinion of Judge Brewer, delivered when denying an application by a receiver of such a system of railroads for leave to reject such leased roads as were unprofitable: "This Wabash road is composed of many subdivisions. While it is a single corporation today, yet into it have passed many corporations and many separate railroad properties. In administering such a consolidated property, the court must look at, not merely the interest of the mortgagee in this general mortgage, or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective incumbrances, and, back of all that, the duty which every railroad corporation owes to the public. And that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety, and to all its branches,—all its parts; differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road, as a system, was in operation, a going concern, from one end to the other; as such, discharging its duties as best it could to its various creditors. This court, at the instance of the corporation, and

to preserve the integrity of the system, took possession of it by its receivers. It took possession of it as a going concern, and so far as is reasonable and practicable, it should continue it as a going concern until it surrenders it to whoever may be the purchaser or future holders of it. With that preface, and calling these separate branches which have passed into this consolidated road, subdivisions, since some have passed in by way of lease and others by way of con solidation, subject to separate mort gages, we pass orders substantially as follows: The first is one which has already been entered, and we simply emphasize it by repeating it, that subdivisional accounts must be kept separately. That was an order passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained. 2. Where any subdivi sion earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any part diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receiver's certificates. * * * 3. Where a subdivision earns no surplus,—simply pays operating expenses,—no rental or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division; but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches tearing the system in two; but the disruption, if it comes, will come from those who seek separation, and have a legal right so to do." But see Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 180 Fed. 704. "4. Where a subdivision not only earns no surplus but fails to pay operating expenses, as in the St. Joseph & St. Louis branches, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off. If they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum." Treat, J., concurring, in Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863, 865-867. In the same case, Judge Woods subsequently rejected a claim to a preference over the mortgage for rents accrued pending a receivership, in a suit in which the mortgagee had been de-

to the mortgagee,[11] and to lease a railway for a fixed term; although, in such a case, a provision for a cancellation of the lease at the option of the court should ordinarily be inserted.[12] Where the lease contains no such clause, the lessee is entitled to compensation for the unexpired term, if, before his lease expires, he is ousted from possession by the court.[13] Receivers for the lessee of a number of connecting street railroads in the same suit under leases from different lessors were authorized to use the income for the entire system for the purpose of operating and maintaining the same as a unit, notwithstanding the provisions of mortgages upon parts of the property.[14] It has been held that receivers should not be authorized to lease street railways to a new corporation, with authority to the lessee to issue bonds secured by a mortgage with priority over mortgages previously existing, in order to raise the funds for the improvement of the property, under the direction of a board of engineers representing the city, and not the original owners of the property;[15] but, in the same case the Circuit Court subsequently authorized the receivers to deliver the street railways to the reorganized corporation before the foreclosure sale.[16] Without authority from the court a receiver of a railroad cannot lease offices for a term of four years;[17] nor it seems for any time.[18] Such authority is not included in the grant of power to make all contracts that may be necessary in carrying on the business of the railroad,[19] nor is the lease ratified by the approval of monthly accounts showing payment of rent under the same.[20]

nied the extension of the receivership for his benefit. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 26. But see Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254; *supra*, § 305. *Cf. infra*, § 321.

11 Mercantile Tr. Co. v. Mo., K. & T. Ry. Co., 41 Fed. 8, 11, 12.

12 Farmers' L. & Tr. Co. v. Eaton, C. C. A., 114 Fed. 14.

13 Ibid.

14 Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., C. C. A., 180 Fed. 648.

15 Merchants' L. & Tr. Co. v. Chicago Rys. Co., C. C. A., 158 Fed. 923.

16 Guaranty Tr. Co. v. Chicago Union Traction Co., 158 Fed. 1015.

17 Chicago Deposit Vault Ry. Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819.

18 Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18, 21. The same case considers the proper disbursements of a receiver for hotel bills.

19 Chicago Deposit Vault Ry. Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819.

20 Ibid.

§ 309. Receivers' certificates. The power of courts of equity to issue receivers' certificates is of modern origin,[1] has been severely criticized,[2] and should be exercised with great reluctance.[3] Where it is absolutely necessary to raise money for the preservation of the property in his hands, a receiver may be empowered by the court to issue certificates which give their owners a lien upon the property prior to that held by any persons except those whose claims are paramount to the rights of the parties to the suit.[4] Such certificates may have a priority over a vendor's lien upon rails.[5]

Receivers' certificates are usually issued only in creditors' suits [6] and suits for the foreclosure of railroad or telegraph mortgages, or mortgages of other public corporations, in order to raise money for repairs, or to defray operating expenses,[7] or

§ 309. [1] The first case seems to have been Meyer v. Johnson (1875), 53 Ala. 237; Coe v. N. J. Mid. Ry. Co., 27 N. J. Eq. 37; Hoover v. Montclair & G. L. Ry. Co., 29 N. J. Eq. 4; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895.

[2] Barton v. Barbour, 104 U. S. 126, 138, 26 L. ed. 672, 678; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. 46. See the Court Management of Railroads, by Hon. S. D. Thompson, 27 Am. Law Rev. 481.

[3] Wallace v. Loomis, 97 U. S. 146, 163, 24 L. ed. 895, 901; Shaw v. Railroad Co., 100 U. S. 605, 612, 25 L. ed. 757, 759; Taylor v. Phila. & R. R. Co., 9 Fed. 1; Credit Co. of London v. Arkansas Cent. R. Co., 15 Fed. 46; Street v. Md. Cent. Ry. Co., 59 Fed. 25.

[4] Meyer v. Johnston, 53 Ala. 237; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Stanton v. Ala. & C. Ry. Co., 2 Woods, 506; s. c., 31 Fed. 585; Kennedy v. St. Paul & P. R. Co., 2 Dill. 448; Hoover v. Montclair & G. L. R. Co., 29 N. J. Eq. 4; Coe v. N. J. Mid. Ry. Co., 27 N. J. Eq. 37; Union Tr. Co. v. Illinois Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963. For a case where certain property was exempted from the lien, see Third St. & S. Ry. Co. v. Lewis, 79 Fed. 19; Boyce v. Southern Nat. Bank, C. C. A., 203 Fed. 698.

[5] Royal Tr. Co. v. Washburn B. & I. Ry. Co., C. C. A., 120 Fed. 11.

[6] Union Trust Co. v. Ill. Midland R. R. Co., 117 U. S. 434, 458; Am. Brake Co. v. Pere Marquette, C. C. A., 205 Fed. 14, 19; Westinghouse El. & Mfg. Co. v. Brooklyn Rapid Transit, C. C. A., 260 Fed. 550.

[7] Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Central Bank & Trust Corporation v. Cleveland, C. C. A., 252 Fed. 530. But see Merchants Loan & Tr. Co. v. Chicago Rys. Co., C. C. A., 158 Fed. 923; Gay v. Hudson River El. Power Co., 166 Fed. 771.

to discharge claims having an equitable preference to that of the party at whose instance the receiver was appointed,[8] or to restore to the rightful owners so much of the income as the receiver has improperly applied to the foregoing purposes.[9] In one case the receiver was authorized to borrow money with which to buy a mortgage prior to that under which the bonds in suit had been issued, in order that the sale of the property might be made by the Federal court in which a creditor's bill was pending, although a subsequent proceeding to foreclose such prior mortgage was then pending in the State court, with the Federal court's permission.[10] They have been issued in compromise of a doubtful claim to a much larger amount of property belonging to the estate.[11] They may be issued to raise money for permanent betterments;[12] but the last is a power which should be exercised rarely and with great caution.[13] In a few cases, receivers have been authorized thus to borrow money in order to complete the construction of railroads, and save from forfeiture land grants and municipal subscriptions.[14] Certificates have been issued to pay interest upon a divisional mortgage prior to that to foreclose which the suit was brought. Where the net earnings of a railroad are sufficient to defray current expenses, the court will not authorize the issue of receivers' certificates merely for the sake of paying interest upon

8 Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Taylor v. Phila. & R. R. Co., 7 Fed. 377; Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

9 Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863; Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 183 Fed. 250; Am. Trust Co. v. Metropolitan S. S. Co., C. C. A., 190 Fed. 113; approved Harv. Law Rev., xxv, 460.

10 Beaton v. Seaboard Portland Cement Co., C. C. A., 211 Fed. 84.

11 Am. Dist. Steam Co. v. Waltermire, C. C. A., 231 Fed. 412.

12 Am. Brake S. & F. Co. v. Pere Marquette R. Co., C. C. A., 205 Fed. 14.

13 Texas Co. v. International & G. N. Ry. Co., C. C. A., 237 Fed. 931.

14 Kennedy v. St. Paul & P. R. Co., 2 Dill. 448; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 294, 295, 27 L. ed. 117, 120, 121. See also Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639. But see Investment Co. v. Ohio & N. W. R. Co., 36 Fed. 48; Merchants' Loan & Trust Co. v. Chicago Rys. Co., C. C. A., 158 Fed. 923; Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786. See Credit Co. v. Arkansas Central R. Co., 15 Fed. 446.

the mortgage under foreclosure.[15] It has been said to be doubt-

[15] Taylor v. Phila. & R. R. Co., 9 Fed. 1; Am. Brake S. & F. Co. v. Pere Marquette & Co., C. C. A., 205 Fed. 14, 23, 24, per Knappen, J.: "Appellant complains of the direction to the receivers to pay the interest on appellant's mortgage, as tying its hand by preventing foreclosure, thus precluding relief from a burdensome situation. Under ordinary conditions, appellant could not be heard to complain of the payment of interest to itself, and thus of a prevention of a default which would give right of foreclosure. Lloyd v. C. & O. S. W. Ry. Co. (C. C.), 65 Fed. 351, 356. But the situation here is a peculiar one. The order in question was made nearly a year ago. * * * If, as seemed not unlikely when the order was made, an indefinite continuance of the receivership is to result in a constantly increasing indebtedness prior to appellant's mortgage, appellant can, we think equitably complain of the denial of opportunity to foreclose. The record does not advise us of the salable value of the railroad property. But, to say the least, it may well be that further considerable increase of indebtedness prior to appellant's mortgage will seriously impair, if not destroy, its value. The object of a creditor's suit is not to permanently or indefinitely tie up the property, but merely to conserve and operate it pending ultimate disposition, to marshal its assets, and in some suitable manner to devote them to the payment or security of its indebtedness. We are not advised of the receiver's plans for the coming year, nor should we attempt to forestall the exercise of discretion by the District Court. Under the circumstances, we content ourselves with suggesting that our action upon the present order must not be taken as indorsing the propriety of further increasing the indebtedness prior to appellant's mortgage in injury to that security, without leaving appellant free to protect itself by foreclosure. Should that question later arise, it can then be determined." Westinghouse E. & Mfg. Co. v. Binghamton Ry. Co., 255 Fed. 378, 385: "A receivership is for the benefit and protection of all interests, general creditors, secured creditors (bondholders), and stockholders and it is the duty of the court so far as reasonably possible, to conserve and protect all interests. The court should not and cannot properly hold and manage such a property indefinitely. There must be revenues not only to pay taxes, but to pay current operating expenses and current and necessary repairs; also to pay interest on bonds accruing, due and secured by mortgage, and which must be paid to prevent the trustee under such mortgages from declaring a default and proceeding to foreclose. This court has no power to enjoin such action by the trustee under such mortgage given to secure the payment of bonds. It has no power to issue receiver's certificates to raise money to pay such interest on bonds, and make the indebtedness thus created a first lien after operating expenses and taxes; that is, a lien prior to the lien on bonds themselves." Per Ray, J.

ful whether the court has the power to authorize a receiver to issue car-trust certificates, secured by a lien upon the cars thus bought, payable in ten annual installments.[16]

In cases of industrial corporations, which are not engaged in public service, such as mining companies,[17] manufacturing companies,[18] land and irrigation companies,[19] and even it seems of holding companies which have the control of the stock and the operations of a system of street railroads,[20] the court has no power to issue receivers' certificates to displace mortgage liens without the consent of the mortgagee, except to provide for the necessary expenditures incident to the administration of the assets, and the preservation of the property from deterioration, pending the winding up of the business and a settlement of the receivership. It has been held that such a receiver has no power, for the purpose of completing an unfinished building, to borrow money by means of certificates, which have priority over a pre-existing mortgage.[21] An order authorizing the issue of receivers' certificates to pay "wages and freights due and to become due" does not authorize the issue of a certificate to pay money advanced to pay wages by honoring "store orders."[22]

Without leave of the court, a receiver has no power to pledge the trust estate, nor to make a contract for a loan of money

16 Taylor v. Phila. & R. Co., 9 Fed. 1.

17 Fidelity I. & S. Co. v. Shenandoah Iron Co., 42 Fed. 372; Farmers' L. & Tr. Co. v. Grape Creek Coal Co., 16 L.R.A. 603, 50 Fed. 481; International Tr. Co. v. Decker Bros., C. C. A., 152 Fed. 78; Cowden v. Wild Goose Mining & Trading Co., C. C. A., 199 Fed. 561.

18 Fidelity I. & S. Co. v. Shenandoah Iron Co., 42 Fed. 372; Laughlin v. U. S. Rolling Stock Co., 64 Fed. 25; Newton v. Eagle & P. Mfg. Co., 76 Fed. 418; Union Tr. Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193; Beaton v. Seaboard Portland Cement Co., C. C. A., 211 Fed. 84; Smith v. Shenandoah Valley Nat. Bank, C. C. A., 246 Fed. 379. But see Pusey & Jones v. Pennsylvania Paper Mills, C. C. A., 173 Fed. 634; Conklin v. U. S. Shipbuilding Co., 123 Fed. 913. See High on Receivers (4th ed.), § 312b.

19 Hanna v. State Tr. Co., C. C. A., 30 L.R.A. 201, 70 Fed. 2; Farmers' Loan & Tr. Co. v. Burbank Power & Water Co., 196 Fed. 539.

20 Ball v. Improved Property Holding Co., C. C. A., 247 Fed. 645.

21 Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456. See U. S. Investing Corp. v. Portland Hospital (Oregon, 1902), 67 Pac. 194, 56 L.R.A. 627; Baltimore Building & Loan Ass'n v. Alderson, C. C. A., 90 Fed. 142, 32 C. C. A. 542.

22 Fidelity Ins. & S. D. Co. v. Shenandoah I. Co., 42 Fed. 372, 377.

which will bind the estate,[23] or even bind the proposed lender.[24]

An order for the issue of receivers' certificates is usually granted only upon notice to all parties in interest.[25] They are entitled to notice before the order becomes practically effective.[26] Those who have not received notice may move to set aside the order and to cancel the certificates, if they act as soon as they learn what was done.[27] Where eighty-five per cent of the creditors joined in the application for the issue of certificates and only one small creditor objected the court ordered that the objector be paid in full and the certificates issued.[28]

The order, although *ex parte*, remains in full force till set aside; and is not revoked by a reference to determine all claims against the receiver, and a confirmation of a report thereat making no mention of the certificates, when it appears that they were not presented or considered at the reference, and that their holder had no notice of the reference.[29] A very short delay after knowledge that such an order has been granted will estop a party from objecting to the validity of certificates issued in pursuance of it,[30] and from claiming that property is not subject to the lien of such certificates.[31]

23 Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963; Cent. Tr. Co. v. Cincinnati, J. & M. Ry. Co., 58 Fed. 500; § 308, *supra*. The court may ratify the loan after it has been made. Elk Fork O. & G. Co. v. Foster, C. C. A., 99 Fed. 495; Ibid., 90 Fed. 767.

24 Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639.

25 Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786; Union Tr. Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193; Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853, 866; Knickerbocker Tr. Co. v. Oneonta, Cooperstown & Richfield Springs Ry. Co., 201 N. Y. 379.

26 Union Trust Co. v. Ill. Midland R. R. Co., 117 U. S. 434, 459, 6 Sup. Ct. 809, 29 L. ed. 963; Am. Brake S. & F. Co. v. Pere Marquette R. Co., C. C. A., 205 Fed. 14, 17.

27 Ex parte Mitchell, 12 S. C. 83. But see Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 297, 298, 27 L. ed. 117, 121, 122.

28 B. Borchardt Co. v. Yaryan Naval Stores Co., 206 Fed. 366.

29 Hervey v. Ill. Mid. Ry. Co., 28 Fed. 169. *Cf.* Central T. R. Co. v. Sheffield & B. C. I. & Ry. Co., 44 Fed. 526. Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874.

30 Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Union Tr. Co. v. Ill. Midland Ry. Co., 117 U. S. 434, 29 L. ed. 963; Central Tr. Co. v. Marietta & N. G. R. Co., C. C. A., 75 Fed. 193; s. c., 75 Fed. 209; Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 183 Fed. 250; Central Tr. Co. v. The Pittsburgh, Shawmut & North-

Receivers' certificates are assignable, but not negotiable.[32] "Receiver's certificates, being merely evidences of indebtedness, can have no higher character than the debts of which they are the representatives."[33] "The receivers' certificate is defined within the corners of the court's order, aided, in interpretation, somewhat by the petition on which issued and such other documentary evidence as may be relevant."[34] A purchaser of receiver's certificates at par from the receiver without notice of any suspicious facts is not prejudiced by the appropriation of the funds by the receiver for his own use.[35] A payment to a certificate holder in violation of an order of the court does not

ern Ry. Co., 174 App. D. 800; Lake v. Mudgett, C. C. A., 252 Fed. 365. It was held that notice of an application for receiver's certificates given to a trustee of a mortgage who was not a party to a suit did not make them, when issued, prior to the mortgage, Farmers' L. & Tr. Co. v. Centralia & C. R. Co., C. C. A., 96 Fed. 636; and that a bondholders' committee empowered to act in matters requisite or necessary for the enforcement and protection of the legal rights of the holders of mortgage bonds had no authority to consent in their behalf to the issue of receiver's certificates with a priority over the mortgage, in order to pay claims not entitled to a preference. Ibid. See Fordyce v. Omaha, Kansas City & E. R. R., 145 Fed. 544, 556.

31 State Tr. Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398.

32 Union Tr. Co. of N. Y. v. Chicago & L. H. R. Co., 7 Fed. 513; Stanton v. Ala. & C. R. Co., 31 Fed. 585; Turner v. Peoria & S. R. Co., 95 Ill. 134, 35 Am. Rep. 144; Stanton v. Ala. & C. R. Co., 2 Woods, 506; s. c., 31 Fed. 585; Central Nat. Bank v. Hazard, 30 Fed. 484.

33 Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co., 42 Fed. 372, 377; Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

34 *Re* J. B. & J. M. Cornell Co., 201 Fed. 381, 388.

35 Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874. Where a receiver issued a certificate to a person named therein as payee, for negotiation and sale, and the latter never paid over any money on account of it, a purchaser of the certificate at much less than par, who was unable to prove that the person from whom he bought it had paid anything therefor to the person named as payee, was not allowed to receive anything from the receiver on account of the same. Union Tr. Co. v. Chicago & L. H. R. Co., 7 Fed. 513. See Stanton v. Ala. & C. R. Co., 31 Fed. 585; s. c., 2 Woods, 506. For a border case where the court refused to set aside certificates obtained upon a report by the receiver which misled the court below by stating an erroneous conclusion as to the legal rights of the certificate holder failed to set forth a copy of the contract upon which such rights were based and made an incomplete presentation of

preclude him from offsetting any lien he may have against a proceeding to compel repayment.[36]

The court has power to pay out of the fund receivers' certificates in the hands of *bona fide* purchasers, although the receivership is dissolved and the bill dismissed.[37]

It has been said that the power to issue them is a personal one which the receiver cannot delegate.[38]

The holders of receivers' certificates are bound by all subsequent proceedings in the suit, whether or not the same affect their lien and with or without notice.[39]

It was held to be an abuse of discretion for the court to sell property, without first determining questions raised concerning the validity of receivers' certificates;[40] and that such questions should be determined, after taking testimony rather than upon a demurrer.[41] The purchaser at a judicial sale made subject to the payment of receivers' certificates cannot contest their validity,[42] unless his right so to do is reserved.

A receiver is personally responsible for a fraudulent statement in a certificate which he issues.[43]

In at least one case, the court ordered the receiver to execute a mortgage to secure the receiver's certificates.[44] The receiver may be authorized to borrow money without the issue of receiver's certificates.[45] In such a case the court may grant the lender a lien upon the property bought with the proceeds of

the facts, see American Dist. Steam Co. v. Waltermire, C. C. A., 231 Fed. 412.

36 People's Savings Bank & Trust Co. v. Rogers, C. C. A., 177 Fed. 386, 387.

37 El. Supply Co. v. Put-in-Bay W. L. & Ry. Co., 84 Fed. 740.

38 Union Tr. Co. v. Chicago & L. H. R. Co., 7 Fed. 513. But see Ala. Iron & Ry. Co. v. Armiston L. & Tr. Co., C. C. A., 57 Fed. 25.

39 Gordon v. Newman, 62 Fed. 686; Mercantile T. Co. v. Kanawha & O. Ry. Co., C. C. A., 58 Fed. 6. But see Sheffield & B. C. I. & Ry. Co. v. Newman, C. C. A., 77 Fed. 787.

40 International Tr. Co. v. Decker Bros., C. C. A., 11 L.R.A. (N.S.) 152, 152 Fed. 78.

41 Savings & Tr. Co. v. Bear Valley Ir. Co., 112 Fed. 693.

42 Central Nat. Bank v. Hazard, 30 Fed. 484; Central T. Co. v. Sheffield & B. C. & I. Ry. Co., 44 Fed. 526.

43 Bank of Montreal v. Thayer, 7 Fed. 622.

44 Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

45 Beaton v. Portland Cement Co., C. C. A., 211 Fed. 84.

the loan.[46] But, ordinarily, the order for the issue of the certificates provides that they shall constitute a lien upon the property superior to all prior incumbrances,[47] or superior to all these with certain exceptions, which is sufficient.[48] Certificates may be authorized, the payment of which is to be subsequent to that of other certificates.[49] A provision as to their priority is a protection to the receiver if he makes payment accordingly; but it has been held that it may be revoked by the court.[50]

It has been said that a receiver's certificate payable out of the income is in the nature of a call loan, and that the holder has the right to presume that the receiver will notify him when the loan is to be collected or the money paid.[51] A certificate may be renewed without prejudice to its lien.[52]

Where the order provides that the certificates shall be a first lien on the property, the lien may be enforced by an independent suit,[53] or by a petition in the suit in which they were issued to the court which ordered their issue,[54] or to a court having territorial jurisdiction over a part of the railroad in an ancillary suit.[55] Even when the order makes the certificates the first lien upon the property, all the expenses of the receivership will be previously paid,[56] and so it has been held will be an attorney's fee in bankruptcy proceedings subsequently instituted.[57] But

46 Ibid.

47 In one case the order simply stated that the certificates should be payable out of the income of the property, and "be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid." Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 298, 27 L. ed. 117, 122. For a good form of an order and a certificate, see Kennedy v. St. Paul & P. R. Co., 2 Dill. 448.

48 Am. Dist. Steam Co. v. Watermire, C. C. A., 231 Fed. 412.

49 Ibid.

50 Ball v. Improved Property Holding Co., C. C. A., 247 Fed. 645.

51 Sage, J., in Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874, 878.

52 People's Savings Bank & Trust Co. v. Rogers, C. C. A., 177 Fed. 386, 387.

53 Swann v. Clark, 110 U. S. 602, 28 L. ed. 256. But see *Re* C. M. Burkhalter & Co., 179 Fed. 403.

54 Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874. See Am. Trust Co. v. Metropolitan S. S. Co., C. C. A., 190 Fed. 113.

55 Ibid. *Contra*, Stark Electric R. Co. v. McGinty Contracting Co., C. C. A., 238 Fed. 657.

56 Pusey V. Jones v. Pennsylvania Paper Mills, C. C. A., 173 Fed. 634. See Ball v. Improved Property Holding Co., C. C. A., 247 Fed. 645.

57 Smith v. Shenandoah Valley Nat. Bk., C. C. A., 246 Fed. 379.

the court postponed to the claim of the certificate holders the fees of attorneys who had acted for the complainant and the receivers and who had represented to the lenders that the certificates were ample security.[58]

Where the order for the issue of the certificates to procure money to pay taxes and rent made no provision as to their priority over rent subsequently accruing upon real property held by the receiver, upon the distribution of the assets, claims for such subsequent rent were placed upon an equality with the certificates.[59]

When the proceeds of the property are insufficient to pay the receiver's certificates in full, those issued to defray the expenses of the receivership will be paid before certificates given for preferential debts of the mortgagor;[60] but certificates issued for betterments were not given a priority over the claims for material and supplies furnished to the insolvent within a few months before the receivership;[61] and the lien of certificates issued for the expenses of the receivership was postponed to tax liens and mechanics' liens that previously vested, although the mortgagee consented that such certificates should be prior to the mortgage.[62] When a suit against a corporation engaged in mining and trading was begun by an attachment, the certificates therein issued were given a lien subsequent to that of the attacking creditor.[63] Where there were two sets of receivers' certificates, the first with the consent of the bondholders made a lien prior to the mortgage, the second issued without such consent and without such a provision; it was held that the second set should be paid subsequent to the mortgage.[64]

58 Willcox v. Southern Nat. Bank, C. C. A., 211 Fed. 968.

59 Ball v. Improved Property Holding Co., C. C. A., 247 Fed. 645.

60 Bank of Commerce v. Central Coal & Coke Co., C. C. A., 115 Fed. 878. This was so held even when the decree provided that the fund arising from the sale should be applied, after payment of costs and expenses, "to the payment of all interventions or other claims heretofore or hereafter to be allowed * * * as superior to the liens of the bonds * * * or, if the fund realized be not sufficient, to pay the same, then to the payment of the same pro rata." See S. Horton v. Thomas McNally, Ch., 89 Misc. N. Y. 165.

61 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 455; § 305, *supra*.

62 Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 634.

63 Smith v. Shenandoah Valley Nat. Bank, C. C. A., 246 Fed. 379.

64 *Re* J. B. & J. M. Cornell Co.,

Where the property was situated outside of the State and judicial district, and lienholders, who were indispensable parties, were citizens of the same State as the complainant; it was held that an order issuing receivers' certificates to complete an unfinished building was void.[65]

A receiver appointed in a suit for the foreclosure of a second railroad mortgage may be authorized to issue certificates constituting a prior lien to that of the first mortgage, provided the mortgagor is in default as to that, and the first mortgagee is a party to the suit.[66]

An order authorizing the issue of receiver's certificates is appealable.[67] A Federal court has no power to enjoin a receiver appointed by a State court from issuing certificates of indebtedness.[68]

§ 310. Advice to receivers. Receivers may apply to the court for instructions and advice, both generally and in particular cases.[1] In every doubtful case, it is the duty of the receiver to apply for the instructions of the court.[2]

"If there are parties in interest, and they have their day in court, the advice may be decisive. But if the matter is *ex parte*, the value of the advice depends largely upon the information and ability of the judge, and is probably binding only on the receivers, for the judge may change his mind on hearing full argument."[3]

201 Fed. 381, 393. In that bankruptcy case, the order of priority was fixed as follows: (1) All taxes due; (2) cost of administration; (3) claim of the holder of the first series of certificates, which were by their terms a lien prior to the mortgage; (4) claims of bondholders secured by the mortgage; (5) second series of certificates and claims of creditors, who had furnished merchandise to the receivers, which were placed upon an equality; (6) claims for damages for breach of contract; (7) claims for injuries. *Re* J. B. & J. M. Cornell Co., 201 Fed. 381, 393.

65 Baltimore Building & Loan Ass'n v. Alderson, C. C. A., 90 Fed. 142, 32 C. C. A. 542.

66 Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117.

67 Farmers' L. & T. Co. Petitioner, 129 U. S. 206, 32 L. ed. 656.

68 Reinach v. Atlantic & G. W. R. Co., 58 Fed. 33.

§ 310. 1 Frank v. Denver & R. G. Ry. Co., 23 Fed. 757; Ex parte Koehler, 23 Fed. 529; Mo. Pac. Ry. Co. v. Tex. & P. Ry. Co., 31 Fed. 862; in bankruptcy, *Re* Gottlieb & Co., 245 Fed. 139.

2 Chable v. Nicaragua C. C. Co., 59 Fed. 846. *Re* Gotlieb & Co., 245 Fed. 139, 145.

3 Mo. Pac. Ry. Co. v. Texas & P.

It has been said: that, when installments of interest are about to fall due under a mortgage which authorizes the mortgagee to declare the principal, due for default in interest, it is the duty of the receiver to apply to the court for instructions with respect to payment of the interest out of the funds in his hands.[4]

Receivers may be authorized to attend the hearings before a State Public Service Commission.[5] It has been said, that from the nature of things the court cannot determine how many trains a receiver shall run,[6] nor select his employees,[7] although it may regulate his treatment of them,[8] and his contracts with them,[9] and will listen to their complaints of unfair treatment by him.[10] The courts have, at the request of receivers, instructed them what rates to charge,[11] and directed them not to obey so much of a State statute as impaired the obligation of a contract, where the petition for instructions was filed a month before the act went into operation,[12] advised a receiver whether he should pay a tax,[13] and authorized him to default in the payment of mortgage interest under a stipulation with the trustees, that foreclosure suits be instituted, the receivership extended to them, and the entry of the decree of foreclosure and sale should then be postponed until time had been afforded for a reorganization.[14]

When a railroad was in the hands of a receiver appointed in a suit to foreclose a mortgage, the court refused to entertain a petition by the mortgagee asking for instructions as to

Ry. Co., 31 Fed. 862; Jones v. Moore, 198 Fed. 301, an order granting leave to sue.

4 Guaranty Tr. Co. v. Inter. Steam Pump Co., C. C. A., 231 Fed. 594, 595.

5 *Re* Metropolitan St. Ry., 166 Fed. 1006.

6 Brewer, J., Treat, J., concurring, in Central Tr. Co. v. Wabash St. L. & P. Ry. Co., 23 Fed. 863, 867.

7 Brewer, J., in Frank v. Denver & R. G. Ry. Co., 23 Fed. 757, 764.

8 Frank v. Denver & R. G. Ry. Co., 23 Fed. 757, 764; Waterhouse v. Comer, 19 L.R.A. 403, 55 Fed. 149.

9 Waterhouse v. Comer, 19 L.R.A. 403, 55 Fed. 149; Platt v. Phila. & R. R. Co., 65 Fed. 660. The court refused to permit receivers of a railroad to reduce the wages of the employees and change the terms of their employment without notice to them. Ames v. Union Pac. Ry. Co., 60 Fed. 674. A reduction was allowed in U. S. Tr. Co. v. Omaha & St. L. Ry. Co., 63 Fed. 737.

10 Continental Tr. Co. v. Toledo. St. L. & K. C. R. Co., 59 Fed. 514.

11 Ex parte Koehler, 23 Fed. 529.

12 Ibid.

13 Ledoux v. La Bee, 83 Fed. 761.

14 Gay v. Hudson River El. Power Co., C. C. A., 169 Fed. 1020.

the propriety of postponing a meeting of its stockholders, and for permission to postpone the meeting.[15]

§ 310a. Reorganization of corporations whose assets are held by receivers. The appointment of the receiver of a corporation which has large interests is usually a step towards its reorganization.[1] When there are conflicting interests it is the duty of the receiver to remain neutral.[2] It is not his duty to take in or to promote any plan or reorganization.[3]

The stockholders are considered to hold their right to control the insolvent corporation in trust for the creditors. Consequently, when the reorganization gives the former a share in the securities of the new company, superior to that given the creditors, secured or unsecured, or places the former upon an equal footing with the latter, the sale should be set aside,[4] or else in a proper case, the property in the hands of the purchaser will be subject to the payment of the claims of the creditors who were unfairly treated.[5] The court has permitted a creditor to take advantage of the plan of reorganization after the time limited for that purpose had expired, when the delay was caused by the failure of the reorganization committee to answer his claim for a preference.[6]

15 Taylor v. Phila. & R. R. Co., 7 Fed. 381.

§ 310a. 1 Guaranty Trust Co. v. Missouri Pac. Ry. Co., 238 Fed. 812, 814-816, per Hook, J.

2 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 205 Fed. 99, quoted *infra*, § 311; Guaranty Tr. Co. v. Missouri Pac. Ry. Co., 238 Fed. 812. This is a duty which is rarely fulfilled or enforced by the courts. For a case where an application for the appointment of an additional receiver was denied, although it was charged and apparently not positively denied "that he wrongfully assumed the function of an expert advisor of those who have undertaken to formulate a plan of reorganization and has impressed upon them his insufficient views of the earning capacity of the railroad, with the result that a proposed plan, based on estimated lower earnings, makes the interest on the new securities to be issued for the junior securities mentioned contingent instead of fixed or absolute," see Central Trust Co. v. Missouri K. & T. Ry. Co., 246 Fed. 155.

3 Guaranty Tr. Co. v. Missouri Pac. Ry. Co., 238 Fed. 812.

4 Louisville Trust Co. v. Louisville N. A. & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130; *infra*, § 394e.

5 Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. ed. 931; Kansas City Ry. Co. v. Guaranty Trust Co., 240 U. S. 166; W. U. Tel. Co. v. U. S. & Mex. Tr. Co., C. C. A., 221 Fed. 545; *infra*, § 394e.

6 Keech v. Stowe-Fuller Co., C. C. A., 205 Fed. 887.

The court will interfere if the reorganization gives an unfair advantage to one class of persons interested over another.[7]

"I do not think that courts sit to redraw or modify or make suggestions concerning such voluntary business arrangements as reorganization plans. There have been circumstances, and they may arrive again, when a chancellor may bluntly refuse to sign a final decree which is intended to carry out a grossly unfair settlement."[8]

"Courts are not empowered to make contracts for parties in interest, nor can courts adjudge or decree the terms upon which a mortgagee may allow to junior lienors or others, participation in his mortgaged property when failure to pay the debt due him brings that property under the hammer. It is rare that any organization is satisfactory to all concerned; for in the nature of things, when there is not on hand enough to satisfy every obligation in full, some, and perhaps all, must suffer more or less; but, in the absence of fraud in the inception or a fraudulent scheme to which court proceedings are necessary incidents, the field in which the battle for respective adjustments must be fought out is beyond the court room, for the court can only ask whether without the aid of fraud or unlawful means, the debt is really and justly due. It is clear that the court cannot directly or indirectly rewrite this reorganization agreement."[9]

A reorganization which results in a transfer to a new company in which stockholders of the debtor have an interest but some of the creditors do not,[10] or in which holders of bonds secured by a mortgage upon part of the property do not receive their fair proportion of the new securities,[11] is unfair, and the sale will be set aside.

7 Guaranty Trust Co. v. Missouri Pac. Ry. Co., 238 Fed. 812, 815.

8 Hough J. in Conley v. Internat. Pump Co., 237 Fed. 286.

9 Guaranty Tr. Co. v. International Steam Pump Co., S. D. N. Y., quoted in C. C. A., 231 Fed. 594, 595.

10 Louisville Trust Co. v. Louisville N. A. & C. Ry. Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. ed. 113.

11 Guaranty Trust Co. v. Missouri Pac. Ry. Co., 238 Fed. 812, 818, 819, 820, per Hook, J.: "Complaint is also made that the holders of the bonds on four other branches or subsidiary lines are offered the same or better terms, and comparisons are made between those lines and the Kansas City Northwestern as regards values of the properties and amounts of incumbrance.

A creditor cannot complain because stockholders are given an interest in the new corporation, provided that his own interest is preserved by the issuance of new securities on equitable terms and that with full knowledge of what is intended he has failed to intervene or object before the sale is confirmed.[12]

But there are other considerations then those. The relation of a particular railroad to the system as a whole, its value to the system on that account, and the advisability of including or excluding it, in view of the necessities of the reorganization, enter into the problem. A court cannot well review such matters, but must leave them largely to the business judgment of those in charge. It would, perhaps, be going too far to say a court should not do so unless in an exceptional instance of fraud or grossly inequitable discrimination. Generally the objection to a plan of reorganization should involve a definite principle, and not require a long complicated investigation of values, properties, etc. * * * The situation reduces itself to this: Whether those conducting the plan of reorganization decide to include the Kansas City, Northwestern Railroad in the mortgage securing the series of bonds, and after the application of the value or proceeds of the mortgaged property determined by agreement or by foreclosure and sale the deficiency should have equitable recognition in the plan as a general debt. The position of the intervening bondholders is a hard one. It is said the rolling stock on hand when their mortgage was given has been used up and that the railroad is now practically without equipment. Being investors, not operators of railroads, naturally they do not want it. On the other hand, the undecided purpose of those in charge of the reorganization hampers them in making the most advantageous disposition of their interest to some other railroad company. The parties may be able to reach an amicable, equitable adjustment, so there is no need to go further at this time."

[12] Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 508, 33 Sup. Ct. 554, 57 L. ed. 931. St. Louis-San Francisco Ry. Co. v. McElvain, 253 Fed. 123, 133, per Sanborn, J.: "There is no moral turpitude, nor is there any illegality in the making and performance of an agreement between the bondholders secured by mortgages, the stockholders, and the unsecured creditors of an insolvent mortgagor, that there shall be a foreclosure and sale of the mortgaged property to or for the benefit of a new corporation in which all the members of the three classes shall be permitted at the option of each of them to take the bonds or stock of the new corporation in substantial proportion to the respective ranks and equities of the classes. Indeed, a foreclosure and sale under such an agreement is the most practicable, equitable, and beneficial method of foreclosure and sale of vast railroad or other properties that has yet been devised." See Inv. Registry Co. v. Chicago & M. El. R. Co., C. C. A., 212 Fed. 594, 612, *per* Seaman, J.

The price at which the property is bought by a reorganization committee upon a judicial sale even when it is an upset price fixed by the court is not conclusive evidence of its value.[13] When it was shortly followed by a transfer in return for new securities the aggregate value of such securities is considered to be the value of the property.[14]

In an early case in the history of reorganizations the court refused to entertain a petition by the mortgagee after the receivership in a foreclosure suit, asking for permission to postpone a meeting of stockholders,[15] but since then the court has refused to permit a stockholders meeting where it was proposed to adopt an inequitable plan of reorganization and has enjoined a vote in favor of such plan.[16]

13 Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 508, 33 Sup. Ct. 554; Rospigliosi v. N. O. M. & C. R. Co., C. C. A., 237 Fed. 341; *infra*, § 394d.

14 Ibid.

15 Taylor v. Phila. & Reading R. R. Co., 7 Fed. 381.

16 Grasseli Chemical Co. v. Aetna Explosives Co., C. C. A., 252 Fed. 456, 458, 459, 461, 462, per Manton, J.: "The petition upon which the order appealed from was granted, after asserting that Prince & Company, the petitioners are the owners of common stock, alleges that the receivership has been a c" ssful one and substantially the facts stated above and, further, that the plan of readjustment hereinafter referred to is sought to be adopted by certain preferred stockholders exercising their claim of voting rights by reason of the default in the payment of dividends. Copy of the readjustment plan is made in the petition, and it is alleged that if approved and adopted, it would be in violation of the rights of the common stockholders. It points out, further, that no new capital is to be paid in or provided for by the readjustment agency, and that, for the services of the so-called readjustment, they are to be paid $750,000. The effect of this, it is said, will give the bondholders and preferred stockholders the privileges and rights to which they are not entitled under the contractual obligations of the defendant, and will place in control a board of directors who would be unfavorable and unjust to the interests of the common stockholders, and who will assist in the adoption of the readjustment plan, with the result that great and irreparable injury will be done the petitioner and a great majority of the common stockholders. The appellants assert that the District Judge had no power to interfere with the stockholders of the defendant in the election of the directors at the annual meeting of the company, and it is said that the injunction granted by the District Court is entirely outside of the scope of the bill of complaint and of the receivership thereunder.

"(1) The order appointing the re-

By their consent to a plan of reorganization which subsequently failed and which recognized the separate existence of

ceivers placed the corporation in the custody and control of the court. It placed the receivers under the admonition, direction and guidance of the court. The court possesses jurisdiction over the corporation as well as over the property of the corporation and it has complete power to deal with either, and it is essential that it should have, for it could not control the property without the power to control the corporation. The appointment of the receiver supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation, its books, its records, and assets. Indeed, it is often the custom for courts in equity in an order appointing the receiver, to expressly restrain the corporation and its officers from exercising any of the privileges or franchises of the corporation until the further order of the court. The court's power to take from the directors their right to direct can also, while in control, restrain action by the stockholders, when it deems it for the best interests of all concerned to do so." * * * "(4) Was there justification therefor under the circumstances disclosed here? It is claimed that at the meeting a board of directors was to be elected, which would permit the control of the corporation to pass into the hands of the preferred stockholders. It is said that they represent the same group of men who [illegible]managed the property as to result in a receivership. At this time there appears to be no requirement for new capital, nor is any offered by the plan of readjustment. The property is being successfully managed by the receivers; it has very profitable contracts, and is, or will very shortly, be able to pay all its indebtedness, including the bonded indebtedness, if need be. It can pay the arrears of dividends on the preferred stock, and may retire the preferred stock. If the dividends are paid, the right of the preferred stock to vote on the basis of nine for one is eliminated, and, when a meeting is held the business policy of the corporation can be determined by the will of the majority of common stockholders. Therefore, the right of the preferred stockholders to vote being but temporary, with every prospect of the common stockholders regaining control of the corporation, the court should not lend its aid nor permit a group of preferred stockholders electing a board of directors who would permit this plan of readjustment to be adopted. Although it is not admitted by the appellants that it is the intention to vote upon the readjustment plan at this meeting, the fact is evident that such is the plain intention.

"On their face, the bonds do not mature until 1945. The plan of readjustment provides for their payment at an earlier period. These bonds are largely held by the owners of the preferred stock, both of which securities were obtained as part of the purchase price for plants, which were sold to or consolidated with the defendant corporation at the time of the con-

another corporation by providing that it should receive all the stock of the reorganized company, the bond holders of the insolvent were estopped from holding the other company liable for its debts upon the ground that both were practically the same corporation when the debts were incurred.[17]

A stockholder who, in good faith, asks for an examination of the books, in order to enable him to determine whether a proposed plan of reorganization is desirable, should be accorded such inspection under proper regulations as to time and circumstances, so as not to interfere either with the transaction of the receiver's duties or with the inspection of other stockholders.[18]

solidation. The plan further creates a retirement provision for the preferred stock, which is not only a deprivation of the common stockholders' rights, but it would seem is injurious to the preferred stockholders as well. It creates a voting trust of the common stock, and therefore deprives the common stockholders of the control of the company. It leaves the future of the corporation to a new company and, without apparent limitation, places it in the hands of readjustment managers with unrestricted power given to issue and dispose of new securities, and grants them an allowance of $750,000 for their services. The entire plan means a large and unnecessary expense, and reduces the cash assets of the company, which might again result in another period of financial embarrassment. In our opinion the complaint of the common stockholders is fully justified. The court below, in the exercise of its obligation to the common stockholders and all others interested, might well, in its equitable protection, have granted the order appealed from upon its disapproval of the same. The cause pursued by the court below was well within its power. The original intention of the corporation and the stockholders, as evidenced by its charter, giving no right to vote to the preferred stockholders, except as above indicated, indicates the right of the common stockholders to exercise control and management of the corporation.

"From the above indications, when the deferred dividends are paid out of the surplus profits, which are very rapidly accumulating, the property of the corporation and the control thereof will pass to the common stockholders, where it was when the court took possession of the property, and with this course no injustice will be visited upon any of the interested parties."

17 N. Y. Tr. Co. v. Carpenter, C. C. A., 250 Fed. 668.

18 Chable v. Nicaragua Canal Constr. Co., 59 Fed. 846. As to the authority of a reorganization committee to create liens or to pledge the assets, see Titus v. U. S. Smelting Ref. & Min. Expl. Co., 231 Fed. 205.

§ 311. Litigation by receivers. The causes of action which a receiver can enforce are of two kinds,—those which belong to the estate of which he has charge before it was entrusted to him, and those which have accrued since his appointment. As has been said before, he cannot sue upon either without the leave of the court which appointed him.[1]

A suit upon a cause of action which belonged to the estate before his appointment is brought in the name of the legal owner of the estate;[2] unless, as is not uncommon, the order authorizes the receiver to sue in his own name.[3] In the former case, the person whose name is used is indemnified out of the fund for all costs to which he is thereby made liable.[4]

It has been held that a receiver cannot sue in his own name for the infringement of a patent until the court has compelled an assignment of the patent to him.[5] Where there are different claimants to shares in a recovery by the receiver and there is doubt as to which has the prior equity, after payment of his expenses, the fund will be apportioned between them.[6]

Receivers of corporations are usually authorized to sue and defend in the name of the corporation.[7] An order of ancillary appointment, giving the receiver all the powers described in the order appointing him, in the court of primary jurisdiction, which had authorized him to institute actions or suits in any court for the recovery of any estate, property or judgment ex-

§ 311. 1 Wynne v. Lord Newborough, 1 Ves. Jr. 164; s. c., 3 Brown, Ch. C. 88; Green v. Winter, 1 J. Ch. (N. Y.) 60.

2 Dick v. Struthers, 25 Fed. 103; Dick v. Oil-Well S. Co., 25 Fed. 105; Daniell's Ch. Pr. (2d Am. ed.) 1977. This has been held to be the proper practice before final decree. Bay State Gas Co. v. Rogers, 147 Fed. 557, 559.

3 Davis v. Gray, 16 Wall. 203, 21 L. ed. 447. See Frankle v. Jackson, 30 Fed. 398.

4 Daniell's Ch. Pr. (2d Am. ed.) 1991.

5 Ball v. Coker, 168 Fed. 304.

6 Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 778.

7 Frankle v. Jackson, 30 Fed 398; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Harland v. B. & M. Tel. Co., 33 Fed. 199; Hale v. Hardon, 89 Fed. 283, 287. *Cf.* Wilder v. New Orleans, C. C. A., 87 Fed. 843; Braddock Br. Co. v. Pfaudler V. M. Co., C. C. A., 106 Fed. 604. Unfair trade may be enjoined at the suit of a receiver authorized to carry on a business. Dixon v. Dixon, Ch. D. 89 L. T. 272. Harv. L. Rev. xvii, 196.

isting in favor of the corporation, gives him the right to sue in the name of the corporation to recover unlawful profits made by a director of the same.[8] His appointment cannot be attacked collaterally when the court acted within its jurisdiction.[8a] Costs recovered against a receiver in an action brought by him in his official capacity, are entitled upon the distribution of the fund to a priority over claims that existed against it before the receiver's appointment.[9]

In the conduct of litigation, as in every other proceeding by him, a receiver is under the constant supervision of the court.[10] He is not bound by a stipulation which is not advantageous to the estate, made by himself or his counsel without the sanction of the court.[11] He cannot consent to a compromise or settlement without the consent of the court.[12] A receiver

8 Bay State Gas Co. v. Rogers, 147 Fed. 557.

8a *Re* Benwood Brewing Co., 202 Fed. 326.

9 Camp v. Receivers Niagara Bank, 2 Paige (N. Y.) 283; Columbian Ins. Co. v. Stevens, 37 N. Y. 536; Locke v. Covert, 42 Hun (49 N. Y. S. C. R.) 484.

10 Van Dyck v. McQuade, 85 N. Y. 616; McEvers v. Lawrence, Hoff. Ch. (N. Y.) 175.

11 Van Dyck v. McQuade, 85 N. Y. 616; Platt v. Phila. & R. R. Co., 115 Fed. 842. *Cf.* Vance v. Royal C. Mfg. Co., 82 Fed. 251; Central Tr. Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659; where such a stipulation was enforced. A stipulation by the receiver of a corporation, to enter its appearance in a suit brought against it, does not bind him to enter his own appearance as receiver. *Re* Muncie Pulp Co., 151 Fed. 732, 733. In the absence of a seasonable and well founded objection, a stipulation made by receivers of an insolvent corporation binds its creditors. Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850.

12 Westwater v. Murray, C. C. A., 245 Fed. 427. There is an extraordinary decision by Mayer, J., holding that a receiver would not be authorized to settle with a claimant who had retained an attorney to collect a claim upon a contingent fee of fifty per cent. The learned judge without citing any statute or precedent thus penalized litigants who were citizens of the State of New York and had made contracts authorized by the law established by the statutes and decisions of that State. *Re* Fitzsimmons, 174 N. Y. 15; Morehouse v. Bkln. Heights Ry. Co., 185 N. Y. 520; Ransom v. Cutting, 188 N. Y. 447; and by the decision of one of his judicial colleagues, Ryan v. Phila. & Reading Coal & Iron Co., 189 Fed. 253, 255. The receiver may be authorized to carry out a contract for the settlement of a death claim made by the corporation before his appointment and to pay the claimant the agreed amount. Westwater v. Murray, C. C. A., 245 Fed. 427.

is bound by an admission in the litigation made in good faith by the corporation before his appointment.[13] He is not bound by a promise of his own made before his appointment.[14] He cannot waive a defense on the merits.[15] He cannot allow a set-off not authorized by law.[16] A receiver may waive service of process and an objection to the jurisdiction founded upon residence.[17] He may be allowed to discontinue without costs an action honestly but erroneously begun by him.[18] The court will not direct its receiver to dismiss an ejectment suit brought by him, except on clear proof that it is impossible for him to succeed.[19]

The rights of a receiver are in general no greater than those of the person whose estate he holds.[20] Thus, a receiver of an insolvent corporation appointed in a creditor's suit cannot "enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent,"[21] for example a statutory liability of stockholders and creditors.[22] He may sue to recover damages caused by the

13 Perry v. Godbe, 82 Fed. 141.

14 Stanton v. Ala. & C. R. Co., 31 Fed. 585.

15 McEvers v. Lawrence, Hoffman Ch. (N. Y.) 172; Keiley v. Dusenbury, 10 J. & S. (N. Y. Super. Ct.) 238; s. c., 77 N. Y. 597; Van Dyck v. McQuade, 85 N. Y. 616.

16 Van Dyck v. McQuade, 85 N. Y. 616. *Cf.* Central Tr. Co. v. Clark, C. C. A., 81 Fed. 269.

17 Whitcomb v. Hooper, C. C. A., 81 Fed. 946. It was held that a receiver who had removed an action brought against him in a State court could not afterwards object that the Federal court had not acquired jurisdiction; Baggs v. Martin, 179 U. S. 206, 45 L. ed. 155; but that his appearance and filing a motion to quash an attachment in the State court, without leave of the Federal court, did not affect the prior jurisdiction of the Circuit Court of the United States. Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96, 112. See §§ 169, 170, *supra*.

18 St. John v. Denison, 9 How. Pr. (N. Y.) 343; Reeder v. Seely, 4 Cowen, 548; Arnoux v. Steinbrenner, 1 Paige (N. Y.) 82.

19 Pakradooni v. Storey Cotton Co., 151 Fed. 607.

20 Jacobson v. Allen, 12 Fed. 454, 457. But see Hart v. Barney & S. Mfg. Co., 7 Fed. 543; Hollander v. Heaslip, C. C. A., 222 Fed. 808, 809.

21 Wallace, J., in Jacobson v. Allen, 12 Fed. 454.

22 Jacobson v. Allen, 12 Fed. 454. A complaint in such an action was held not to be bad for uncertainty because it did not show whether the suit was based on a statute or upon an agreement made to define a statutory liability. French v.

fraudulent or negligent conduct of directors,[23] to collect an unpaid stock subscription,[24] and to set aside a fraudulent transaction, by which stock was cancelled in return for the delivery to the stockholder of the property.[25] The receiver of an insolvent corporation represents not only the company but also creditors and stockholders, and in his character as trustee for the latter, he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied.[26]

He may sue to restrain the collection of a judgment obtained by fraud which has been affirmed on appeal although the insolvent has executed a bond to obtain a supersedeas.[27] He may prove a claim against another receiver.[28]

The appointment of a receiver does not interrupt the running of the Statute of Limitations.[29]

The defendant to an action by the receiver of an insolvent's estate cannot set off claims against the insolvent which have been assigned to him since the application for the receiver's appointment.[30]

Ordinarily, a foreign receiver cannot sue until he has obtained an ancillary appointment;[31] but he may sue in a foreign court, upon a judgment which he has recovered in the court that appointed him;[32] or to recover land conveyed to him as

Busch, 189 Fed. 480; Freeman v. Jackson, 227 Fed. 688; Wood v. Noyes, C. C. A., 245 Fed. 742.

23 Bay State Gas Co. v. Rogers, 147 Fed. 557.

24 Kirkpatrick v. Am. Alkali Co., 135 Fed. 230.

25 Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Aldrich v. Gray, C. C. A., 147 Fed. 453; T. L. Smith Co. v. Orr, C. C. A., 224 Fed. 71; Drennen v. Southern States Fire Ins. Co., C. C. A., 252 Fed. 776.

26 Attorney General v. Guardian M. L. Ins. Co., 77 N. Y. 272, 275; Gillet v. Mooly, 3 N. Y. 479, 488; Talmadge v. Pell, 7 N. Y. 328; Whittlesey v. Delaney, 73 N. Y. 571; National T. Co. v. Miller, 33 N. J. Eq. 155, 158; Jacobson v. Allen, 128 Fed. 454, 455.

27 Owen v. Clifton, C. C. A., 232 Fed. 136. See § 310, *supra*.

28 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 205 Fed. 99. See § 310a, *supra*.

29 Honston Oil Co. v. Dowden, C. C. A., 202 Fed. 714.

30 In re Van Allen, 37 Barb. (N. Y.) 225, 231; Van Dyck v. Quade, 85 N. Y. 616; City of Shelbyville, Ky. v. Glover, C. C. A., 184 Fed. 234.

31 Booth v. Clark, 17 How. 322, 15 L. ed. 664, *supra*, § 93.

32 Wilkinson v. Culver, 25 Fed. 639.

receiver.[33] He can also do so when he has received a voluntary assignment of the assets of the insolvent,[34] or when a statute vests him with the title to the same.[35] In a court that has appointed an ancillary receiver it will be presumed, in the absence of allegations to the contrary, that a suit there instituted is brought in his ancillary capacity.[36] A substituted trustee can, however, sue in a foreign jurisdiction, even though the trial court that appointed him required him to give a bond and to account to itself in the same manner as a receiver.[37] It seems that a receiver appointed by a State court can sue in the Federal court in the same district.[38]

The appointment of a receiver, in a jurisdiction where its only place of business and all its tangible assets are located, was held to prevent a suit brought there by a receiver subsequently appointed in the State of its incorporation although the latter receiver sued before the former.[39]

A receiver is especially favored in the enforcement of causes of action arising after his appointment. He can, upon motion or petition in the suit wherein he is appointed, obtain injunctions to prevent disobedience to contracts made with him,[40] or prevent interference with property in his possession,[41] whether the person enjoined is a party to the suit or not, even if he be a State officer; for example, a tax collector,[42] or members of a

33 Oliver v. Clarke, C. C. A., 106 Fed. 402.

34 Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; Lewis v. Clark, C. C. A., 129 Fed. 570.

35 Converse v. Mears, 162 Fed. 767; *supra*, § 93.

36 Sullivan v. Sheehan, 89 Fed. 247.

37 Glenn v. Soule, 22 Fed. 417; Holmes v. Sherwood, 16 Fed. 725; s. c., 3 McCarthy, 405. *Cf.* Hale v. Hardin, 89 Fed. 283, 287, 288.

38 Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; Hegewich v. Silver, 140 N. Y. 414. But see Olney v. Tanner, 10 Fed. 101.

39 Lively v. Picton, C. C. A., 218 Fed. 401.

40 Walton v. Johnson, 15 Sim. 352.

41 Angel v. Smith, 9 Ves. 335; Lake Shore & M. S. Ry. Co. v. Felton, C. C. A., 103 Fed. 227. In Brady v. South Shore Traction Co., 197 Fed. 669, an injunction was granted against competition upon municipal car tracks, to use which the corporation in the hands of the receiver had a license that was not exclusive, through the operation of cars, charging lower fares than those charged by the receivers, when it was claimed that the rival company had no power to use the road.

42 In re Tyler's Petition, 149 U. S. 164, 37 L. ed. 689; Ex parte Chamberlain, 55 Fed. 704; Ex parte Huidekoper, 55 Fed. 709; Ledoux v. La Bee, 83 Fed. 761. City of Shel-

State commission which has illegally reduced the compensation to be charged for a public service;[43] or he may seek this relief by an original bill.[44]

After a sale by the receiver the court loses jurisdiction to protect the purchaser except to the extent required to complete the sale and deliver possession.[45]

In nearly every case, interference with a receiver in the discharge of his duties is a contempt of court, even when no injunction expressly forbidding it has been issued.[46] For example, striking laborers have been adjudged guilty of contempt for attempting to prevent employees of a receiver of a railroad from working for him.[47] The court will not enjoin the em-

'yville v. Glover, C. C. A., 184 Fed. 134. A sale for taxes without leave of the court is void. Va. T. & C. Steel & I. Co. v. Bristol Land Co., 88 Fed. 134. A valid tax upon the assets is, it seems, a prior lien after the judicial costs. Ledoux v. La Bee, 83 Fed. 761.

43 Gas & El. Stee. Co. v. Mon. & El. Tr. Corp., C. C. A., (2d Ct.), 1920.

44 Landon v. Public Utilities Commission, 234 Fed. 152, approved on this point but reversed, 249 U. S. 236.

45 Brady v. South Shore Traction Co., 206 Fed. 336.

46 Thompson v. Scott, 4 Dill. 508; Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Royal Tr. Co. v. Washburn B. & L. Ry. Co., 113 Fed. 531; *infra*, § 428.

47 Secor v. Toledo, P. & W. R. Co., 7 Biss. 513; King v. Ohio & M. Ry. Co., 7 Biss. 529; In re Higgins, 27 Fed. 443. "If the testimony makes it clear that when these parties went in such numbers, and conducted themselves in such a way, that while they simply said, 'Please get off this engine,' or 'We want you to get off this engine,' they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and trainmen that personal prudence compelled them to leave,—why, then the government has made out its case. As my brother Treat said in a similar case, that we had before us in St. Loius, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass upon facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention." Brewer, J., U. S. v. Kane, 23 Fed. 748, 751, citing In re Doolittle, 23 Fed. 544, 548. And in another case the same judge said: "Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discharge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice; but where parties are engaged in that which is of itself unlawful, in doing that which they have no

ployees of a receiver from a peaceable strike, unaccompanied by violence or intimidation.[48] He can compel, by a summary proceeding in the court that appointed him the delivery of money or other property of the estate in the possession of a stranger to the suit, who claims no right to its possession,[49] or who acquired the same subsequent to his appointment; even though the stranger claims a lien thereupon adverse to the receiver.[50] Where a marshal had levied on property previously in the possession of a receiver of a State court, the receiver was allowed to proceed by a rule to take the possession of the same, although the regular practice was an intervention by him.[51] It has been held, however, that the court should not enjoin a stranger to the suit who is a citizen of another State from enforcing legal process in his own State against land there in the possession of the receiver.[52]

It has been held that a foreign receiver cannot sue in the name of a corporation in another district, where the object is to remove the funds collected to the court that appointed him for administration.[53] A receiver must proceed by an original suit to recover property held by a stranger to the litigation under a claim of title.[54] And he cannot ordinarily maintain

right to do, and in so doing obstruct the officers of the court although intending no contempt, that is a very different thing." Brewer, J., In re Doolittle, 23 Fed. 544, 548.

48 Arthur v. Oakes, C. C. A., 25 L.R.A. 414, 63 Fed. 310; *supra*, § 276. It has been held that ordering the employees of a receiver to strike is a violation of an order of the court directing the receiver to operate a manufacturing plant. U. S. v. Weber, 114 Fed. 950.

49 Miles v. New So. B. & L. Ass'n, 95 Fed. 919.

50 Horn v. Pere Marquette R. Co., 101 Fed. 626.

51 Remington P. Co. v. Louisiana Pr. & Pub. Co., 56 Fed. 287.

52 Schindelholz v. Cullum, C. C. A., 55 Fed. 885.

53 Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. ed. 1163; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894.

54 Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Noe v. Gibson, 7 Paige (N. Y.) 513. Or to collect a claim of the corporation. Eau Claire v. Payson, C. C. A., 107 Fed. 557. A receiver cannot by petition in the suit obtain an injunction against unlawful discrimination by a railroad company which is not a party to the suit. Wood v. N. Y. & N. E. R. Co., 61 Fed. 236. Where a receiver took pay for corporate property in stock which he kept himself, crediting his fund with price in cash, held that he could

a bill in equity when he has an adequate remedy at law,[55] for otherwise the defendant would lose his right to trial by jury.[56]

After the appointment of ancillary receivers although no issue has been joined or final decree entered, the court may order the oral examination of a person not a party to the suit, who, the receivers and the complainant charge, holds assets of the defendant. Such an application will not be denied because material allegations concerning such property are made upon information and belief; nor because the person whose examination is prayed presents an affidavit positively denying that he holds any property of the defendant. It is better practice to require notice of such an application to be served upon the person whose examination is applied for.[57]

Since a proceeding to collect assets of an estate, whether brought *in personam* to recover damages, or *in rem*, as by replevin or ejectment, is ancillary to the principal suit, a receiver appointed by a Federal court can bring a suit for that purpose in the court of his appointment irrespective of the citizenship of the parties or the amount involved.[58] Where a Federal receiver had sued in a State court, which had the power to entertain equitable defenses in actions at law, the Federal court refused to direct him to suspend that action, in order to permit

not sue individually for fraudulent representation by the vendor of the stock. Kenedy v. Benson, 54 Fed. 836.

55 Sewerage and Water Board of New Orleans v. Howard, C. C. A., 175 Fed. 555; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629; Whelan v. Enterprise Transfer Co., 164 Fed. 95; Eau Claire v. Payson, C. C. A., 109 Fed. 676. But see Peck v. Elliott, C. C. A., 79 Fed. 10; Cockrell v. Cooper, C. C. A., 86 Fed. 7, 15; Cunningham v. Cleveland, C. C. A., 98 Fed. 657.

56 Hollander v. Heaslip, C. C. A., 222 Fed. 808.

57 Bowker v. Haight & Freese Co., U. S. C. C., S. D. N. Y., June 29, 1905, per Lacombe, J. Roger Foster for receivers cited Foster v. Townshend, 68 N. Y. 203, 208; Ch. III, § 10; Daniell's Ch. Pr., First Am. ed. 1269, 1270; Lord Pelham v. Duchess of New Castle, 3 Swanst. 290, n.; Bird v. Littlehales, 3 Swanst. 300, n.; Dixon v. Smith, 1 Swanst. 457; Anon., 6 Ves. 287; Angel v. Smith, 9 Ves. 336; Brooks v. Greathead, 1 J. & W. 178; Hamlyn v. Lee, cited in Seton on Decrees, 413; Johnes v. Claughton, Jac. 573; Treadwell v. Morrell, Chan. N. Y., Aug. 1829 cited in Hoffman's Ch. Pr. 1, 156. See Westlake v. Marrin, 176 Fed. 742, s. c., N. Y. L. J., July 7, 1910; *infra*, § 394.

58 White v. Ewing, 159 U. S. 36, 40 L. ed. 67; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573, 43 L. Ed. 814; *supra*, §§ 51, 57.

the defendant to prosecute a Federal suit in equity to establish his right to a set off, although the courts of the two jurisdictions held different views as to the right of set off under the facts; but the Federal court stayed the suit before it until the State court had disposed of the action which had been there brought before the defendant sued in equity.[59]

A receiver of the assets of an insolvent bank has no greater right in obligations payable to the bank than the bank itself.[60]

Except under extraordinary circumstances, the court cannot upon the petition of a creditor compel the receiver to appeal at the expense of the estate from an order authorizing the payment of a claim as preferred.[61] Creditors may be authorized to sue, at their own expense in the receiver's name, to collect a doubtful claim, in the courts of a foreign jurisdiction under a stipulation that only such creditors as are contributors shall participate in the proceeds of the recovery.[62]

A receiver cannot sue out a writ of error from the Supreme Court of the United States to the judgment of a State court, except in a case where that might be done by an individual.[63] He has the right of appeal from an appealable order or decree of a Federal court which sustains a claim antagonistic to the rights of both parties to the suit, or antagonistic to the rights of either party; subject to the limitation that he may not question any order or decree which distributes burdens, or apportions rights, or distributes the estate in his hands between the parties, or any clause in the order or decree appointing him, or any order or decree resting in discretion.[64]

It was held that one of three receivers may take an appeal without the consent of the other.[65]

Permission to appeal at the expense of the estate may be refused to a receiver, when the highest creditor is interested

59 Frees v. John Shields Const. Co., 145 Fed. 1020.

60 Cutler v. Fry, 240 Fed. 238.

61 Grier v. Union Nat. Life Ins. Co., 217 Fed. 293.

62 Cornell v. Nichols & Langworthy Mach. Co., C. C. A., 201 Fed. 320.

63 Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633.

64 Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 186, 187, 43 L. ed. 941, 942, 943.

65 Goodman Mfg. Co. v. Pittsburg-Buffalo Co., 222 Fed. 144.

against such an appeal,[66] and where the question involved is doubtful, the court may refuse such permission, unless creditors give security for the expenses of the appeal,[67] and may even require security for the costs of the respondent.[68] Courts of equity will disregard separate corporate existence only on the ground of agency or estoppel, or when justice is done.[69]

He may appeal from an order or decree which affects his personal rights, such as an order which disallows his fees or commissions; but it seems that he cannot appeal from an order which rests in the discretion of the court; for example, an order which discharges or removes him, or directs him in the administration of the estate, as, for example, to issue receiver's certificates or to make improvements.[70] "His right to appeal from an allowance or claim against the estate does not necessarily fail when his receivership is terminated, to the extent of surrendering the property in the possession of the receiver."[71] Upon an appeal in a suit brought by him, in the absence of any Federal question, the jurisdiction is considered as dependent upon the difference of citizenship in the suit in which he was appointed; and the judgment or decree of the Circuit Court of Appeals is final.[72]

A receiver is presumed to represent all parties to the suit, and he cannot object because other parties have no notice of an application duly served on him;[73] although, of course, the court may listen to a suggestion of that nature by him. No action by the directors or stockholders of a corporation after the ap-

66 Cook v. Anderson Food Co. (N. J. Ch.), 55 Atl. 1042.

67 Gay v. Hudson River El. Power Co., 184 Fed. 631.

68 Ibid.

69 N. Y. Tr. Co. v. Carpenter, C. C. A., 250 Fed. 668.

70 Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 189, 43 L. ed. 941, 944. An order directing the receiver of a railroad to construct and maintain gates and other safeguards at the crossing of another road, in accordance with a contract made between two railroad companies, with covenants running with the land, is not a decree for specific performance, but merely an interlocutory order affecting the administration of the estate from which he cannot appeal. Hunt v. Ill. Cent. Co., C. C. A., 96 Fed. 644. But see Felton v. Ackerman, 61 Fed. 225.

71 Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 189, 43 L. ed. 941, 944.

72 Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 43 L. ed. 814.

73 McLeod v. New Albany, C. C. A., 66 Fed. 378. As to the right of a creditor to enforce a cause of

pointment of a receiver can release a claim which it owns,[74] or bind it by a contract.[75]

§ 312. Duties of receivers. A receiver holds the property of which he is given the care in trust for all persons interested therein, whether parties to the suit or not,[1] provided that they do not claim it by a title paramount to his own.[2] His duties, therefore, are substantially those of a trustee, although his powers are usually more limited; and the decisions concerning the duties and liabilities of trustees, executors, administrators, and assignees in bankruptcy and insolvency are often of service in determining those of a receiver.[3]

A receiver's first duty after his appointment is to take possession of the property entrusted him by the order, using all the powers therein given him.[4] If any of it is under lease he should notify the tenants of his appointment and demand that they attorn to him.[5]

Ordinarily as soon as he has obtained possession of all the estate that consists of personal property he should make an inventory thereof;[6] he should investigate all pledges and mortgages of any part of the assets[7] and cause the property in his hands to be insured against fire.[8] All moneys that he receives he should either pay into court or deposit in a bank to the credit of himself as receiver, in a separate account from that for his

action owned by a receiver, see *infra*, § 314.

74 Stewart v. Laberbee, C. C. A., 185 Fed. 471.

75 Barker v. Southern Bldg. & Loan Ass'n, 181 Fed. 636.

§ 312. 1 Davis v. Gray, 16 Wall. 203, 217, 218, 21 L. ed. 447, 452; Central T. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863; Hamilton v. David C. Beggs Co., 171 Fed. 157; Keeney v. Dominion Coal Co., 225 Fed. 625.

2 Davis v. Duke of Marlborough, 2 Swanst. 108, 118, 137, 138; Georgia v. Atlantic & G. R. Co., 3 Woods, 434.

3 See, for example, Com. v. Franklin Ins. Co., 115 Mass. 278; People v. National T. Co., 82 N. Y. 283.

4 Daniell's Ch. Pr. (2d Am. ed.) 1987.

5 Daniell's Ch. Pr. (2d Am. ed.) 1987.

6 Lewin on Trusts (6th ed., London, 1875), 184; England v. Downs, 6 Beav. 269. But see *infra*, § 321. *Cf.* Williamson v. Wilson, 1 Bland (Md.), 418, 436. But see Guaranty Tr. Co. v. Met. St. Ry. Co., 168 Fed. 937, aff'd. C. C. A., 177 Fed. 925, quoted *infra*, § 394.

7 Wise v. Williams, 162 Fed. 161.

8 Thompson v. Phoenix Ins. Co., 136 U. S. 287, 293, 34 L. ed. 408, 411, per Mr. Justice Harlan.

private deposits.[9] In remitting money from one place to another, he may do so by using the ordinary means, provided that he uses due care.[10] He will be personally liable for all loss to the estate caused by his making any other disposition of the funds collected by him.[11] It is advisable for a receiver to take a receipt for all sums of money exceeding twenty dollars paid out by him. By so doing, and by using such receipts as vouchers, he will have less difficulty in passing his accounts.[12] A receiver should so keep the estate in his hands that it can easily be traced, delivered up, or accounted for.[13] When he is carrying on a mercantile business, he must keep cost sheets, in order that whether he is making a profit or loss may readily be ascertained.[14] He should, at least as often as once a year, account and pay into court all the money which he has received, together with the profits thereof, less all necessary or authorized expenditures, and such compensation as the court allows him.[15] If he receives a considerable sum of money during the interval between the regular times for his accounting, it seems that he should apply to the court for directions concerning its investments;[16] and in general, he should apply for instructions whenever any unexpected event occurs of which advantage may be taken for the benefit of the state, or which necessitates active measures to preserve the state from loss.[17] He should pay no creditor of the estate without authority from the court; and even an *ex parte* order authorizing such payment will be no

9 Salway v. Salway, 4 Russ. 60; s. c., 2 R. & M. 215; Wren v. Kirton, 11 Ves. 377; Hinckley v. Railroad Co., 100 U. S. 153, 157, 25 L. ed. 591, 593. For a case where a receiver was held responsible for money lost by the failure of a bank, see Fikener v. Bott, (Ky.) 47 S. W. 251.

10 Knight v. Lord Plimouth, 3 Atk. 480; s. c., 1 Dickens, 120.

11 Salway v. Salway, 4 Russ. 60; s. c., 2 R. & M. 215; Rowth v. Howell, 3 Ves. 565.

12 Remsen v. Remsen, 2 J. Ch. (N. Y.) 495, 501.

13 Williamson v. Wilson, 1 Bland (Md.), 418; Hinckley v. Railroad Co., 100 U. S. 153, 157, 25 L. ed. 591, 593; Atty. Gen. v. North Am. L. I. Co., 89 N. Y. 94, 107, 108.

14 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

15 Daniell's Ch. Pr. (2d Am. ed.) 1992; Shaw v. Rhodes, 2 Russ. 539. See § 319.

16 Shaw v. Rhodes, 2 Russ. 539; Hicks v. Hicks, 3 Atk. 274; Earl of Lonsdale v. Church, 3 Brown Ch. C. 41.

17 Shaw v. Rhodes, 2 Russ. 539; Hicks v. Hicks, 3 Atk. 274; Earl of Lonsdale v. Church, 5 Brown Ch. C. 41; *supra*, § 310.

protection to him when granted upon the inaccurate representation that there were sufficient funds to make the payments without detriment to the business.[18] An application for such a payment was denied because of the inequitable circumstances connected with an assignment of a judgment.[19]

He cannot act inequitably, even for the benefit of the estate;[20] and if money is paid him, which in equity belongs to another, he can be compelled to pay the same to its rightful proprietor.[21] Any profit which he may make from the estate belongs to the finally successful party, or to him to whom the surplus, after the payment of prior demands, is finally directed to be paid.[22] If he uses the property over which he has been appointed in his private business, he must pay the estate for its use,[23] and it may be charged to be subject to a constructive trust after its transfer by him to one who is not a *bona fide* purchaser.[24]

It is his duty to exhibit, to claimants against the fund, all entries in the books of the corporation, which relate to their respective claims.[25] "In every case of doubt, it is well for a receiver to refrain from action until he may obtain the instruction of the court, whose officer he is."[26]

"If rival and discordant interests between the parties interested in the property produce conflicting plans, upon which they cannot agree, it is the receiver's duty to stand absolutely neutral between all, giving to no one any preference or advantage over the other, and according equal facilities to every stockholder, whether he holds a single share or ten thousand."[27] It is usually considered improper for a receiver to retain as his counsel one who has previously acted in the suit for one of the parties.[28] But it is proper for a receiver appointed in a suit

18 Gibbs v. David, L. R. 20 Eq. 373.

19 Investment Registry v. Chicago & M. Electric Ry. Co., 204 Fed. 500.

20 Skud v. Tillinghast, C. C. A., 195 Fed. 1.

21 Whelan v. Enterprise Transp. Co., 175 Fed. 212.

22 Strang v. Edson, C. C. A., 198 Fed. 813; *infra*, § 313. But see Whitesides v. Lefferty, 3 Humph. (Tenn.) 150.

23 Battaile v. Fisher, 36 Miss. 321.

24 Baker v. Schofield, 243 U. S. 114; Ammon-Stivers Min. Co. v. Great Northern Mining & Development Co., 119 Fed. 377.

25 Bowker v. Haight & Freese Co., 140 Fed. 796; *supra*, § 310a.

26 Chable v. Nicaragua C. C. Co., 59 Fed. 846.

27 Ibid; *supra*, § 310a.

brought by a creditor for the satisfaction of his own debt alone, to retain the attorney of the complainant.[29]

A receiver of a railroad is a common carrier.[30] He is guilty of impropriety, for which he may be removed, when he discriminates between different persons who use the railway;[31] and he may be obliged to repay such sums of money as he has exacted from shippers of freight by unlawful discriminations against them.[32]

A receiver cannot resign without the permission of the court which appointed him.[33]

"Whenever receivers appointed by a Federal court are in the possession and control of a business of employers covered by this Act," carriers engaged in interstate and international commerce, except masters of vessels, "the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railroad or in the customary places on the premises of other employers covered by this Act." [34]

28 Ryckman v. Parkins, 5 Paige (N. Y.), 543; Blair v. St. Louis, H. & K. R. Co., 20 Fed. 348. In one case the court refused to allow the receiver to retain a relative who had previously practiced elsewhere, and had come into the Circuit apparently for the purpose of acting as counsel for the receiver. Blair v. St. Louis, H. & K. R. Co., 20 Fed 348. See *infra*, § 321a.

29 Shainwald v. Lewis, 8 Fed. 878. See Davis v. Chattanooga U. Ry. Co., 65 Fed. 348.

30 Beers v. Wabash, St. L. & P. Ry. Co., 34 Fed. 244; Investment Registry v. Chicago & M. Electric Ry. Co., 204 Fed. 500, see *infra*, § 313; Rutherford v. Union Pac. R. Co., 254 Fed. 880.

31 Handy v. Cleveland & M. R. Co., 31 Fed. 689. See Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 30 Fed. 2; Cutting v. Florida Ry. & Nav. Co., 43 Fed. 747. It has been said that a contract between a receiver of a railroad company and a shipper for the payment of a rebate upon an intrastate shipment, is not illegal. Bibber-White Co. v. White River Val. El. R. Co., 175 Fed. 470.

32 Cutting v. Florida Ry. & Nav. Co., 43 Fed. 747.

33 Daniell's Ch. Pr. (2d Am. ed.) 2002. See In re Matter of Jones, 4 Sandf. Ch. (N. Y.) 615.

34 Act of July 15, 1913, ch. 6, § 9, 38 St. at L. 107, Comp. St. § 8674.

"Whenever in any case pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be fined not more than three thousand dollars or imprisoned not more than one year."[35]

A receiver of a railway including a street railway should continue the operation of the railroad[36] while the franchise is in force.[37] But under extraordinary circumstances the receivers have been permitted by the court to abandon and dismantle part of the railroad and sell the wreakage for the benefit of creditors.[38]

The receiver of a railway company cannot charge more than the valid legal rate established by the State authorities.[39] When, however, the State authorities establish a rate of fare which is illegal and so low, that its enforcement amounts to a confiscation of the property of the company, the Federal court may authorize the receiver to increase the fare in the absence of a contract forbidding the railway company to do so.[40]

35 Jud. Code, § 65, 36 St. at L. 1087, re-enacting in substance 25 St. at L., § 2, p. 436; 24 St. at L., § 2, p. 554. But see Royal Tr. Co. v. Washburn B. & I. R. Ry. Co., 113 Fed. 531. It has been said that a receiver is subject to the Act of March 4, 1907 (34 St. at L. 2416 c. 2939, Comp. St. Supp. 1911, p. 1321, forbidding a common carrier to permit employees of a certain class to remain on duty for more than sixteen consecutive hours; but that he is ordinarily not personally liable for the fine imposed for its violation (U. S. v. Ramsey, C. C. A., 197 Fed. 144); and that after the appointment of a receiver of an insolvent corporation, the company is not liable to the corporation Income Tax. Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 774. As to the liability of receivers under Federal Statutes, see Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897; U. S. v. DeCoursey, 82 Fed. 302.

36 Central Bank & Tr. Co. v. Greenville & W. R. Co., 248 Fed. 350.

37 Boisot v. Amarillo St. Ry. Co., 244 Fed. 838.

38 State of Iowa v. Old Colony Tr. Co., 215 Fed. 307; Central Bank & Tr. Corporation v. Cleveland, 252 Fed. 530.

39 Westinghouse E. & Mfg. Co. v. Binghampton Ry. Co., 255 Fed. 378.

40 Ibid.

§ 313. Liability of receivers. The liability of a receiver is in many but not all respects analogous to those of a trustee. He is liable to all persons interested in the estate in his hands for any damage resulting to them from any breach of duty by him, whether intentionally[1] or through negligence.[2] It has been held that he is personally responsible for funds of the trust embezzled by his clerks.[3] He is, however, free from liability to the parties to the suit on account of any act performed in obedience to an order of the court within its jurisdiction, and not obtained by fraud, until the same has been vacated upon appeal or otherwise.[4]

A receiver's liability to strangers is much more limited than that of a trustee.[5] He is not liable personally upon a covenant entered into in his official capacity with the sanction of the court.[6]

Although it may be that in the courts of Massachusetts he is personally responsible for rent when he retains possession of a leasehold,[7] in the Federal courts he is not liable in such a case, and the court may authorize him to abandon a leasehold after experience has shown that it is unprofitable to the estate, and then he incurs no personal liability, and the estate is responsible only for the use of the property during the time that he has remained in possession,[8] according to its rental value.[9]

§ 313. [1] Knight v. Lord Plimouth, 3 Atk. 480, 481; Kaiser v. Kellar, 21 Iowa, 95, 97; Koontz v. Northern Bank, 16 Wall. 196, 202, 203, 21 L. ed. 465, 468; *infra*, § 321.

[2] Skerrett's Minors, 2 Hog. 192. *Infra*, § 321.

[3] Gunn v. Ewan, 93 Fed. 80.

[4] Holcombe v. Johnson, 27 Minn. 353.

[5] See Taylor v. Davis, 110 U. S. 330, 335, 28 L. ed. 163, 165.

[6] Livingston v. Pettigrew, 7 Lans. (N. Y.) 405; Newman v. Davenport, 9 Baxt. (Tenn.) 538; Taylor v. Davis, 110 U. S. 330, 335, 28 L. ed. 163, 165; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 259.

[7] Com. v. Franklin Ins. Co., 115 Mass. 278; People v. National Tr. Co., 82 N. Y. 283. *Cf.* People v. Univ. L. Ins. Co., 30 Hun (37 N. Y. S. C. R.), 142; Wells v. Higgins, 132 N. Y. 459; Schwartz v. Cahill, 220 N. Y. 174. But see Stokes v. Hoffman House, 167 N. Y. 554, 53 L.R.A. 870; s. c., 46 N. Y. App. D. 120.

[8] St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640; Ames v. Union Pac. Ry. Co., 60 Fed. 966; U. S. Tr. Co. v. Wabash W. Ry. Co., 150 U. S. 287, 37 L. ed. 1085; Seney v. Wabash W. Ry. Co., 150 U. S. 310, 37 L. ed. 1092; Quincy, M. & P. Ry. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632; Kneeland v. Am. L. & Tr.

When the property was a street railroad the receivers were charged as rent only the amount of the net earnings. When the line was part of a system operated in connection with the rest, these were estimated by pro-rating the total receipts on the basis of mileage, and the operating expenses on the basis of car mileage. The receivers were credited out of the general funds of the receivership for the money which they had spent in electrifying part of this leased line.[10]

The payment under orders of the court of the rent fixed by the lease, is not an assumption thereof.[11] He has a reasonable time within which to elect whether to keep the lease as an asset of the estate.[12] Where a receiver retained possession, without

Co., 136 U. S. 89, 34 L. ed. 379; Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 459; s. c., 175 Fed. 812; s. c., 176 Fed. 471; s. c., 190 Fed. 609, 615; s. c., 192 Fed. 135; Coy v. Title Guarantee & Tr. Co., 198 Fed. 275; Betts v. Bisher, C. C. A., 213 Fed. 581. *Re* Mullings Clothing Co., C. C. A., 238 Fed. 58. *Cf.* 3 Columbia Law Rev. 53. For cases where it was held that the court had adopted and assumed the lease, see Central R. & B. Co. of Ga. v. Farmers' L. & Tr. Co., 79 Fed. 158; Mercantile Tr. Co. v. Atlantic & P. R. Co., C. C. A., 88 Fed. 140; s. c., as U. S. Tr. Co. v. M. Tr. Co., C. C. A., 80 Fed. 18; Central T. Co. v. Continental Tr. Co., C. C. A., 86 Fed. 517; U. S. Tr. Co. v. Mercantile Tr. Co., 88 Fed. 140. Dayton Hydraulic Co. v. Felsenthall, C. C. A., 116 Fed. 961. The question whether the court should adopt the lease was said to be administrative rather than judicial in its nature, and not to be reviewed by an appellate tribunal, unless there was a manifest abuse of discretion. Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254. *Certiorari* denied, 168 U. S. 710, 42 L. ed. 1213.

9 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 190 Fed. 609, 615; *Re* Adams Cloak, Suit & Fur House, 199 Fed. 337; Fleming v. Noble, C. C. A., 250 Fed. 733. In Pennsylvania Steel Co. v. N. Y. City Ry. Co., 175 Fed. 812, the receivers, while in possession, were directed to pay the rent, although the same was considered to be exorbitant. See High on Receivers (4th ed.), §§ 273, 394a; *Re* Grignard Lithographic Co., 155 Fed. 699, holding that the landlord could not recover for power which was not used by the trustee in bankruptcy.

10 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 219 Fed. 939. In the Same Case 175 Fed. 812, the receivers while in possession of a leased line were directed to pay for a short time the stipulated rent although the court considered it to be exhorbitant.

11 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 176 Fed. 471; s. c., 175 Fed. 812; s. c., 192 Fed. 135, where a temporary agreement as to the rent was made with the lessor.

12 Walton v. Stafford, 14 App. D. (N. Y.) 310; Kansas City Pipe Line Co. v. Fidelity Title & Trust Co., C. C. A., 217 Fed. 187; Penn-

giving security, after an order of the court which appointed him directed that he either surrender the property or give security for the rent; it was held that he was personally liable.[13]

It is the safer practice for the landlord to apply to the court before instituting an action of rejectment or dispossess proceedings to oust the receiver for nonpayment of rent.[14] Where the default was that of the insolvent such permission should ordinarily be granted without considering any defenses which the tenant may interpose.[15] The landlord waives a previous forfeiture for nonpayment of rent when he accepts rent from the receiver at the rate fixed by the lease and also by asking the court to fix a time within which the receiver should decide whether to adopt the lease.[16] It has been held that the receiver cannot be dispossessed for nonpayment of rent by a petition in the suit of his appointment,[17] but only by an independent action of ejectment [18] unless a State statute authorizing summary proceedings in landlord and tenant cases exists and is followed.[19]

The same principles apply to a lease of personal property such as railroad cars;[20] and it seems to building contracts [21]

sylvania Steel Co. v. N. Y. City Ry. Co., 219 Fed. 939; Fleming v. Noble, C. C. A., 250 Fed. 733. Ten (Pennsylvania Steel Co. v. N. Y. City Ry. Co., 190 Fed. 609, 615) and nine (St. Joseph and St. Louis R. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640) months have been *held* to be not unreasonable periods of time. It was said that it was not unreasonable to preserve the integrity of the system until its sale, by continuance in possession of the leased property. Pennsylvania Steel Co. v. N. Y. City Ry. Co., 176 Fed. 471. See authorities cited in note 8, *supra*.

13 Brooklyn Improvement Co. v. Lewis, 136 App. Div. (N. Y.) 861.

14 Durand & Co. v. Howard & Co., C. C. A., 216 Fed. 585; Odell v. H. Batterman Co., C. C. A., 223 Fed. 292.

15 Odell v. H. Batterman & Co., C. C. A., 223 Fed. 292.

16 Durand & Co. v. Howard & Co., C. C. A., 216 Fed. 585.

17 Johnson v. Lehigh Valley Traction Co., 130 Fed. 932. *Contra*, Pennsylvania Steel Co. v. New York City Ry. Co., 225 Fed. 734.

18 Ibid.

19 See Prince v. Schlesinger N. Y. S. (Trial term, Nov. 28, 1905.)

20 Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025. *Cf.* Platt v. Phila. & R. R. Co., C. C. A., 84 Fed. 535; Thomas v. Western Car Co., 149 U. S. 95, 37 L. ed. 663; Farmers' L. & Tr. Co. v. Chicago, etc., Ry. Co., 42 Fed. 6; Easton v. Houston & T. C. Ry. Co., 38 Fed. 784; Isaac M'Lean Sons Co. v. William S. Butler & Co., 227 Fed. 325.

21 Commonwealth Roofing Co. v.

and other executory contracts the performance of which is incomplete when the receiver is appointed.[22] The appointment of the receiver does not deprive a party to a contract with the insolvent of his right of rescission because of fraud.[23]

Receivers of a street railroad system have been authorized, after notice to the public, to discontinue the exchange of transfers, although the corporation had contracted to make them.[24]

A receiver can be compelled to restore to the estate any interest in the assets which he has acquired directly or indirectly by purchase at his own sale,[25] and any profit which he has made from the estate.[26] If he uses part of the assets in his private business he must pay the estate for its use.[27] When by the use of the assets he elects himself president of another company, he must account to the beneficiaries of the trust for all profits which he thus acquires.[28]

A receiver is not personally liable for a loss resulting from his conduct of the business, when he was not guilty of negligence or misconduct and acted under the direction of the court without objection by the parties in interest.[29]

A receiver is personally liable to strangers for trespass,[30] fraud,[31] or other wilful act, although performed under color of

North Am. Tr. Co., C. C. A., 135 Fed. 984.

22 See Manhattan Tr. Co. v. Sioux City & N. R. Co., 81 Fed. 50; Central Tr. Co. v. East Tenn. Land Co., 79 Fed. 19; Missouri & K. Interurban Ry. Co. v. Edson, C. C. A., 198 Fed. 819; Peabody Coal Co. v. Nixon, C. C. A., 226 Fed. 20; Dickinson v. Willis, 239 Fed. 171; Landon v. Public Utilities Commission of Kansas, 245 Fed. 950.

23 Salter v. Williams, C. C. A., 244 Fed. 126.

24 *Re* Dry Dock R. R., 165 Fed. 487.

25 Baker v. Schofield, 243 U. S. 114; Batton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676; Curran v. Craig, 22 Fed. 101.

26 Strang v. Edson, C. C. A., 198 Fed. 813.

27 Battaile v. Fischer, 36 Miss. 321.

28 Strang v. Edson, C. C. A., 198 Fed. 813.

29 Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 629; *cf.* White v. Murray, 218 Fed. 933.

30 In re Young, 7 Fed. 855; Olney v. Tanner, 10 Fed. 101; Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676; Conn v. Rice, C. C. A., 204 Fed. 181; Lichtenstein v. Belknap, 100 Misc. (N. Y.), 420; Welcusky v. Breslin, 176 App. Div. (N. Y.) 534. For a case where a receiver was held *not* liable for malicious prosecution, see Widmeyer v. Felton, 95 Fed. 926.

31 Bank of Montreal v. Thayer, 7 Fed. 622.

his office. So, if by mistake, though honestly, he takes possession of the property of another, he is personally liable;[32] the fact that he does so under authority of an order of the court will not justify him as against a person who was not a party to the suit or proceeding in which the order was granted.[33] In all of such cases it seems that he can, independently of the statute, be sued without leave of the court which appointed him.[34]

A person who, without having been lawfully appointed, assumes to act as a receiver, has all the liabilities of one duly appointed,[35] but a receiver is not liable for damages caused by a mistaken claim of title which he made in good faith when he did not interefere with the position.[36] He is personally liable for purchases on credit made without authority,[37] but not for money borrowed on the credit of the estate under an order of the court.[38]

A receiver, even when acting as a common carrier, is not liable personally for injuries caused by the negligence of his employees, when he exercised reasonable care in their selection.[39] The only remedy of the person thus aggrieved is by an action against the receiver in his official capacity, seeking satisfaction out of the estate.[40]

A receiver appointed by State [41] or Federal [41a] Court is not liable to pay the Federal Income Tax, nor ordinarily a State fran-

[32] Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676; Curran v. Craig, 22 Fed. 101.

[33] Curran v. Craig, 22 Fed. 101.

[34] Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676. In re Young, 7 Fed. 855; Bank of Montreal v. Thayer, 7 Fed. 622; Curran v. Craig, 22 Fed. 101. But see Aston v. Heron, 2 Myl. & K. 390; Chalie v. Pickering, 1 Keen, 749.

[35] Wood v. Wood, 4 Russ. 558.

[36] Huxley v. Hayes, C. C. A., 201 Fed. 899.

[37] Haines v. Buckeye Wheel Co., C. C. A., 224 Fed. 289.

[38] Ibid.

[39] Kennedy v. I. C. & L. R. Co., 3 Fed. 97; Union Tr. Co. v. Chicago & L. H. Ry. Co., 7 Fed. 513, 516; Davis v. Duncan, 19 Fed. 477; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; Thompson v. No. Pac. Ry. Co., 93 Fed. 384, 389; Hanlon v. Smith, 175 Fed. 192. See, however, Kain v. Smith, 80 N. Y. 458.

[40] Kennedy v. I. C. & L. R. Co., 3 Fed. 97; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; Union Tr. Co. v. U. & L. H. Ry. Co., 7 Fed. 513, 516; Gray v. Grand Trunk W. Ry. Co., C. C. A., 156 Fed. 736.

[41] Lather v. Handlan, 102 Misc. (N. Y.) 563.

[41a] Eq. Tr. Co. v. Western Pac. Ry. Co., 236 Fed. 813.

[42] Under the New Jersey Statute, Franklin Tr. Co. v. State of New

chise tax.[42] The action of the court in placing property in the hands of a receiver does not however relieve it from liability to State and local taxation.[43] It can be assessed for taxes while in the possession of the receiver.[44] Taxes assessed pending the receivership are preferred claims. Taxes assessed before the receivership are usually preferred over other debts of the insolvent, but are paid subsequently to debts incurred by the receiver.[45]

A Federal Court has refused to follow the decision of a State Court that a receiver should not pay taxes assessed against personal property in his possession.[46]

When, before a suit for a personal injury is brought against him, the receiver has been discharged and the estate sold, or returned to its owner, it has been held that the plaintiff has no remedy in a Federal court except against the employee, unless one has been preserved for him by the court.[47] For the owner of the property is not liable for the negligence of the receiver's employees.[48] For this reason it is customary to insert in the order for the sale in bulk of property in the possession of a receiver, a direction that the purchaser shall take it subject to all claims for injuries caused while it was managed by the receiver.[49] Such a provision, although not mentioned in the order for the sale, may be inserted as a condition in the order confirming the sale, and the purchaser, after taking possession under the latter order, is estopped from disputing the validity of the condition.[50] Claims of this nature are usually enforced in

Jersey, C. C. A., 181 Fed. 769. *Contra* Conklin v. U. S. Shipbuilding Co., 148 Fed. 129. Under the Ohio Statute, Keeney v. Dominion Coal Co., 225 Fed. 625.

43 Croy v. Title Guaranty & Tr. Co., C. C. A., 220 Fed. 90, s. c., 212 Fed. 520.

44 Croy v. Title Guaranty & Tr. Co., 212 Fed. 520; Spring Valley Water Co. v. City & County of San Francisco, C. C. A., 225 Fed. 728.

45 Atkinson & Co., Inc. v. Aldrich-Clisbee Co., 248 Fed. 134.

46 Bear River Paper & Bag Co. v. City of Petoskey, C. C. A., 241 Fed. 53.

47 Davis v. Duncan, 19 Fed. 477; White v. Keokuk & D. M. Ry. Co., 52 Iowa, 97. See § 394, *infra*. But see Gray v. Grand Trunk Ry. Co., C. C. A., 156 Fed. 736. For cases where a State court gave a remedy, see Texas Pac. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81; Fordyce v. Withers (Texas), 20 S. W. 266; Baer v. McCullough, 176 N. Y. 97.

48 Davis v. Duncan, 19 Fed. 477.

49 Farmers' L. & Tr. Co. v. Central R. R. Co. of Iowa, 2 McCrary 181; s. c., 7 Fed. 537; s. c., subsequently considered in 17 Fed. 758.

50 Farmers' L. & Tr. Co. v. Cen-

the suit in which the receiver was appointed.[51] The discharge of a receiver until revoked relieves him from all liability to those who had an opportunity to be heard upon the motion for his discharge.[52]

§ 314. Suits against receivers. By the former practice, following the old chancery rule, a receiver could not be sued without the permission of the court that appointed him.[1]

A judgment against a receiver in an action which could not properly be instituted without permission, is not void because no such permission was obtained.[2] Such permission is revocable and may be conditional.[3] "The leave to bring suit in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer."[4]

An act of Congress has changed the practice as follows: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."[5] This dispos-

tral R. R. of Iowa, 17 Fed. 758; *infra*, § 394.

51 Ibid.

52 Lehman v. McQuown, 31 Fed. 138; Davis v. Duncan, 19 Fed. 477; *infra*, § 324.

§ 314. 1 Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Central Tr. Co. of New York v. Wheeling & L. E. R. Co., 189 Fed. 82. For a case where the order of the State court granting leave to sue a receiver appointed by it, was held not to authorize a suit in a Federal court, see Harper v. Printing-Tel.-News Co., 128 Fed. 979. *Cf.* Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; *supra*, §§ 52, 55. Otherwise when it grants leave to sue him "in any court of competent jurisdiction." James Freeman Brown Co. v. Harris, 139 Fed. 105.

2 Ridge v. Manker, C. C. A., 132 Fed. 599.

3 Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 74; Buckhannon & N. R. Co. v. Davis, C. C. A., 135 Fed. 707; Investment Registry v. Chicago & M. Electric R. Co., C. C. A., 251 Fed. 510.

4 Davis v. Duncan, 19 Fed. 477, 483. See also Jordan v. Wells, 3 Woods 527.

5 Jud. Code, § 66, re-enacting 25 St. at L., p. 436; 24 St. at L., p. 554. See Croy v. Marshall, 21 Ohio W. L. B. 489; Atkin v. Wabash Ry. Co., 41 Fed. 193, 194; Colonial Trust Co., et al. v. Pacific Packing & Navigation Co., 142 Fed. 298; Nashville Ry. & Light Co. v. Bunn, C. C. A., 168 Fed. 862. This

sesses receivers appointed by a Federal court of any right which they might otherwise have to remove suits brought against them from the State to the Federal courts, where no difference of citizenship exists and no Federal question is involved.[6] It has been held that this statute makes the judgment in the State court in such an action conclusive as to the right of the plaintiff therein to recover damages, and as to the amount of the recovery;[7] that the receiver has the right to appeal from the judgment of the State court, and that the Federal court should not, as a condition of such appeal, oblige him to execute a *supersedeas* bond.[8] Judgment in such a suit cannot be enforced by execution against the property.[9] It has been held in New York that after the appointment of a receiver the officer of a corporation cannot be examined in proceedings supplementary to execution.[10]

The time and manner of payment must be determined by the court that appointed the receiver.[11] The statute does not authorize the interference by the State court with property in the possession of the receiver[12] by an action of unlawful de-

applies to receivers in bankruptcy. *Re* Gutman, 114 Fed. 1009; *Re* Kanter & Cohen, 121 Fed. 984.

6 Gableman v. Peoria, D. & E. Ry. Co., 179 U. S. 335, 45 L. ed. 220. See *supra*, §§ 5, 37, 51.

7 Dillingham v. Hawk, C. C. A., 23 L.R.A. 517, 60 Fed. 494; St. Louis S. W. Ry. Co. v. Holbrook, C. C. A., 73 Fed. 112; Bound v. South Carolina Ry. Co., 174 Fed. 729; Meyer Rubber Co. v. Georgetown & W. R. Co., 174 Fed. 731; Willcox v. Jones, C. C. A., 177 Fed. 870, holding that the judgment bears interest in accordance with the State statute; Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006. *Contra*, Guaranty Tr. Co., v. Chicago Union Traction Co., 175 Fed. 284. But see Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 311, 314.

8 Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551, 555, 556.

9 Ibid. Dillingham v. Hawk, C. C. A., 23 L.R.A. 517, 60 Fed. 494; St. Louis S. W. Ry. Co. v. Holbrook, C. C. A., 75 Fed. 112; Mo. Pac. R. Co. v. Texas Pac. R. Co., 41 Fed. 311; Gableman v. Peoria, D. & E. Ry. Co., 179 U. S. 335, 339, 45 L. ed. 220, 222.

10 Jones v. Standard Plunger Elevator Co., 167 App. Div. 178.

11 Ibid. Meyer Rubber Co. v. Georgetown & W. R. Co., 174 Fed. 731.

12 Comer v. Felton, C. C. A., 61 Fed. 731; Stateler v. Cal. Nat. Bank, 77 Fed. 43; J. I. C. Plow Works v. Finks, C. C. A., 81 Fed. 524, 529. *Supra*, § 55. For a remarkable exertion of Federal power, see Louisville Tr. Co. v. Cincinnati I. P. Ry. Co., 78 Fed. 307

tainer,[13] a suit to recover title or possession to property,[14] garnishment,[15] or, condemnation proceedings,[16] or proceedings to condemn a grade crossing,[17] or by a suit for specific performance,[18] nor, perhaps, by any injunction.[19] The proper method of collecting taxes upon property in the possession of a receiver is by an application by the State officer of the court for an order requiring such payment.[20] A suit to foreclose a tax lien upon land of which the receiver is mortgagee may be brought in Oregon without permission of the court.[21] The refusal of the receiver to agree with the petitioner upon the point and manner of crossing does not constitute "an act or transaction" by him within the meaning of the statute.[22] The law does not authorize a mandamus against a receiver.[23] The proper remedy in all such cases is usually a petition of intervention *pro interesse suo*.[24]

13 Comer v. Felton, C. C. A., 61 Fed. 731.

14 J. I. C. Plow Works v. Finks, 81 Fed. 529; Love v. Louisville & E. R. Co., 178 Fed. 507. So held of a suit to foreclose a lien when the receiver was a defendant. Am. L. & Tr. Co. v. Central Vt. R. Co., 84 Fed. 917. *Cf.* Grand Trunk Ry. Co. v. C. Vt. R. Co., 88 Fed. 622. So a Federal court refused to entertain a suit to foreclose a lien upon, Am. L. & Tr. Co. v. Central Vt. R. Co., 84 Fed. 917; or ejectment from, Waters v. Shinn, 178 Fed. 345; or to set aside a fraudulent conveyance of property in the hands of a State receiver. Werner v. Murphy, 60 Fed. 769. *Cf. supra*, §§ 52, 55. For a case where the Federal court appointed a trustee to protect the rights of lienors, see Risk v. Kansas Tr. Co., 58 Fed. 45. The same rule applies to trustees and receivers in Bankruptcy. *Re* Russell & Birkett, C. C. A., 101 Fed. 248. They may, however, be sued in trover without leave of the court of bankruptcy. *Re* Kanter v. Cohen, C. C. A., 121 Fed. 984; *Re* Spitzer, C. C. A., 130 Fed. 879.

15 Central Tr. Co. v. East Tenn. V. & G. Ry. Co., 59 Fed. 523; Central Tr. Co. of New York v. Wheeling & L. E. R. Co., 189 Fed. 82. For the practice by the receiver in such a case, see In re Barnard, 61 Fed. 531. For the remedy by a State receiver when property is attached by a United States marshal, see Remington P. Co. v. Louisiana P. & Pub. Co., 56 Fed. 287.

16 Hayes v. Columbus, L. & M. Ry. Co., 67 Fed. 630.

17 Coster v. Parkersburg B. R. Co., 131 Fed. 115; Buckhannon & N. R. Co. v. Davis, C. C. A., 135 Fed. 707.

18 Dickenson v. Willis, 239 Fed. 171, 173.

19 Ibid.

20 Coy v. Title Guarantee & Trust Co., 212 Fed. 520.

21 Coy v. Title Guarantee & Trust Co., 257 Fed. 571.

22 Buckhannon & N. R. Co. v. Davis, C. C. A., 135 Fed. 707.

23 Royal Tr. Co. v. Washburn B. & I. Ry. Co., 113 Fed. 531; *infra*, §§ 428, 457.

24 Winchester v. Davis Pyrites Co., C. C. A., 67 Fed. 45; Minot

It has been held that the statute does not prevent an injunction against the interference by the creditors with the assets in the hands of a receiver of a national bank;[25] nor authorize a stockholder of a corporation to enforce a corporate cause of action by a suit against a debtor to the corporation, when the receiver refuses to sue,[26]—in the latter case, the proper remedy being an application to the court to direct the receivers to sue;[27]—nor authorize the joinder of the receiver in his official capacity in an action against different companies for making in concert with him discriminating rates;[28] and that upon his accounting the receiver can set off against a claim upon the fund debts owed by the claimant to his successor in interest.[29]

A petition to the Federal court for the payment of a claim should show that the receiver holds assets properly applicable thereto.[30]

The holder of a common-law claim who intervenes in the Federal court in the first instance waives his right to a trial by jury; and if the court submits to a jury the issues that arise thereupon, the verdict is merely advisory.[31]

The statute applies to receivers appointed before its enactment;[32] and to suits against a receiver for liabilities incurred by his predecessor in office.[33] It applies to receivers appointed

v. Mastin, C. C. A., 95 Fed. 734; Strain v. Palmer, C. C. A., 159 Fed. 624; *supra*, § 258.

25 Stateler v. Cal. Nat. Bank, 77 Fed. 43. As to suits in a State court for an injunction against a Federal receiver, see Royal Tr. Co. v. Washburn B. & I. R. Co., C. C. A., 139 Fed. 865.

26 Swope v. Villard, 61 Fed. 417. *Cf.* Werner v. Murphy, 60 Fed. 769. *Contra*, Flynn v. Third Nat. Bank, 122 Mich. 642; Saunderson v. Bank of Mecklenberg, 75 S. E. 94.

27 Land Title & Trust Co. v. Asphalt Co., 120 Fed. 996, 999. See Werner v. Murphy, 60 Fed. 769; Swope v. Villard, 61 Fed. 417.

28 Western N. Y. & P. R. Co. v. Penn Refining Co., C. C. A., 137 Fed. 343.

29 Central R. & B'g Co. v. Farmer's L. & Tr. Co., 113 Fed. 405.

30 Empire Distilling Co. v. McNulta, C. C. A., 77 Fed. 700. But see Veatch v. Am. L. & Tr. Co., C. C. A., 84 Fed. 274. For a case where the claimant did not lose any rights by delay till after a dividend had been paid, and the State rule requiring a surrender of collateral was not followed, see London & S. F. Ry. Co. v. Williamette S. M. L. & Md. S. Co., 80 Fed. 226.

31 Flippin v. Kimball, C. C. A., 87 Fed. 258. *Cf.* Atkin v. Wabash Ry. Co., 41 Fed. 193.

32 Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829.

33 McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796; State v. Port Royal & A. Ry. Co., 84 Fed. 67.

by the courts of the Territories over the property of corporations created by acts of Congress.[34] Non-resident receivers may be served in the same manner as the corporations over which they were appointed.[35] A judgment in a suit thus prosecuted can only be collected out of the property in the hands of the receiver in his official capacity.[36] The statute does not authorize suits against a receiver upon claims against the corporation, over whose property he has been appointed.[37] After the property has been sold, free and clear from all incumbrances except certain claims, which the decree directs shall be presented within a limited time, and after such time has expired, a receiver cannot, without leave of the court that appointed him, be sued for acts committed in his management of the property;[38] but a suit pending against a receiver at the time of his discharge may be prosecuted to final judgment where the property has been sold subject to claims against him;[39] and an order of

But see Jones v. Schlapbeck, 81 Fed. 274.

34 Wheeler v. Smith, 81 Fed. 319.

35 Eddy v. Lafayette, 163 U. S. 456, 464, 41 L. ed. 225, 228. It was *held* that process might be served upon any local agent of the receivers. *Re* Seaboard Air Line Ry., 166 Fed. 376.

It has been held that the appointment of a receiver does not *ipso facto* revoke the authority of the agents of the corporation and that service upon a person in the employ of the company when the receiver was appointed is binding upon the corporation, if such service would have been good had there been no receiver. Chiletti v. M. K. & T. Ry. Co., 102 Kan. 297, 171 Pac. 14, L.R.A. 1918, Ch. 1147, see *supra*, § 61, Gursky v. Blair, 218 N. Y. 41. In New York the appointment of a receiver by a Federal court revokes the designation by the corporation of a person on whom process may be served. Gursky v. Blair, 218 N. Y. 41. See Missouri K. & T. Ry. Co. v. Hudson, Oklahoma, Sept. 1918, 174 Pac. 1058, Central Tr. Co. v. St. Louis A. & T. Ry. Co., 40 Fed. 426; *contra* Baltimore & Ohio Ry. Co. v. Freedman, C. C. A., 112 Fed. 37.

36 Farmers' L. & Tr. Co. v. Central R. Co. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 310. *Re* Seaboard Air Line Ry., 166 Fed. 376; Hanlon v. Smith, 175 Fed. 192.

37 Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co., 118 Fed. 204.

38 Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co., 118 Fed. 204.

39 Baer v. McCullough, 176 N. Y. 97, 103 Parker, C. J.: "Clearly the statute indicates that it was a part of the Congressional scheme that the appointment of receivers of great corporations—in the case of railroads, covering hundreds and sometimes thousands of miles, with

a Federal court which discharged a railroad receiver, restored the property to the defendant company and required that all claims against the receiver be presented by intervention to that court before a given date, did not prevent the subsequent recovery in a State court of a judgment against the company for damages on account of personal injuries caused by the negligent operation of the railroad by the employees of the receiver before his discharge.[40]

property extending through many different counties and States—should not operate to prevent parties having claims against such corporations, or against the receivers thereof, from proceeding in the courts of the neighborhood precisely as they could have done when the corporation was managing the property. And to save the citizen unnecessary expense, and the more surely to protect him in his rights, it provided, in effect, that the right to bring the action should not depend upon the will of the court appointing the receivers, and so could be brought without the consent of such court. But while Congress intended to permit the establishment of claims against the fund in the hands of the receivers to take place through the ordinary local judicial machinery, it could not, of course, tolerate an attempt on the part of such courts to take possession of so much of the fund or property in the hands of the receivers as would be necessary to the satisfaction of the claims. Only one court could be permitted to operate the property, marshal the assets, decree a sale and provide for the distribution of the assets among those entitled thereto, and hence it was deemed necessary to establish the boundary line beyond which State courts could not go. Such a construction is in harmony with the decree made by the Federal court in this case. True, it provided for a method by which claims against the fund could be ascertained, but it did not provide that such method was exclusive, nor do we think it could have so provided in view of the language of the statute authorizing the commencement of suits without its consent, for if it could take to itself exclusive jurisdiction to establish claims against the fund by decree made at the close of the litigation, it could also do it at the outset of the litigation, and in such case the authority conferred by statute upon other courts to take jurisdiction of actions brought against the receivers would be without effect, and, of course, the statute cannot thus be brushed aside.

"The decree of the Federal court in this case was made on broader lines—lines more convenient for the litigant and in harmony with the statute. It assured the creditor that his claim, whether established or not at the time of the sale of the property, shall be paid, and it does not attempt to take from him the right, plainly given him by the statute, to select the court most convenient to him, and it reserved to the Federal court, in the interest of all the creditors, the right to proceed at the foot of the decree

A Court of the United States will rarely, if ever, enjoin a proceeding in admiralty in a Federal District Court against property in the hands of one of its receivers.[41]

It has been held that the statute does not apply to a receiver in bankruptcy who is not carrying on the business of the bankrupt, except in so far as the cause of action arises out of his acts in the care and preservation of the property of the estate.[42]

A receiver appointed under a creditor's bill is not a proper party to an ancillary foreclosure suit.[43] An independent suit to recover a simple contract debt incurred by him cannot be maintained in equity.[44] The creditor must sue at law or bring a petition of intervention in the original suit.[45]

A suit begun before the appointment of a receiver may subsequently be prosecuted to judgment, and the judgment so obtained establishes, as against the receiver, the rightful amount of the demand.[46] The judgment should be entered against the corporation and not against the receiver except under special circumstances when the receiver has been substituted as a defendant.[47] A party who, pending such a suit, files his claim against the receiver in the suit in which the receiver was appointed, does not thereby make an election of remedies and lose his right to prosecute the suit.[48] In such a case it was

to make such further order as might be necessary to carve out of the property or take from the fund such sum as should be necessary to satisfy all claims established through the proper legal machinery provided either by the State or the Federal government in the event that the purchaser of the property, the Erie Railroad Company, should fail to pay such claims.''

40 Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81. Where the receivers remained in possession a few days after the delivery of the deed to the purchaser, a cause of action for negligence then arising is a liability of the receivership enforceable under such a clause of the decree. Fidelity I., Tr. & S. D. Co. v. Norfolk & W. R. Co., 88 Fed. 815.

41 Paxson v. Cunningham, 63 Fed. 132; Berwind-White Coal Mining Co. v. Eastern S. S. Corp., 228 Fed. 726. *Cf.* The St. Nicholas, 49 Fed. 671.

42 *Re* Kalb & Berger Mfg. Co., C. C. A., 165 Fed. 895.

43 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642.

44 Nash v. Ingalls, 79 Fed. 510.

45 Ibid.

46 Pine Lake Iron Co. v. Lafayette Car Works, 53 Fed. 853. See *supra*, § 230.

47 Sundles v. Idaho-Oregon Light & Power Co., 218 Fed. 698.

48 Ibid. See Zacher v. Fidelity Tr. & S. D. Co., C. C. A., 106 Fed. 593.

held that the claimant thereby lost his right to costs in the original action.[49]

It has been held that leave from a State court need not be obtained before suing a receiver appointed by it for the infringement of a patent.[50] It has been held that an action will not lie against a receiver for a personal injury sustained before his appointment.[51]

In a proper case after the appointment of a receiver the Federal court may enjoin suits previously or subsequently brought which interfere with the administration of the assets.[52] Such injunctions have been granted to enjoin the continuance of a suit previously begun to enforce a lien on the property; in which the plaintiff had been guilty of laches.[53] To enjoin a separate action against a party to the foreclosure suit to enforce an agreement to make advances for interest and a sinking fund.[54] To enjoin a suit to collect an extension note which matured before other extension notes, all issued under a scheme of extension to which the note in suit referred, when the early maturity of the note in suit, had been concealed from the other creditors and its collection would have been given its holder an unconscionable preference in the distribution of the property in the hands of the receiver.[55]

It has been held that the Federal court should not enjoin suits against the owners of property in its possession which will not interfere with the possession,[56] nor an action to foreclose a mortgage upon property in the hands of its receiver.[57]

Following the analogy of action authorized by statute in admiralty and bankruptcy, the Federal courts sometimes, in-

49 Ibid.

50 Hupfeld v. Automatic Piano Co., 66 Fed. 788. *Cf.* Curran v. Craig, 22 Fed. 101.

51 Finance Co. of Pa. v. Charleston C. & C. R. Co., 46 Fed. 508.

52 Equitable Trust Co. of New York v. Western Pac. Ry. Co., 231 Fed. 478; Henry M. Jackson v. Parkersburg & Ohio Valley Elec. Ry. Co., 233 Fed. 784; Security Inv. Co. of Pitts. v. First Nat. Bank of Beaumont, Tex., C. C. A., 203 Fed. 632; *supra*, § 270a.

53 Henry M. Jackson v. Parkersburg & Ohio Valley Elec. Ry. Co., 233 Fed. 784, but see *supra*, §§ 52, 55.

54 Equitable Trust Co. v. Western Pac. Ry. Co., 231 Fed. 478.

55 Security Inv. Co. of Pitts. v. First Nat. Bank of Beaumont, Tex., C. C. A., 203 Fed. 632.

56 Equitable Trust Co. of N. Y. v. Pollitz, C. C. A., 207 Fed. 74.

57 Westinghouse Elec. & Mfg. Co. v. Binghamton Ry. Co., 255 Fed. 378, 385.

clude in the order for the appointment of a receiver of the property or a corporation injunctions against the commencement or continuance of a suit against the company by any creditor in a State court. This practice is not justified by precedent. It is in conflict with the public policy of the United States as expressed in the Act of Congress authorizing suits against Federal receivers without the consent of the courts that appointed them,[58] and is forbidden in the Clayton Act.[59]

That such an order cannot enjoin without special reason, suits previously instituted has been held by a Circuit Court of Appeals.[60] A clause in an order appointing a receiver of property of a corporation, restraining the defendant and other persons from interfering with or assuming control of the claims and causes of action of the company, does not prevent the prosecution of a previous suit by stockholders against the defendant and its directors to enforce a cause of action held by the company against the latter.[61]

§ 315. Manner of applying for the appointment of a receiver.

It has been held that a court has no jurisdiction to appoint a receiver, unless a cause is pending;[1] and that, therefore, will never be appointed upon petition[2] when no suit has been begun, except in the case of lunatics.[3] The grounds of the exception and the reasons why it does not extend to infants are not very clear.[4]

After a suit has been begun, however, a receiver may be appointed at any stage of it when a necessity is shown,—before appearance,[5] between appearance and answer,[6] between answer and decree,[7] at the decree,[8] or afterwards, if the cause is still

58 Judicial Code, § 66, see § 314 *infra*.

59 § 19, 38 St. at L. 737, Comp. St. § 1243c. *Supra*, § 291.

60 Central Trust Co. v. Chicago Ry. Co., C. C. A., 224 Fed. 706, in which the author was counsel.

61 Am. Steel Foundries v. Chicago Ry. & Tr. Co., 231 Fed. 1003, in which the author was counsel.

§ 315. 1 In re Brant, 96 Fed. 257, Anon., 1 Atk. 578. See § 324.

2 In re Brant, 96 Fed. 257; Anon., 1 Atk. 578; Ex parte Whitfield, 2 Atk. 315; Merchants' & M. Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

3 Ex parte Radcliffe, 1 J. & W. 639; Anon., 1 Atk. 578; Ex parte Warren, 10 Ves. 622.

4 Ex parte Whitfield, 2 Atk. 315.

5 Tanfield v. Irvine, 2 Russ. 149.

6 Vann v. Barnett, 2 Brown Ch. C. 158; Metcalfe v. Pulvertoft, 1 V. & B. 180.

7 Kershaw v. Mathews, 1 Russ. 361.

8 Osborne v. Harvey, 1 Y. & C. N. R. 116.

open [9] and the complainant is not in default.[10] But a case of pressing necessity must exist to justify the appointment of a receiver before answer.[11] An objection to the bill on account of multifariousness or a misjoinder of parties will not prevent the appointment of a receiver; nor will the pendency of a motion for leave to amend the bill,[12] unless indeed the proposed amendment would change materially the allegations showing the necessity for a receiver.

The bill should lay the foundation for the appointment by stating the facts which show its necessity and propriety,[13] and should contain a prayer for a receiver.[14] If, however, a state of facts subsequently arise making the appointment necessary, it may probably be made without an amendment of the original or the filing of a supplemental bill.[15] The application for a receiver should be supported by evidence showing that the appointment is necessary.[16] If the application is made before decree, the affidavits should be founded upon the allegations in the bill.[17] If statements not founded on allegations in the bill and alleging facts which existed and were known before the bill was filed, are introduced into the affidavits, it seems that the court will not consider them,[18] and even if, where the case made by the bill fails, sufficient ground for a receiver is confessed in the answer, it seems that a receiver should be denied

9 Cooke v. Gwyn, 3 Atk. 689; Atty. Gen. v. Mayor of Galway, 1 Molloy, 95; Bowman v. Bell, 14 Sim. 392.

10 Harrington v. Union Oil Co., 144 Fed. 235.

11 Latham v. Chaffee, 7 Fed. 525. See Union Mut. Life Ins. Co. v. Union Mills P. Co., 3 L.R.A. 90, 37 Fed. 287.

12 Barnard v. Darling, 1 Barb. Ch. (N. Y.) 76.

13 Tomlinson v. Ward, 2 Conn. 396; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.), 438. But see Hottenstein v. Conrad, 9 Kan. 435.

14 Eq. Rule 25. But see Osborne v. Harvey, 1 Y. & C. N. R. 116.

15 Malcolm v. Montgomery, 2 Molloy, 500; Hottenstein v. Conrad, 9 Kan. 435.

16 Middleton v. Dodswell, 13 Ves. 266; Kerr on Receivers (2d Am. ed.), 154. It was held in a State court that a bill praying for a receiver sworn to "as being true to the best of affiant's knowledge and belief," is not sufficiently verified. Smith-Dimmick Lumber Co. v. Teague, 24 South. 4.

17 Dawson v. Yates, 1 Beav. 301, 306; Cremen v. Hawkes, 2 Jones & La. T. 674; Kerr on Receivers (2d Am. ed.), 154.

18 Dawson v. Yates, 1 Beav. 301, 306; Kerr on Receivers (2d Am. ed.), 154.

the plaintiff, at least until he has amended his bill.[19] Where the application is made *ex parte,* it is the complainant's duty to make a full, frank, and complete statement of all facts which might affect the action of the court.[20] After an application for a receiver has been once denied, a second application supported by the same papers will rarely be granted.[21] The former rule was that, after answer, a plaintiff when moving for a receiver could only rely upon the admissions in the answer;[22] but now a sworn answer is given upon such a motion little more effect than an ordinary affidavit, and may be contradicted by affidavits in support of the bill.[23]

The appointment is usually only made upon notice and is very rarely granted *ex parte.*[24] Less than one day's notice has been held to be insufficient.[25] A receiver may, however, be appointed *ex parte,* if that is the only way to preserve the property from destruction or serious injury, or removal beyond the jurisdiction of the court.[26] It has been said that a receiver of the

19 Cremen v. Hawkes, 2 Jones & La. T. 674; Kerr on Receivers (2d Am. ed.), 154.

20 Burroughs v. Toxaway Co., 182 Fed. 129.

21 Fenton v. Lumberman's Bank, Clarke Ch. (N. Y.) 360.

22 Daniell's Ch. Pr. (2d Am. ed.) 1976. See Goodman v. Whitcomb, 1 J. & W. 589; Kershaw v. Mathews, 1 Russ. 361.

23 Allen v. Dallas & W. R. Co., 3 Woods, 316, 332.

24 Blondheim v. Moore, 11 Md. 365; People v. Norton, 1 Paige (N. Y.), 17; Sandford v. Sinclair, 8 Paige (N. Y.), 373; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117.

25 St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. 691.

26 Phelps v. Mutual Reserve, etc., Ass'n, C. C. A., 61 L.R.A. 717, 112 Fed. 453; Worth Mfg. Co. v. Bingham, C. C. A., 116 Fed. 785; *Re* Francis, 136 Fed. 912; holding that such an appointment, without notice to a defendant who is not present, was not unconstitutional as a taking of his property without due process of law. In Buchanan v. Bay State Gas Co., U. S. C. C. D., Del. Oct. 15, 1896, in which the writer was counsel, Judge Wales appointed a receiver *ex parte* upon documentary evidence. Also in a later case Judge Kirkpatrick in U. S. C. C. D., N. J., appointed a receiver *ex parte.* Brady v. Bay State Gas Co., 106 Fed. 584. Latimer v. McNeal, C. C. A., 142 Fed. 451; Mann v. Gaddie, C. C. A., 158 Fed. 42; Taylor v. Easton, C. C. A., 180 Fed. 363. In Weiss v. Haight & Freese Co., May, 1906, in which the writer was counsel, Judge Lowell made such an appointment; affirmed on the ground of waiver in Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328; *certiorari* denied 207 U. S. 594, 52 L. ed. 356; Burroughs v. Toxaway Co., 182 Fed. 129; Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385;

assets of a railroad company should rarely be appointed in a suit to which no stockholders or bondholders are actually parties.[27] It was held that a committee of bondholders whose misconduct is one of the grounds for the receivership are not indispensable parties.[28] Where the officer of a corporation who had been served with notice of a motion for the appointment of a receiver fraudulently concealed that fact from his associates, and did not oppose the motion, although no collusion with the plaintiff was shown, a motion to vacate the appointment was entertained.[29]

A delay of one month after knowledge of the appointment of a receiver, who had expended in the improvement of the property money furnished him by others, was held such acquiescence as to estop a party from moving to vacate the order of appointment for irregularity because granted without notice to him.[30] Except in an extraordinary case, a receiver will not be appointed over property in the possession of a stranger to the suit.[31] When it appears that the court has no jurisdiction the bill should be dismissed by the court on its own motion "however the knowledge may be acquired."[32] The objection that the complainant is not a judgment creditor is waived unless specifically made at the time of the application for the appointment.[33] Allegations

Gibson v. Martin, 8 Paige (N. Y.), 481; Johns v. Johns, 23 Ga. 31; Triebert v. Burgess, 11 Md. 452; Gibbons v. Mainwaring, 9 Sim. 77; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Barley v. Gittings, 15 App. D. C. 421, 437; Hendrix v. Am. Freehold, etc., Co., 95 Ala. 313. See Harv. Law Rev. xv, 849; *supra*, § 304.

27 Overton v. Memphis & L. R. Co., 10 Fed. 866. But see Central T. Co. v. Texas & St. L. Ry. Co., 24 Fed. 153. The absence of the defendant from the jurisdiction or inability to find and serve him or some urgent emergency, making the interference of the court necessary to prevent loss of the property, are sufficient grounds for an appointment without notice. Mann v. Gaddie, C. C. A., 158 Fed. 42; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438; People v. Albany & Susquehanna R. R. Co., 38 How. Pr. (N. Y.) 228, 252.

28 Lowenthal v. Georgia Coast & P. R. Co., 233 Fed. 1010.

29 Allen v. Dallas & W. R. Co., 3 Woods 316.

30 Ibid.

31 Searles v. Jacksonville, P & M. R. C., 2 Woods 621. See also Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452.

32 Scattergood v. American Pipe & Construction Co., C. C. A., 249 Fed. 23.

33 L. D. George Lumber Company v. Daugherty, C. C. A., 214 Fed. 958.

of collusion are insufficient to support a motion to vacate the appointment when they are not supported by any facts.[34]

§ 316. Who may apply for the appointment of a receiver. A receiver is usually appointed upon the application of the plaintiff. Before a decree it seems that one defendant cannot move for a receiver,[1] unless he has filed a cross-bill or counterclaim praying for one.[2] After a decree, however, he may, in a proper case, obtain a receiver of the property of a co-defendant upon petition,[3] but not usually over the property of the plaintiff without a cross-bill.[4]

§ 317. Manner of the appointment of a receiver. By the English practice, which was followed in New York before the passage of statutes altering it, when an application for the appointment of a receiver was granted, the selection of the receiver was referred to a master in chancery, whose action was subject to the confirmation of the court.[1] The same master usually exercised supervision over contracts made by the receivers and the adjustment of his compensation.[2] In the Federal courts, however, it is the customary practice for the judge to appoint and often to supervise a receiver himself, without the aid of a master, except when the accounts are passed.[3]

The order is not void because the bill is demurrable for want of equity, or because the bill is not verified.[4] The denomination of a person appointed with authority to bring a suit, as a special

[34] Welch v. Union Casualty Ins. Co., 238 Fed. 968.

§ 316. [1] Robinson v. Hadley, 11 Beav. 614; Leddel's Ex'r v. Starr, 19 N. J. Eq. (4 C. E. Green) 159. But see Sargant v. Read, L. R. 1 Ch. D. 600; Henshaw v. Wells, 9 Humph. (Tenn.) 568.

[2] Grote v. Bury, 1 W. R. 92; Robinson v. Hadley, 11 Beav. 614; Kerr on Receivers (2d Am. ed.) 153, 154.

[3] Barlow v. Gains, 8 Beav. 329; Hiles v. Moore, 15 Beav. 175; Kerr on Receivers (2d Am. ed.) 154.

[4] Grote v. Bury, 1 W. R. 92; Robinson v. Hadley, 11 Beav. 614; Kerr on Receivers (2d Am. ed.) 153, 154.

§ 317. [1] Creuze v. Bishop of London, Dick. 687; Thomas v. Dawkin, 1 Ves. Jr. 452; In re Eagle Iron Works, 8 Paige (N. Y.), 385; High on Receivers, § 90; Daniell's Ch. Pr. (2d Am. ed.) 1976.

[2] Thornhill v. Thornhill, 14 Simons 600.

[3] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Frank v. Denver & R. G. Ry. Co., 23 Fed. 757. But see Taylor v. Phila. & R. R. Co., 7 Fed. 379; s. c., 9 Fed. 1; Cowdrey v. Railroad Co., 1 Woods 331, 341.

[4] Clark v. Brown, C. C. A., 119 Fed. 130.

master instead of as a receiver, will not affect the validity of the order.[5]

In a stockholder's suit, the entry of an order appointing a receiver, with instructions to sell all of the property of a corporation, without determining any of the issues so tried and submitted, was held unauthorized and erroneous.[6]

§ 317a. Disapproval of the appointment of the receiver. The Judicial Code provides: "Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the Circuit Court of Appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuits in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be."[1]

§ 318. Who should be appointed receiver. As a general rule, no one should be appointed receiver of property who has any

5 Royal Ins. Co. v. Miller, 199 U. S. 353, 50 L. ed. 226; Tenabo Mining & Smelting Co. v. Bates, C. C. A., 220 Fed. 756.

6 Gila Bend Reservoir & Irrigation Co. v. Gila Water Co., 202 U. S. 270, 50 L. ed. 1023.

§ 317a. 1 Jud. Code, § 56, 36 St. at L. 1102; *supra*, § 306.

interest therein,[1] or is in any way connected with the litigation in the course of which the appointment is made,[2] or is nearly related to,[3] or is in the employ of, any of the parties thereto,[4] or who, if he should receive the appointment, would occupy two

§ 318. [1] Wiswell v. Starr, 48 Me. 401. The son or brother of a party to a cause should not be appointed receiver over property which is the subject of the litigation, Williamson v. Wilson, 1 Bland (Md.) 418; Taylor v. Oldham, Jac. 527; but see Shainwald v. Lewis, 8 Fed. 878. Nor should the next friend of an infant, whose duty it is to protect his interest, be appointed receiver over his estate, Stone v. Wishart, 2 Madd. 64; nor an active trustee over the trust estate, Sutton v. Jones, 15 Ves. 584; ——— v. Jolland, 8 Ves. 72; although a mere dry trustee may be thus appointed, Sutton v. Jones, 15 Ves. 584; nor should a master in chancery, whose duty it is to pass receivers' accounts, be appointed a receiver, *Ex parte* Fletcher, 6 Ves. 427. It has also been said in England, "that the receiver-general of taxes for a county cannot be appointed a receiver; for having given, as such, security to the crown, if he were to become indebted to the crown and to the estate, the crown might, by its prerogative process, sweep away all his property." Daniell's Ch. Pr. (2d Am. ed.) 1973. See Atty. Gen. v. Day, 2 Madd. 246, 254. And Lord Eldon held that a peer could not be a receiver, because, "in many instances, a receiver may be committed." Atty. Gen. v. Gee, 2 V. & B. 208. It was held improper to appoint as assignee in bankruptcy of a corporation one who had been appointed by a State court receiver of its assets. In re Stuyvesant Bank, 5 Ben. 566 s. c., 6 N. B. R. 272. But it was subsequently held eminently proper to appoint as a receiver of the assets of an insolvent corporation one who by the laws of the State that chartered it was the official custodian of its assets in case of its insolvency even though that State was in another Circuit from the one in which the suit for a receiver was brought, and the officer did not reside within the jurisdiction of the court. In this case it was made a condition of the appointment that the receiver should pay into the registry of the court the proceeds of all assets collected within its jurisdiction, but he was allowed to give sureties who were residents of the State where he dwelt. Taylor v. Life Ass'n of Am., 3 Fed. 465.

[2] Baker v. Backus, 32 Ill. 79; Garland v. Garland, 2 Ves. Jr. 137; State Tr. Co. v. Nat. Land & Mfg. Co., 72 Fed. 575; Wood v. Oregon Dev. Co., 55 Fed. 901; Chicago Great Western R. Co. v. Hulbert, C. C. A., 205 Fed. 248; Dill v. Supreme Lodge, Knights of Honor, 226 Fed. 807; Berwind-White Coal Mining Co. v. Eastern Steamship Corp., 228 Fed. 726; United States v. Illinois Surety Co., 238 Fed. 840.

[3] Williamson v. Wilson, 1 Bland (Md.) 418.

[4] Baker v. Backus, 32 Ill. 79; Atty Gen. v. Bank of Columbia, 1 Paige (N. Y.) 511; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849.

inconsistent positions;[5] nor a person who is not familiar with the management of similar property,[6] and able to give sufficient attention to the management of his trust.[7]

The court may, however, under special circumstances appoint as receiver a trustee,[8] a person interested in the subject of the suit,[9] or even a party to the suit,[10] or his near relation.[11] This, however, should rarely be done, unless by consent, or possibly when it clearly appears to be for the interest of all concerned;[12] and in such a case by the English practice the receiver was usually obliged to act without compensation if he accepted the trust.[13]

A stockholder,[14] a member,[15] an officer or a director, of a corporation should ordinarily not be appointed receiver of the same,[16] especially when he has been connected with or assented

5 Stone v. Wishart, 2 Madd. 64; *Ex parte* Fletcher, 6 Ves. 427.

6 Lupton v. Stephenson, 11 Ir. Eq. 484. But it was held that a person was not disqualified from appointment as receiver of a railroad because he was not a citizen of the State where the railroad was chartered and situated; nor because he was not a railroad expert and was unacquainted with the mechanical details of the railroad. Farmers' L. & Tr. Co. v. Cape Fear & Y. Val. R. Co., 62 Fed. 675. *Contra*, Wynne v. Lord Newborough, 15 Ves. 283. Nonresidents are often appointed ancillary receivers. Bayne v. Brewer Pottery Co., 82 Fed. 391.

7 Wynne v. Lord Newborough, 15 Ves. 283; Gibbs v. David, L. R. 20 Eq. 373.

8 Sykes v. Hastings, 11 Ves. 363; Sutton v. Jones, 15 Ves. 584; Gardner v. Blane, 1 Hare, 381; Powys v. Blagrave, 18 Jur. 463; Ames v. Birkenhead Docks, 20 Beav. 332; Potts v. Warwick & B. C. N. Co., Kay, 143; Kerr on Receivers (2d Am. ed.) 136-139.

9 Hoffman v. Duncan, 18 Jur. 69; Powys v. Blagrave, 18 Jur. 462; Kerr on Receivers (2d Am. ed.) 136.

10 Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40; Robinson v. Taylor, 42 Fed. 803, 812.

11 Shainwald v. Lewis, 8 Fed. 878.

12 Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Kerr on Receivers (2d Am. ed.) 136-139.

13 Wilson v. Greenwood, 1 Swanst. 471, 483; Blakeney v. Dufaur, 15 Beav. 40; Hoffman v. Duncan, 18 Jur. 69; Powys v. Blagrave, 18 Jur. 463. But see Newport v. Bury, 23 Beav. 30.

14 Wiswell v. Starr, 48 Me. 401; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; but see People v. Illinois B. & L. Ass'n, 56 Ill. App. 642.

15 Dill v. Supreme Lodge, Knights of Honor, 226 Fed. 807.

16 Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161. Finance Co. of Pa. v. Charleston, C. & S. C. R. Co., 45 Fed. 436; Olmstead v. Distilling & C. F. Co., 67 Fed. 24; but see Farness L. &

to the transactions that lead to its insolvency;[17] but under special circumstances, when it is necessary to obtain the advantage of his knowledge of its affairs and he cannot otherwise be employed, such an officer or director may be appointed;[18] although, in such a case, it is advisable to join a disinterested person with him as a co-receiver.[19] The fact that directors of a corporation which has been appointed receiver are also directors of the insolvent corporation may be a sufficient cause for objecting to its appointment or for joining with it a disinterested person.[20] In one case, the court held that the fact that there was a possible claim on the part of the corporation against one of several receivers was no ground for removing him, until the court or his associates had determined to prosecute the claim.[21] When a party to the cause is appointed receiver in it, he does not thereby lose his privilege of acting as party.[22] It has been held in Tennessee, that no one, not even a clerk of the court, can be made a receiver against his will.[23]

Recent statutes provide that no clerk or deputy clerk of a Federal court shall be appointed receiver except for special reasons which must be assigned in the order of appointment;[24] and that "no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a mem-

Tr. Co. v. No. Pac. R. Co., 61 Fed. 546; Coy v. Title Guarantee & Tr. Co., 157 Fed. 794; Attorney General v. Bank of Columbia, 1 Paige (N. Y.) 511; Baker v. Backus, 32 Ill. 79. *Cf. Re* Gordon Supply & Mfg. Co., 129 Fed. 622. See High on Receivers (4th ed.), §§ 63-81a.

17 Coy v. Title Guarantee & Tr. Co., 157 Fed. 794.

18 State Tr. Co. v. Nat. Land Imp. & Mfg. Co., 72 Fed. 575; Bowling Green Trust Co. v. Virginia Passenger & Power Co., 133 Fed. 186; Cole v. Phila. & E. Ry. Co., 140 Fed. 944; but see People v. Illinois B. & L. Ass'n, 56 Ill. App. 642.

19 Cole v. Phila. & E. Ry Co., 140 Fed. 944.

20 Cole v. Phila. & E. Ry. Co., 140 Fed. 944.

21 Land Title & Trust Co. v. Asphalt Co. of America, 120 Fed. 996.

22 Scott v. Platel, 2 Phil. 229; Cowdrey v. Railroad Co., 1 Woods 331, 350.

23 Waters v. Carroll, 9 Yerg. (Tenn.) 102.

24 20 St. at L., 415.

ber."[25] A State statute prohibiting the appointment of non-residents as receivers is not binding upon a Federal court.[26]

An order may provide for the appointment of a receiver in the alternative to other relief.[27]

§ 319. The receiver's security. As a general rule, the order for the appointment of a receiver provides that he shall give good and sufficient security for the faithful performance of his duties.[1] This, by the English practice, was usually a recognizance entered into by the receiver and two or more sureties, whereby they, the cognizers, acknowledged "themselves to be indebted to the cognizees (usually the Master of the Rolls and the senior Master of the Court) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs, executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels."[2] The recognizance, however, was subject to a condition making it void if the receiver should duly account for the rents and profits of the estate over which he was appointed.[3] In the Federal courts no fixed rule prevails, the security required from a receiver being whatever the judge who orders his appointment thinks proper.[4]

When a receiver is appointed by consent, the court may appoint him without requiring security, or upon his own recognizance only.[5]

The sureties, when individuals, should usually be residents of the district; but under peculiar circumstances sureties residing elsewhere have been accepted.[6]

25 25 St. at L., 554.

26 City of Defiance v. McGonigale, C. C. A., 150 Fed. 689.

27 Curling v. Townshend, 19 Ves. 628.

§ 319. 1 Daniell's Ch. Pr. (2d Am. ed.) 1977; Mead v. Lord Orrery, 3 Atk. 235; Tomlinson v. Ward, 2 Conn. 396.

2 Daniell's Ch. Pr. (2d Am. ed.) 1977; Mead v. Lord Orrery, 3 Atk. 235; Tomlinson v. Ward, 2 Conn. 396.

3 Daniell's Ch. Pr. (2d. Am. ed.) 1999.

4 Taylor v. Life Ass'n of Am., 3 Fed. 465.

5 Hibbert v. Hibbert, 3 Meriv. 681; Countess of Carlisle v. Lord Berkley, Amb. 599; Ridout v. Earl of Plymouth, 1 Dickens, 68.

6 Taylor v. Life Ass'n of Am., 3 Fed. 465.

The sureties of a receiver cannot be discharged at their own request,[7] except under special circumstances, "as where underhand practice is proved, and the person secured shown to be connected with such practice."[8] "For if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it."[9] If a surety should procure his discharge during the continuance of the receivership, the receiver must enter into a fresh recognizance.[10]

At common law a surety is liable for the full amount of the penalty of the recognizance, bond, or undertaking by which he is bound.[11] In equity, however, he is only liable to the full amount, including interest as well as principal which the receiver is liable in equity to pay,[12] unless that exceeds the amount of the penalty, which fixes the extreme limit of his liability.[13] It has been held in England that a surety who has undertaken to be responsible for whatever a receiver should receive or become liable to pay as such receiver, is liable for funds received by the receiver before the security was given.[14] Where the parties interested have been guilty of gross delay in compelling the receiver to pass his accounts, the court may excuse the surety from the payment of the whole or part of the interest.[15]

According to Daniell, "When an action is brought against a receiver's surety upon the recognizance, the proper course for him to pursue appears to be to apply to the court by motion to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the receiver, so as the same does not exceed the amount of the recognizance, into court; and upon such motion, the order will be made, upon the surety's paying the cost of the application, and of the proceedings consequent upon it. When the receiver's account has not been taken, the motion should also pray a reference to the master to

7 Griffith v. Griffith, 2 Ves. Sen. 400; Gordon v. Calvert, 2 Sim. 253.

8 Hamilton v. Brewster, 2 Molloy 407.

9 Lord Harwicke in Griffith v. Griffith, 2 Ves. Sen. 400.

10 Vaughan v. Vaughan, 1 Dick. 90; Blois v. Betts, 1 Dick. 336.

11 Dawson v. Raynes, 2 Russ. 466, 468.

12 Dawson v. Raynes, 2 Russ. 466.

13 Walker v. Wild, 1 Madd. 528.

14 Smart v. Flood, 49 L. T. 467.

15 Dawson v. Raynes, 2 Russ. 466.

see what is due from the receiver; and it seems that upon such application the court will indulge the surety by allowing him to pay the balance by instalments."[16] When the surety has been obliged to pay on account of the receiver, he will be entitled to a lien for his reimbursement upon whatever may subsequently be due to the receiver from the suit.[17] The sureties may be liable for the malfeasance of the receiver, although the bill under which the appointment was made has been dismissed for want of jurisdiction.[18]

In the absence of a rule of court, or of a stipulation in the bond, the liability of the surety should be enforced in an independent action.[19] In the absence of special circumstances no action can be brought until there has been an accounting by the receiver.[20] It has been held that an order made upon notice to the receiver, directing him to pay the amount of a judgment against him in his official capacity, will not support a judgment for the same against his sureties, when there has been no accounting.[21]

§ 320. Proof of claims against receivers. Claims against receivers are generally presented and proved before masters in chancery, to whom the matter has been referred. Where there is no doubt about the validity of a claim, the receiver should not seek to delay the entry of a judgment in the claimant's favor, so that the latter may contest the validity of bonds with the standing of a judgment creditor.[1] The court often limits the time within which proof must be made;[2] and in cases of preferred claims, the time within which the preference must be

16 Daniell's Ch. Pr. (2d Am. ed.) 2005, 2006, citing Walker v. Wild, 1 Madd. 528.

17 Glossop v. Harrison, Cooper, 61; s. c., 3 V. & B. 134.

18 Baltimore B. & L. Ass'n v. Alderson, C. C. A., 99 Fed. 489.

19 Kirker v. Owings, C. C. A., 98 Fed. 499.

20 Coe v. Patterson, 122 App. Div. (N. Y.) 76. But see Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447.

21 Ibid.

§ 320. 1 Union Tr. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., 179 Fed. 981; Williamson v. Callius, C. C. A., 243 Fed. 835.

2 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721. The court denied a petition presented after the time for filing claims had expired and praying for an order requiring the receiver to retain money to await the determination of an action at common law brought in a State court against the insolvent corporation by the petitioner who had filed no claim against the estate, Ibid.

asserted may also be limited;[3] but, in the absence of such an order, a party filing a claim is not required to give notice of the particular class to which the same belongs or whether a preference is claimed.[4] Where no final distribution has been made, it is not unusual to permit claims to be filed after the prescribed time when they share in subsequent dividends, but not in the dividends previously paid.[5]

Claims may be past due, immature or contingent.[6] In respect to the question of provability, they may be divided into two classes: "(1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the case; (2) Claims which are so uncertain that their worth cannot be so ascertained."[7] The first class of claims can be proved and share in the dividends, whether they are overdue accounts, immature notes, or claims for damages for breach of contract, coinciding with or following the receivership.[8] It has been held that the second class of claims cannot be proved, no matter how highly meritorious they may be.[9]

Upon the rejection of a lease by the receiver, the lessor may prove against the estate his claim for rent to the time of re-entry and for the difference between the rental value at that date and the rent received for the residue of the term.[10] A protest at

3 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721; Pennsylvania Steel Co. v. New York City Ry. Co., A. 229 Fed. 120. See Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bank, et. al., 230 Fed. 738.

4 Pennsylvania Steel Co. v. New York City Ry. Co., 187 Fed. 287.

5 Harrison v. Kirk Humhuds 1904, 1 Park N. Y. F. & W. R. R. 140 Fed. 799; Ry. Stein 94 Fed. 124 v. *infra* § 387.

6 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721, 739.

7 Ibid. See Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 629.

8 Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 721, 740; New York Security & Trust Co. v. Lombard Inv. Co., 73 Fed. 537; Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 28 E. L. 378.

9 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721, 740; People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412. See § 645, *infra*.

10 William Filene's Sons Co. v. Weed, 245 U. S. 597; Re Mullin Clothing Co. C. C. A., 238 Fed. 58; Gardiner v. W. S. Butler & Co., 245 U. S. 603.

the time of the rejection is not a prerequisite to such proof.[10a] Where the rent specified in the lease was excessive, the claims against the receiver for rent during his occupancy should be allowed at no more than the reasonable rental value.[11] In a street railroad lease this may be the net earnings.[12] When the receiver does not use water,[13] or electric power,[14] he is not liable under the covenant of the lease to pay for these. Where a claim was presented for damages by the tenant to the building and there was no evidence as to how much of any damage occurred during the receivership, no preference of any kind was allowed.[15] When the lease is an assignment of leases to the lessor the ultimate lessee is the principal debtor and its lessor the surety.[16] Consequently, this lessor can only recover so much as it requires to pay its own lessors.[17] It has been held that the fact that the lessor had controlled the lessee and applied its earnings to the payment of rent thus obtaining a preference over other claims of the same rank should not deprive it of its right to share equally with the other general creditors with respect to its claims to rent unpaid.[18] Under a railroad lease the lessor was allowed to prove a claim for damages caused by a breach of covenant to pay franchise taxes, so far as the same had been assessed, but not as regards future taxes.[19] Proof was allowed of claims for rent up to the date fixed by the court for filing claims against the receivers, but not subsequently.[20] Where the receivers were

10a Ibid.

11 Atkinson & Co. v. Aldrick-Clisbee Co., 248 Fed. 134.

12 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 219 Fed. 939. But see, S. C., 175 Fed. 812, *supra* § 313.

13 Lockport Felt Co. v. United Box Board & Paper Co., 182 Fed. 328.

14 Re Grignard Lithographic Co., 155 Fed. 699. *Cf.* Pa. Steel Co. v. N. Y. City Ry. Co., 208 Fed. 777; Odell v. Bedford Co., 224 Fed. 996.

15 Atkinson & Co. v. Aldrich-Clisbee Co., 248 Fed. 134.

16 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 217 Fed. 423.

17 Ibid.

18 Ibid.

19 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

20 Ibid. In S. C., 190 Fed. 609, held that expenditures made for the operation, maintenance and improvement of the railroad, after the receivership was extended to the lessor, were not chargeable to the estate of the lessee, since it derived no benefit from the same, and that its receiver was entitled in equity to recover from the receivers of the lessor, in preference to the claims of the mortgagees of the latter, so much of the former's funds as were used for such purposes. For a case

operating the road experimentally, to determine whether or not they should adopt the lease, the court extended the time within which the claim might be filed until after the experimental period had terminated.[21] Bonds assumed as part of consideration for the lease were admitted to proof.[22] It was held that a claim upon a guarantee of payment of the principal and interest of certain railroad bonds can only be proved for interest past due at the time it is filed and not for principal and future interest, since, until the termination of a foreclosure, the amount of damages is too uncertain;[23] and an agreement with the mortgagor to pay such bonds, cannot be proved for the same reason.[24] Where the lessee had assumed a contract giving an express company the right to deliver parcels by express over its line for a term of twenty years, in return for a percentage of the gross receipts, and the express company had assigned this and other contracts to another solvent company in consideration of an agreement to pay to the assignor specified yearly rental during the remainder of the term, some of the other contracts giving express privileges over lines not owned or controlled by the assignor; since there was no covenant that the control should continue in the latter, it was held that the damages were too uncertain for recovery or for proof.[25] Where in a litigation

determining the apportionment between the lessor and the lessee, of damages collected from directors, see Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 778; s. c., 201 Fed. 418. This case held, amongst other things, that the mortgagee had no right to these proceeds. Citing Farmer's Loan & Tr. Co. v. Waterbury, C. C. A., 193 Fed. 44.

21 Ibid. Receivers for the lessee of a street railroad system comprising lines owned by different corporations, are entitled to use the income from the entire system for the purpose of operating and maintaining the same as a unit, notwithstanding the provisions of mortgages on different parts of the property. Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., C. C. A., 180 Fed. 648.

22 Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 216 Fed. 459.

23 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721; Tredegar Co. v. Seaboard Air Line Ry., C. C. A., 183 Fed. 289.

24 Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 721.

25 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 208 Fed. 747, 756, distinguishing s. c., C. C. A., 198 Fed. 721. For a case where the court held the evidence insufficient to prove the damages caused by the operation of a railroad under an il-

between the lessee and the lessor, both in the hands of a receiver, it was decided that the amount due the claimant for materials furnished to the lessee should be taken out of a share of a fund due the lessor and paid to the receiver of the lessee; this determination set aside so much of the final for use for the payment of the claim; and the receiver of the lessee was directed to pay the full amount to the claimant.[26] When a payment had been made in settlement of a suit by the receiver of a lessee to recover the balance of a sum which the defendant had, for a consideration received from the lessor promised the lessor and lessee to furnish to the latter for use in making permanent improvements on the property leased, the court directed that after deducting the costs of such of these improvements as had been made by the lessee and its receiver the remainder should be paid to the receivers of the lessor.[27]

Although the receiver has a reasonable time within which to accept or reject a contract, when he does so his relation relates back to the beginning of the receivership and the breach takes place as of that time.[28] A receiver appointed in a suit by general creditors should not recognize a secret lien upon the property which is purely equitable.[29] A claim for taxes is properly presented by a petition praying for an order directing payment.[30] A claim against the insolvent cannot be set off against a claim of the receivers for services or money received due to the receivership,[31] but the holder of a privileged claim was permitted

legal contract, see Central Trust Co. v. Wheeling & L. E. R. Co., 211 Fed. 515.

26 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 202 Fed. 607, aff'd C. C. A., 206 Fed. 663. For different decisions concerning the respective claims of the lessors and lessees of street railroads, when both are insolvent and in the hands of receivers, see, besides the authorities previously cited: Pennsylvania Steel Co. v. N. Y. City Ry. Co., 196 Fed. 661, s. c., C. C. A., 198 Fed. 778, s. c., C. C. A., 206 Fed. 663, 208 Fed. 747, s. c., 208 Fed. 757, s. c., 208 Fed. 771, s. c., C. C. A., 216 Fed. 458; s. c., 217 Fed. 423, s. c., 219 Fed. 961, s. c., 225 Fed. 106.

27 Penn. Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 778.

28 Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 721, 744.

29 H. K. Porter Co. v. Boyd, C. C. A., 171 Fed. 305.

30 Midland Guaranty & Trust Co. v. Douglas County, C. C. A., 217 Fed. 358.

31 Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., 175 Fed. 154; Butterworth v. Degnon Contracting Co., C. C. A., 214 Fed. 172.

to set it off against a claim by the receiver for the return of an improper payment.[32] A claim assigned after the appointment of a receiver cannot be set off against a receiver's claim but may be proved against the estate in his hands.[33]

In general, no interest is allowed which accrues subsequently to the appointment of the receiver,[34] but a lienor is entitled to interest out of the proceeds of the property on which he has a lien,[35] preferred claims are paid interest in full before any payment on account of claims which are not preferred,[36] and when the assets are sufficient to pay all claims what remains will be applied to the payment of interest.[37]

Liens upon the insolvent's property can be enforced against the receiver except to the extent that he represents the holder of a prior lien.[38] The lienors may prove and share upon a parity with the general creditors in any balance due them after the proceeds of the property covered by their respective liens have been credited upon their claims.[39] Except in cases of bankruptcy,[40] the Federal court has no power to require the creditor to surrender his lien as a condition of sharing in the general assets.[41] Otherwise, claims are liquidated as of the date of the appointment of the receiver[42] or the date of the insolvency.[43]

32 People's Savings Bank & Tr. Co. v. Rogers, C. C. A., 177 Fed. 386.

33 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 231 Fed. 440.

34 Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Co., 233 U. S. 261, 266; Thomas v. Western Car Co., 149 Fed. 95, 116.

35 Huff v. Bidwell, C. C. A., 218 Fed. 6; Spring Coal Co. v. Kereeh, C. C. A., 239 Fed. 48.

36 Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Co., 233 U. S. 261, 266; Penn. Steel Co. v. N. Y. City Ry. Co., C. C. A., 216 Fed. 458, 470.

37 Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Co., 233 U. S. 261, 267.

38 Chesapeake & Ohio Coal & Coke Co. v. Block, Sheridan & Wilson, C. C. A., 224 Fed. 924. Schmidtman v. Atlanta Phosphate & Oil Co., C. C. A., 230 Fed. 769.

39 Chesapeake & Ohio Coal & Coke Co. v. Block, Wilson & Sheridan, C. C. A., 224 Fed. 924; Schmidtman v. Atlanta Phosphate & Oil Co., C. C. A., 230 Fed. 769.

40 See § 645 *supra.*

41 Chesapeake & Ohio Coal & Coke Co. v. Black, Sheridan & Wilson, C. C. A., 224 Fed. 924. But see Kline v. Arizona Mut. Savings & Loan Ass'n, C. C. A., 235 Fed. 694.

42 Brown v. Massachusetts Hide Corporation, C. C. A., 218 Fed. 769.

43 Re United Grocery Co., 253 Fed. 267.

A note given by the insolvent is *prima facie* valid.[44] An entry on the books of a corporation, kept under the direction of an officer, and not in accordance with usual bookkeeping, is insufficient to prove a claim on his behalf.[45] An assignee was not permitted to enlarge an itemized claim, filed before the assignment.[46] When the circumstances of an assignment were inequitable the court rejected proof of the claim.[47] An assignment of a claim by a receiver to other receivers who were therein described as receivers under the mortgage, was not recognized by the court which treated it as a cancellation.[48] One receiver may prove a claim against another,[49] where a creditor proves two claims upon separate contracts which are in substance the same debt he is entitled to a dividend on only one of them.[50] Where a creditor holds, as collateral, mortgage bonds issued by his debtor, he is not entitled to receive from the assets not subject to the mortgage, dividends calculated on the basis of the amount due him plus that of the amount due upon such bonds.[51]

It has been said to be the better practice for the court to fix a time before the accounts are made up for distribution and to allow all claims that are matured and certain before such date.[52] Bankruptcy acts and State statutes regulating the provability of claims against insolvent or dissolved corporations are only entitled to consideration in so far as the rules they lay down appeal to the conscience of the chancellor. So, the decisions of

44 Barber A. P. Co. v. Forty-Second Str., M. & St. M. Ave. Ry. Co., C. C. A., 180 Fed. 648.

45 Mizell v. Elmore & Hamilton Contracting Co., C. C. A., 219 Fed. 528; see Spencer v. Babylon R. Co., 213 Fed. 125.

46 Pennsylvania Steel Co. v. New York City Ry. Co., 225 Fed. 96.

47 Investment Registry v. Chicago & M. El. Ry. Co., 204 Fed. 100.

48 Pennsylvania Steel Co. et. al. v. New York City Ry. Co. et. al. 225 Fed. 96.

49 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 225 Fed. 96.

50 Curtis v. Walpole Tire & Rubber Co., 227 Fed. 698.

51 Hilner v. Diamond State Steel Co., 176 Fed. 384.

52 H. K. Porter Co. v. Boyd, C. C. A., 171 Fed. 305. In N. Y. Security & Trust Co. v. Lombard Inv. Co., 73 Fed. 537, it was held that all claims could be allowed which had matured before an order of distribution. In Pennsylvania Steel Co. v. N. Y. City Ry. Co., 182 Fed. 155, held that an application for the payment, in full, of certain claims, as preferred, should be denied until the final determination of the status of all classes of claims which might be entitled to a preference.

the courts construing and applying such acts and statutes are only of weight when they discuss principles of general application.[53]

§ 321. Receiver's accounts. A receiver should account annually to the court unless accounts at shorter intervals are required of him.[1] His accounts are filed and passed in the office of the master to whom matters pertaining to the receivership are referred.[2] A receiver's account should describe the situation of the estate at the time when he received it, and any changes that have since taken place. He should then state his receipts and disbursements, which should be set forth in schedules as specifically as possible.[3] It is the better practice for him to charge himself with the inventory and to take credit as it is disposed of; to separate expenditures not on improvement account from those for operating expenses;[4] to file vouchers for all sums of money, in excess of twenty dollars, which he has paid.[5] He should also state such indebtedness as he has incurred; and, in general, give as full a description of the estate in his hands, and of his acts concerning the same, as is practicable.[6] When a receiver of a railway system has been extended to apply to several mortgages, some of them covering separate parts of the property, the receiver need not be required to keep

53 Bear River P. & B. Co. v. City of Petoskey, C. C. A., 241 Fed. 53.

§ 321. 1 Potts v. Leighton, 15 Ves. 273; General Order, 15 Ves. 278; Lowe v. Lowe, 1 Tenn. Ch. 515.

2 Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997.

3 Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997. But see Lafayette Co. v. Neeley, 21 Fed. 738. He has a lien upon the estate for the repayment of his individual funds advanced to execute orders of the court. Union Tr. Co. v. Illinois Midland Ry. Co., 117 U. S. 434, For a case where the receiver's expenses on a journey to Europe were allowed, see N. Ala. Ry. Co. v. Hopkins, C. C. A., 87 Fed. 805. For the disallowance of New York hotel bills paid by the receiver of a Kansas railroad, see Braman v. Farmers' L. & T. Co., C. C. A., 114 Fed. 18, 21.

4 Ibid.; Ely v. Van Kannel Revolving Door Co., 184 Fed. 459.

5 Remsen v. Remsen, 2 J. Ch. (N. Y.) 495, 501. See also Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

6 Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997; Hooper v. Winston, 24 Ill. 353; Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Atty. Gen. v. N. A. L. I. Co., 89 N. Y. 94, 107; Bourne v. Maybin, 3 Woods, 724, 741; Equity Rule 79.

a separate account of the earnings and income of such parts, unless it is shown that it is practicable to do so.[7]

Receivers will be charged with personal liability for such indebtedness incurred by them as might have been prevented had they kept proper accounts,[8] and with preferential payments made by them, which should have been ratably applied among all the creditors.[9] When a receiver withholds from a stranger to the suit, money to which the latter is entitled, he is liable for interest upon the same from the time of its receipt until he pays it into court and asks for directions as to its distribution.[10] The burden rests upon him to justify and prove his accounts, so far as they are questioned by exceptions.[11] An *ex parte* order authorizing a payment, which is obtained from the court under a misapprehension due to fraud or negligence by the receiver, will not protect him.[12]

If a person has not been paid for services rendered to the estate, but has agreed with the receiver to be content with what the court allows him, that fact should be stated in the account together with a description of the services thus performed.[13] Allowances for counsel fees will usually be small, until the final accounting of the receiver, when the full amount earned will be ordered paid.[14] When the account has been adjusted, the receiver should be ordered to pay the balance into court, and his surety is liable for his default. After such an order, his liability is not measured by the funds or property of the estate, although such funds can be used to comply with the order.[15]

7 Bankers Trust Co. v. Missouri K. & T. Ry. Co., C. C. A., 251 Fed. 795.

8 Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18.

9 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

10 Rosenthal v. McGraw, C. C. A., 138 Fed. 721.

11 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

12 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

13 Adams v. Woods, 8 Cal. 306. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 675; Bound v. S. Carolina Ry. Co., 43 Fed. 404; Maxwell v. Wilmington Mfg. Co., 82 Fed. 214; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 675; Boston S. D. & Tr. Co. v. Chamberlain, C. C. A., 66 Fed. 847. *Cf.* Sowles v. Nat. Union Bank, 82 Fed. 139; Am. Loan & Tr. Co. v. S. Atl. & O. R. Co., 81 Fed. 62; Kernochan v. Ballance, 56 N. Y. Supp. 132; s. c., 26 N. Y. Misc. 435.

14 Matter of Simpson, 36 App. Div. 562, 564.

15 Ibid.

Where before his appointment a receiver had received rent paid to him in his individual capacity in advance, he was obliged to apportion the rent, and to account for so much of it as was paid for the time he acted as receiver of the property, for the use of which the rent was paid.[16]

It has been said that exceptions should not be taken after a master's report upon a receiver's accounting has been filed, the master acting in the place of the court in a judicial and not in a ministerial capacity.[17] Should the receiver or any other party to the accounting feel aggrieved at a ruling of the master, he should take exception at the time,[18] and subsequently petition the court to refer the matter back to the master for correction.[19] The court's duty upon such a petition consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail or the evidence upon which those items are severally founded; the latter duty belonging more especially to the province of the master acting in his judicial capacity, analogous to the province and duty of a jury on questions of fact.[20]

Where the receiver claimed in his accounts a balance as due him, and it was found that he was indebted to the estate, he was charged personally with the costs of the accounting.[21]

In a proper case, the receiver, as well as any other party interested, may appeal from the final decree entered after his accounting.[22]

§ 321a. Selection and compensation of receiver's counsel. The counsel to the receiver is in large matters usually selected or suggested by the court.[1] The court has refused to allow the receiver to retain a relative who has previously practiced elsewhere, who had recently come into the circuit apparently for the sole purpose of acting as counsel for the receiver.[2] It

16 *Re* Allin, 8 Fed. 753.

17 Cowdrey v. Railroad Co., 1 Woods, 331, 334. But see *infra*, § 393.

18 Ibid.

19 Ibid.

20 Gunn v. Ewan, 93 Fed. 80.

21 Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447; Petersburg S. & I. Co. v. Dellatorre, C. C. A., 70 Fed. 643.

22 Hinckley v. Gilman C. & S. R. Co., 94 U. S. 467, 24 L. ed. 166; Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888.

§ 321a. 1 Guaranty Trust Co. v. Chicago Trust Co., C. C. A., 185 Fed. 411; Empire Tr. Co. v. Aubrey, C. C. A., 254 Fed. 281.

2 Blair v. St. Louis T. & K. Ry. Co., 20 Fed. 348.

is usually considered to be improper for the receiver to retain as counsel a lawyer who has previously acted for one of the parties in the suit.[3] But where the receiver is appointed in a suit by a creditor for the stipulation of the plaintiff's debt alone, he may retain the claimant's attorney,[4] and where the main object of the appointment is to recover assets fraudulently concealed there is no objection to the retainer of the plaintiff's lawyer when he has special knowledge of the facts.[5] The Court may appoint or authorize the receivers to appoint counsel to represent different interests whose claims against the funds are inconsistent but after the controversy between these interests has been decided, such retainer should cease.[6]

The employment by the receiver of his law partner, as counsel, is a transaction which is indelicate, and is not to be commended.[7] When, however, it clearly appears that the receiver is not to share in the compensation, his partner may be paid for legal services rendered to the estate.[8] A receiver is entitled to credit for reasonable counsel fees which he has paid or incurred,[9] including fees for defending him against charges

3 Ryckman v. Parkins, 5 Paige (N. Y.) 543; Blair v. St. Louis, H. & K. R. Co., 20 Fed. 348.

4 Shainwald v. Lewis, 8 Fed. 878. See Davis v. Chattanooga U. Ry. Co., 65 Fed. 395.

5 McPherson v. U. S., C. C. A., 245 Fed. 35.

6 Penn. Steel Co. v. N. Y. City Ry. Co., 221 Fed. 440.

7 Empire Trust Co. v. Aubrey, C. C. A., 254 Fed. 281, 283.

8 Matter of Simpson, 36 App. Div. (N. Y.) 562, 564.

9 Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568; Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. Where the judge wrote the receivers stating that certain persons therein named were their only standing counsel and that others should be employed only after consultation with the court, it was *held* that that was a sufficient discharge of any that might have been previously employed. Guaranty Tr. Co. of New York v. Chicago Rys. Co., C. C. A., 185 Fed. 411. It has been held that $500 is proper compensation to an attorney for filing the receivers' bond and for the preparation, service, and filling of a summons and complaint to compel the payment of $10,000. People, etc., v. Przestrzelski, (Gerard, J., N. Y. Sup. Ct., Sp. Tm.) N. Y. L. J. May 24, 1912. Where the attorneys for an insolvent bank consented to allowances to attorneys for a receiver, in order to enable the bank to resume business, it was *held* that the consent was given under duress and that the receiver might appeal from the order making the allowance. People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750. Specific items for counsel fees were considered in Drey v. Watson, C. C. A., 138 Fed. 792, 796. See also *infra*, § 422.

of breach of trust which are not sustained,[10] but not for services in trying to collect a cause of action to which the receiver was clearly not entitled,[11] nor, it has been said, for services in opposing a motion to vacate his appointment;[12] unless when he is also trustee under the mortgage, when such counsel fees may be allowed.[13] He cannot receive credit for counsel fees he contracted to pay for instituting suits which were unnecessary and not warranted under the circumstances.[14]

Allowances for counsel fees are the property of the receiver and not of his counsel;[15] but payment directly to the attorney is often directed.[16] When a counsel of a receiver rendered services in different States, his compensation was adjusted at the amount usually paid lawyers in the respective States where they were performed.[17]

The corporation has the power to retain an attorney to oppose the application for the receivership.[18] But his claim for compensation for service in such opposition,[19] or for other [20] services rendered to the corporation during the receivership are not a part of the expenses of the receivership, but are subordinate thereto, and have no preference over the claims of general creditors in the absence of a statute.[21]

§ 322. Compensation of receivers. The compensation of a receiver is usually fixed in the first instance by the master,[1] with whose determination the court will not ordinarily interfere.[2]

10 Mo. & K. I. Ry. Co. v. Edson, C. C. A., 224 Fed. 79.

11 Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864.

12 Burroughs v. Toxaway Co., 182 Fed. 129; modified S. C., C. C. A., 185 Fed. 435.

13 Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435.

14 Burroughs v. Toxaway Co., 182 Fed. 129.

15 Stuart v. Boulware, 133 U. S. 78, 81, 33 L. ed. 568.

16 So ordered by Lacombe, J., in Bawker v. Haight & Freese Co., S. D., N. Y., Dec. 1906, and subsequently, in this case. The author was counsel for the receivers. In Burroughs v. Toxaway Co., C. C. A., 4th Ct., 185 Fed. 435, 441, the allowance was made to the receiver with a direction that it be paid to his attorneys, the amount which each attorney should receive being specified.

17 Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

18 Barker v. Southern Bldg. & Loan Ass'n, 181 Fed. 636; Russell v. Shippen Bros. Lumber Co., 229 Fed. 461.

19 Barker v. Southern Bldg. & Loan Ass'n, 181 Fed. 636.

20 Atkinson & Co., Inc., v. Aldrich-Clisbee Co., 248 Fed. 134.

21 *Supra*, § 305a.

§ 322. 1 Cowdrey v. Railroad Co., 1 Woods, 331, 341; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187.

The compensation will rarely, if ever, be increased upon appeal.[3] Where the court has fixed a receiver's compensation in advance, it has the power to award him an additional sum for extraordinary labors.[4] In cases of moderate amount a commission of five per cent. upon the receipts and disbursements is not unusual.[5] Commissions were, however, not allowed upon securities which came into the hands of the receiver, but were not collected by him.[6] Where the amounts received and disbursed are large, it is customary to pay the receiver a salary or a lump sum graduated according to the amount of his time employed, the value of the property, the difficulty of his task, and the success of his administration.[7] It has been said that the peculiar duties and responsibilities and accountability of a receiver of a railroad entitle him to a larger amount than would be demanded by the head officer of a railroad, of the same size and business.[8]

Receivers are entitled to a fair and reasonable compensation

2 Cowdrey v. Railroad Co., 1 Woods, 331, 341; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. 32 Fed. 187.

3 Hinekley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568; Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18.

4 Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. 60.

5 Cowdrey v. Railroad Co., 1 Woods, 331, 346; Day v. Croft, 2 Beav. 488; Girard Tr. Co. v. McKinley-Lanning L. & Tr. Co., 143 Fed. 355; Calhoun v. Dragon Motor Co., 166 Fed. 980. $12,000 each was held to be ample compensation for two receivers who had been occupied six months in the administration of trust funds amounting to $2,000,000. People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750. Ten per cent. upon the receipts from a business conducted by him, and five per cent. upon his receipts from other sources and his disbursements were allowed in Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447. Where a receiver collected earnings of the property, to a part of which a third person was entitled under a contract with the defendant, it was held that neither he nor the insolvent estate could charge for the services rendered in collecting the part payable to the stranger. Rosenthal v. McGraw, C. C. A., 138 Fed. 721.

6 Girard Tr. Co. v. McKinley-Lanning L. & Tr. Co., 143 Fed. 355.

7 Cowdrey v. Railroad Co., 1 Woods, 331, 346; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. 60; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187. See Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. Where the majority of the creditors had given their assent to the appointment of receivers of a partnership, upon a bill alleging insolvency and that the completion of a contract would be for the benefit of creditors; it was held that the affidavit of the attorney for a single judgment creditor stating his be-

for the services rendered, to be fixed by the court appointing them after considering the nature of the matters administered, the amount involved, the complications attending it, the amount of the bond, the time, labor and skill needed and expended and the promptness in accounting.[9] Receivers are bound to use the utmost care not to contract bills which they may be unable to pay from the property in their hands, and the existence of such bills throws on the receivers a great burden to establish a right to compensation for services. Therefore when they conduct business for a corporation, knowing that it is at a loss, they cannot be allowed compensation, where the funds in their hands

lief that the firm was solvent and that the receivership was obtained for the benefit of the partners, in order to hinder and delay creditors, was insufficient to justify the vacation of the receivership or to authorize its creditors to issue an execution against property in the hands of the receivers. Patterson v. Patterson, 184 Fed. 547.

[8] Bradley, J., in Cowdrey v. Railroad Co., 1 Woods, 331, 347. Approved by Brewer, J., in Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187, 188. See also Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559. Receivers of railroads have been frequently allowed as much as $10,000 a year. Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Cowdrey v. Railroad Co., 1 Woods, 331, 347. But see Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. 60. In one reported case two receivers were each allowed $70,000 for three and a half years' work. Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187. In a few cases not reported larger fees have been allowed. In other cases annual salaries of $6,000, Boston S. D. & Tr. Co. v. Am. R. Tel. Co., 67 Fed. 165, 168; Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18; Boston S. D. & Tr. Co. v. Chamberlain, C. C. A., 66 Fed. 847, where, for winding up the estate after the railroad was sold, only $1,750, was allowed for seven months; $4,500, Easton v. H. & T. C. Ry. Co., 40 Fed. 189; and $2,500, Central Tr. Co. v. Cincinnatti, J. & N. Ry. Co., 58 Fed. 500, 512. In street-railroad cases much less is allowed. Montgomery v. Petersbury S. & I. Co., C. C. A., 70 Fed. 746. $15,000 was held to be sufficient for twenty-nine months of service in the administration of oil properties in four different States, which sold for $271,000, when the receiver had also been allowed $15 a day for his expenses during 125 days spent in different cities; and an allowance of $24,022.84 was reduced to that amount. In the same case, it was held that an allowance to an assignee, under an insolvent assignment, of five per cent. upon the money handled by him, was sufficient. Drey v. Watson, C. C. A., 138 Fed. 792. For a case where the Federal court refused to allow its receiver to set off the amount of compensation awarded him by a State court, for compensation for services as a receiver of the same property in another suit, against the sum he was directed to pay by a decree of the Federal court, see Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; In re Hinckley, 3

are insufficient even to discharge all of the debts they have incurred.[10]

The receiver's right to compensation passes to his personal representatives upon his death,[11] and ordinarily has precedence of the claims of holders of receiver's certificates.[12] Whether a receiver can assign his commissions before they are earned is doubtful.[13] An agreement by a receiver that he would not enforce any claim for his commissions, "to the detriment of" the claim of an intervenor, was held not to entitle the latter to be paid out of commissions allowed the receiver from funds that would otherwise have been applied in payment of preferred claims.[14]

Misconduct of the receiver, such as the unnecessary prolongation of the receivership[15] or his failure to keep proper books of account,[16] or his misrepresentation or suppression of facts in his reports to the court,[17] or his conduct of the business at a loss, without authority of the court although with consent of all the creditors,[18] may be a reason for denying any compensation. It has been held by some authorities that where the appointment of a receiver is set aside his compensation can be charged only against the party who moved for the appointment and should not be paid out of the funds of the estate.[19] But the rule in the Federal courts is otherwise[20] unless the appointment was improvidently applied for.[21]

Fed. 556. For a case of estoppel against objecting to the amount of compensation, see Dillingham v. Moran, C. C. A., 81 Fed. 759.

9 Eames v. H. B. Claflin Co., C. C. A., 239 Fed. 631.

10 Atkinson & Co., Inc. v. Aldrich-Clisbee Co., 248 Fed. 134.

11 Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447.

12 Petersburg S. & I. Co. v. Deletorre, C. C. A., 70 Fed. 643.

13 Bloomfield v. Roy, C. C. A., 120 Fed. 502, 503.

14 Bloomfield v. Roy, C. C. A., 120 Fed. 502.

15 Newell v. International Tr. Co., C. C. A., 169 Fed. 497.

16 Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18.

17 Haines v. Buckeye Wheel Co., C. C. A., 224 Fed. 289, 295.

18 Atkinson & Co. v. Aldrich-Clisbee Co., 248 Fed. 134, see Haines v. Buckeye Wheel Co., C. C. A., 224 Fed. 289, 294.

19 Verplank v. Mercantile Ins. Co., 2 Paige, N. Y. 438; People v. Jones, 33 Mich. 303; Weston v. Watts, 45 Hun. 219; Pittsfield Nat. Bank v. Bayne, 140 N. Y. 321, 35 N. E. 630; French v. Gifford, 31 Iowa 428; Re Wentworth Lunch Co., C. C. A., 191 Fed. 821; See Re Loeov, C. C. A., 142 Fed. 960; *Infra*, § 324.

20 Palmer v. Texas, 212 U. S. 118.

21 Re Independent Mach. & Tool Corp., C. C. A., 251 Fed. 484.

Where a receiver, with the consent of the court, authorized certain creditors to advance the necessary expenses to collect certain claims of the estate, under an agreement that they should have a preference for the payment of their expenses and their claims out of the proceeds; it was held that he should receive no compensation from that fund, except from the surplus after they had been paid in full.[22]

Where the effect of an order granted, in a suit by a receiver directing him to pay certain costs, is to leave no funds wherewith to pay commissions, the order will be reversed and the application to pass his account will be remitted with direction to fix his compensation and to fix an allowance for counsel fees, including services of the respondent upon the appeal from said order, but excluding services rendered upon the receiver's appeal, taken without leave of the court, and in connection with motions for leave to appeal to the Appellate Division.[23]

An order allowing compensation to a receiver should be made only after notice and a hearing, at which the parties interested have an opportunity of contesting the same.[24] The order granting a receiver compensation may be set aside and the receiver be directed to return the money if facts subsequently presented to the court show that it was erroneously made.[25] An order granting a receiver's compensation is appealable and may be reversed for want of proper notice of the application for the same.[26]

§ 323. Removal of receivers. A receiver may be removed for misconduct in office,[1] or because his original appointment

22 Southern Ry. Co. v. Townsend, C. C. A., 161 Fed. 310; Cornell v. Nichols & Langworthy Mach. Co., 189 Fed. 556; aff'd., C. C. A., 201 Fed. 320. See McEwen v. Harriman Land Co., C. C. A., 138 Fed. 797, 808, 71 C. C. A., 163; *infra*, § 393.

23 Walter E. Smith v. Alexander Adlerman, 105 Misc. 223.

24 Ruggles v. Patton, C. C. A., 143 Fed. 312; Merchants' Bank v. Crysler, 67 Fed. 388; s. c., 14 C. C. A. 449.

25 Haines v. Buckeye Wheel Co., C. C. A., 224 Fed. 289, 298.

26 Ruggles v. Patton, C. C. A., 143 Fed. 312; Merchants' Bank v. Crysler, 67 Fed. 388; s. c., 14 C. C. A. 449.

§ 323. 1 Handy v. Cleveland & Marietta R. Co., 31 Fed. 689; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Clarke v. Central R. R. & B. Co., 66 Fed. 16. Instances of such misconduct as will be a cause for the removal of a receiver are: unlawful discrimination in charges between different shippers upon a railroad; Handy v. Cleveland & M. R. Co., 31 Fed. 689; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; but see Central Tr. Co.

was obtained by collusion or fraud,[2] or was improper on account of his interest in the subject of the receivership or connection with the parties in interest,[3] or because subsequent developments make his continuance in the office likely to be detrimental to the estate.[4] Unreasonable delay in the administration of the estate is a cause for the removal of a receiver.[5] The fact that the estate has a claim against him is a proper cause for his removal.[6] A receiver will not be removed or discharged at his own request except for good cause shown, nor ordinarily for a reason which he knew or had ground to anticipate when he accepted the receivership.[7] Ordinarily, a receiver can only be removed by the court which appointed him,[8] upon an application made in the suit in which his appointment was made.[9] A Federal

v. Ohio Cent. R. Co., 23 Fed. 306; the purchase of supplies for the purpose of the receivership from a firm or corporation in which he is largely interested, Atkins v. Wabash, St. L. &. P. Ry. Co., 29 Fed. 161. In the Eastern District of Georgia, the court refused to remove a receiver, who had continued in good faith reports of the condition of the property similar to those issued by the corporation before his appointment, who had aided in a scheme for reorganizing the property, who had in good faith allowed a special rate to a shipper, and whose agents had been guilty of fraud. Clarke v. Central R. R. & B. Co., 66 Fed. 16. But in the Second Circuit a receiver very properly is not allowed to become a member of an organization committee. Chable v. Nicaragua, C. C. A., 59 Fed. 846.

2 O'Mahoney v. Belmont, 62 N. Y. 133; s. c., 37 N. Y. Super. Ct. 223.

3 Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161.

4 Meier v. Kansas Pac. R. Co., 5 Dillon, 476; where two receivers were unable to act in harmony. But see Conner v. Belden, 8 Daly (N. Y. C. P.) 257; Land Title & Trust Co. v. Asphalt Co., 120 Fed. 996.

5 *Re* Angel, 131 Mich. 345, 91 N. W. 611.

6 Land Title & Tr. Co. v. Asphalt Co., 120 Fed. 996.

7 Richardson v. Ward, 6 Madd. 266; *Re* Lytle, 3 Paige Ch. (N. Y.) 251; Smith v. Vaughan, Ridg, *temp.* Hardw. 251; Beach on Receivers, § 782. Thus the court refused to remove, at his own request, a receiver upon the sole ground that the duties of his office interfere with his private business. Beers v. Chelsea Bank, 4 Edw. Ch. (N. Y.) 277. But see Purdy v. Raplye (N. Y. Ch. 1835); Edwards on Receivers, 661. A receiver may be removed at his own request when by reason of blindness he has become physically incapable of performing the duties of his receivership. Richardson v. Ward, 6 Madd. 266.

8 Young v. Montgomery & E. R. Co., 2 Woods, 606, 618; Alabama & C. R. Co. v. Jones, 7 N. B. R. 145, 169; Beach on Receivers, §§ 777, 778.

9 Davis v. Michelbacher (S. C. Wis.), 31 N. W. R. 168; Beach on Receivers, §§ 777, 778.

court may, however, after the removal of a suit, remove a receiver therein appointed by a State court.[10] And it was held that when a Circuit Court of the United States had appointed a receiver of a line of railroad running through another circuit, as well as through that wherein the appointment is made, his authority in the other circuit was recognized merely by judicial comity, and he might be removed from all control over property therein by the Federal court there held, upon a bill there filed.[11] A delay of ten months after knowledge of the facts upon which the motion is founded, in moving for the discharge of a receivership and the removal of a receiver, has been held a sufficient reason for denying the application.[12] Upon an application for the removal of a receiver of a mine, the court ordered that the agent of the applicant be permitted to inspect the mine.[13] When a receiver is removed, the court may appoint another in his place. The successor to a receiver can usually enforce, at least in equity, contracts made with his predecessor in his official capacity and is usually responsible in his official capacity[14] for liabilities incurrred by his predecessor in the same manner as if he were a corporation sole.[15] It has been said that a receiver cannot appeal from an order discharging or removing him.[16]

§ 324. Discharge of a receiver. The discharge of a receiver is a termination of the receivership, if no successor to him is then appointed.[1] It will be ordered when the court is satisfied

10 Texas & St. L. Ry. Co. v. Rust, 17 Fed. 275.

11 Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871. But see Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 618; Muller v. Dows, 94 U. S. 444; Young v. Montgomery & E. R. Co., 2 Woods, 606, 618; Alabama & C. R. Co. v. Jones, 7 Nat. B. Reg. 145, 169.

12 Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. ed. 1021; see *supra*, § 389.

13 Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. 178.

14 Thompson v. Phoenix Ins. Co., 136 U. S. 287, 34 L. ed. 408.

15 McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796.

16 Bosworth v. St. Louis Terminal R. R. Ass'n, 174 U. S. 182, 189, 19 Sup. Ct. 625, 43 L. ed. 941, modifying and affirming S. C., 26 C. C. A., 279; 80 Fed. 969, 53 U. S. App. 302; *Re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; Young v. Irish, 104 Minn. 367, 116 N. W. 656; State v. Superior Court, 36 Wash. 81, 78 Pac. 202; High on Receivers (4th ed.) § 825. But see Conner v. Belden, 8 Daly (N. Y. C. J.) 257; Wilson v. Barney, 5 Hun (N. Y.), 257; Connolly v. Kretz, 78 N. Y. 620.

§ 324. 1 Beach on Receivers, § 791. See High on Receivers,

either that no occasion for a receivership existed when the appointment was made,[2] or that in the course of subsequent events the necessity for the receivership has ceased.[3] Ordinarily, a receiver can be discharged only by the court that appointed him.[4] After the removal of a case from a State to a Federal court, the Federal court may discharge a receiver appointed by the former.[5]

Any person injured by the appointment of a receiver can move for his discharge although not a party to the suit in which he was appointed.[6] The motion should be made on notice to all parties interested.[7] A motion for the discharge of a receiver may be denied on account of the laches of the moving party.[8] Ordinarily a receiver of the estate of an infant should not be discharged until a year after the infant's majority, unless the ward after majority consents to his discharge.[9] A receiver will not be discharged, as of course, at the motion of the party who procured his appointment, if other parties who have acquired an interest in the receivership object.[10] The entry of a final decree which does not provide for the continuance of a

§§ 832-848a. Where a decree provided that when the receiver made a report, if no exceptions were filed thereto, he should be discharged, but no report was filed, it was *held* that the court was not ousted of jurisdiction. Bray v. Staples, C. C. A., 180 Fed. 321.

2 Lavender v. Lavender, Irish R. 9 Eq. 593; Furlong v. Edwards, 3 Md. 99; Sage v. Memphis & L. R. Co., 18 Fed. 571; s. c., 125 U. S. 361, 31 L. ed. 694.

3 Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbridge v. Blair, 3 Beav. 421; Tolman v. Ubero Plantation Co., 142 Fed. 270.

4 Young v. Montgomery & E. R. Co., 2 Woods, 606; Beach on Receivers, § 791.

5 Texas & St. L. Ry. Co. v. Rust, 17 Fed. 275; Mahoney Mining Co. v. Bennett, 4 Shaw, 287. As to the disposition of the money in the hands of a receiver thus discharged, see Mack v. Jones, 31 Fed. 189, 196.

6 Thomas v. Brigstocke, 4 Russ. 64; Grenfell v. Dean of Windsor, 2 Beav. 544; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510, 17 L. ed. 900.

7 Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbrigge v. Blair, 3 Beav. 421, 423.

8 Allen v. Dallas & W. R. Co., 3 Woods, 316, 331; National M. B. Ass'n v. Mariposa Co., 60 Barb. (N. Y.) 423; Hazard v. Credit Mobilier of America, 38 Fed. 195; Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. ed. 1021.

9 Matter of Van Horne, 7 Paige Ch. (N. Y.) 346; Wildridge v. McKane, 2 Molloy, 545. See also Bainbrigge v. Blair, 2 Beav. 421.

10 Bainbrigge v. Blair, 3 Beav. 421; People v. Globe M. L. Ins. Co., 57 How. Pr. (N. Y.) 481; Fay v. Erie & K. R. R. Bank, Harring. (Mich.) 194. See, however, Davis v. Duke of Marlborough, 2 Swanst.

receivership supersedes the appointment of a receiver.[11] An order appointing receivers in a foreclosure suit persons who had been previously appointed under a creditor's bill does not vacate the latter appointment.[12] Where a receivership had been extended so as to cover the property of a corporation not a party to the bill, an order directing the receiver to return its property to such corporation was held to be equivalent to a revocation of the receivership as to that company.[13] A receiver may be discharged from the control of real estate, and the rents and profits which he has collected be continued in his control until the termination of the litigation.[14] It has been held that the discharge of a receiver by a decree cannot be set aside upon a motion entered after the term at which it was made,[15] unless the decree reserved the jurisdiction of the court for the enforcement of claims. Then the court may appoint a special receiver, against whom pending actions may be revived, with authority to retake possession of sufficient property to satisfy any judgments that may be recovered.[16]

The discharge of a receiver terminates his liability for acts done in his official capacity,[17] at least to those who had due notice of the proceedings; and until the same is set aside, he cannot be sued as receiver.[18] After a receiver's discharge damages to the estate resulting from his mismanagement cannot be recovered from the sureties upon an injunction bond concurrent with his appointment,[19] but his discharge does not relieve the sureties upon a forthcoming bond, executed to him and his successors, although no other receiver is appointed and the other property is returned to his corporation, which

108, 168; Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 471.

11 Daniell's Ch. Pr. (2d Am. ed.) 1765.

12 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 225 Fed. 734.

13 Hook v. Bosworth, 64 Fed. 443.

14 Jones v. Smith, 40 Fed. 314.

15 Davis v. Duncan, 19 Fed. 477. *Contra*, Taylor v. Easton, C. C. A., 180 Fed. 363, where, upon the discovery of assets a new receiver was appointed at a term long subsequent.

16 Southern Ry. Co. v. Townsend, C. C. A., 161 Fed. 310.

17 Davis v. Duncan, 19 Fed. 447; White v. Keokuk & D. M. Ry. Co., 52 Iowa, 97; Western N. Y. & P. R. Co. v. Penn Refining Co., C. C. A., 137 Fed. 343.

18 Archambeau v. Platt, 173 Mass. 249; Lilienthal v. Betz, 185 N. Y. 153, 159, 7 Ann. Cas. 41.

19 Lehman v. McQuown, 31 Fed. 138.

can then sue upon the bond.[20] Where a decree discharged a receiver upon condition that he should file a release from the person to whom the property was given by the decree, it was held that his omission to file the release did not make him liable to strangers for former injuries by his employees.[21] Upon the discharge of a receiver and the return of the property to the original owner, who did not oppose the receiver's appointment, the owner is liable for all contracts by the receiver entered into by the authority of the court, and also for the damages caused by the negligence or other torts of the receiver's agents which are incidental to the ordinary management of the property.[22] An order discharging a receiver and directing him to deliver the property to a person from whom he had taken it was held not to be an adjudication that the latter was entitled to the same.[23]

Where the court acted within its jurisdiction, and a receiver is discharged because his appointment was not justified, the expenses of his administration, including his compensation, are charged against the funds in his hands; and the party who moved for his appointment is not obliged to pay them[24] unless the proceedings were instituted improvidently without reasonable cause[25] or the prosecution thereof has been

20 Am. Surety Co. v. Campbell & Zell Co., C. C. A., 138 Fed. 531.

21 Davis v. Duncan, 18 Fed. 477.

22 Texas & Pac. Ry. Co. v. Huron, 164 U. S. 636, 640, 41 L. ed. 580, 582; Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 89, 38 L. ed. 81, 84. *Cf. supra*, § 313.

23 Marshall v. Otto, 59 Fed. 249, 255.

24 Palmer v. Texas, 212 U. S. 118, 132; Elk Fork O. & G. Co. v. Jennings, 90 Fed. 767; New Birmingham I. & L. Co. v. Blevins (Tex. Civ. App.), 34 S. W. R. 828; Clark v. Brown, C C. A., 119 Fed. 130; Ephraim v. Pac. Bank, 129 Cal. 589, 592.

25 Industrial & Min. G. Co. v. El. Supply Co., 58 Fed. 732, 734; Ogden City v. Bear L. & W. & Imp. Co., 55 Fed. 385; Matter of Lacov, C. C. A., 142 Fed. 960; Beach v. Macon Grocery Co., C. C. A., 125 Fed. 513; 60 C. C. A., 557, 559; Burroughs v. Toxaway Co., 182 Fed. 129; S. C., C. C. A., 185 Fed. 435; Chicago Title & Tr. Co. v. Newman, C. C. A., 187 Fed. 573; *Re* Metals Extraction & Refining Co., C. C. A., 193 Fed. 372. *Re* Wentworth Lunch Co., C. C. A., 191 Fed. 821. Huff v. Bidwell, C. C. A., 218 Fed. 6; Fryer v. Weakley, C. C. A., 261 Fed. 509; Hawes v. First Nat. Bank, C. C. A., 229 Fed. 51. See Richmond v. Irons, 121 U. S. 27; Farmers' Nat. Bank v. Backus, 77 N. W. R. 142; Northern Ala. Ry. Co. v. Hopkins, 31 C. C. A. 94; s. c., 87 Fed. 505; Gallagher v. Gingrich, 105 Iowa, 237; Cutter v. Pollock, 4 N. D. 205; Cutter v. Pollock, 7 N. D. 631, 634.

unreasonably delayed;[26] and he is not liable for interest upon the funds in the receiver's hands.[27] It was so held even when the appointment was made without jurisdiction.[28] Where the proceedings were instituted improvidently without reasonable cause,[29] or induced by fraud,[30] or there has been unreasonable delay in the prosecution of the suit,[31] the expense of the administration including the receiver's compensation should be charged against the party upon whose application the appointment was made. But it has been held by a divided court that in such a case in bankruptcy the receiver has a lien upon assets to recover his disbursements.[32] Where the proceeds of the estate are sufficient to pay the expenses of the receivership, they cannot be charged against the party at whose application the appointment was made, unless he was guilty of some misconduct,[33] or he has received some special benefit from the receivership.[34] Where a receivership in a creditor's suit has been beneficial to the mortgaged property, the receiver's compensation may be paid therefrom before the mortgage debt.[35] Otherwise this should not be done.[36] The failure of a trustee to exercise a power of sale vested in him, and the institution of a foreclosure suit instead, is no reason for charging him with the expense of the receivership.[37] The fact that land was sold at foreclosure for enough to pay the amount of the mortgage and costs does not prevent the payment to the receivers of compensation out of other property covered by the mortgage.[38]

26 Unreasonable delay in the prosecution of the action may be ground for charging the expense of the receivership to the complainant, when the appointment of the receivers is set aside, Harrington v. Union Oil Co., 144 Fed. 235.

27 Clark v. Brown, C. C. A., 119 Fed. 130.

28 Palmer v. Texas, 212 U. S. 118. But see Ephraim v. Pacific Bank, 129 Cal. 589, 592; Fryer v. Weakley, C. C. A., 261 Fed. 509.

29 Fryer v. Weakley, C. C. A., 261 Fed. 509.

30 Ephraim v. Pac. Bank, 129 Cal. 589, 592.

31 Harrington v. Union Oil Co., 144 Fed. 235.

32 *Re* Independent Mach. & Tool Corp., C. C. A., 251 Fed. 484.

33 Atlantic Tr. Co. v. Chapman, 208 U. S. 360, 52 L. ed. 528.

34 Farmers' Nat. Bank v. Backus, 74 Minn. 264.

35 Provident Life & Tr. Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854. See *supra*, § 305a.

36 Spencer v. Taylor Creek Ditch Co., C. C. A., 194 Fed. 635.

37 Atlantic Tr. Co. v. Chapman, 208 U. S. 360, 52 L. ed. 528.

38 Strain v. Palmer, C. C. A., 159 Fed. 628.

§ 325. Appeals from orders appointing receivers. "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond."[1] Although the statute authorizes an appeal from an order, continuing, refusing or dissolving, or refusing an application to dissolve, an injunction, there is no such provision concerning orders appointing receivers. The right to appeal from an order denying an application to appoint a receiver or to dissolve a receivership, or from an order continuing or dissolving a receivership, is not expressly granted. Where an appeal had been taken from an order appointing a receiver an appeal from an order denying a motion to vacate such an order was dismissed.[2]

It has been held: that an *ex parte* order appointing a re-

§ 325. [1] Jud. Code, § 129, 36 St. at L. 1087. Where before the Act authorizing appeals from orders appointing receivers, an order appointed a receiver and contained no other injunction than the usual mandate that the defendant, its officers, agents and employes, deliver to him the property in their hands; it was held that it was not appealable. Bissell C. S. Co. v. Goshen S. Co., C. C. A., 72 Fed. 545; Marden v. Campbell Printing-Press & Mfg. Co., C. C. A., 67 Fed. 809. An order vacating the appointment of a receiver and staying all proceedings in the suit, was held to be an injunction order and appealable. Baker v. Walter Baker & Co., C. C. A., 83 Fed. 3.

[2] Guardian Trust Co. v. Shedd, C. C. A., 240 Fed. 689.

ceiver is appealable;[3] and that an order nominally appointing a "conditional receiver," which gave the appointee no greater powers than those of a special master, namely, to keep and require accounts, to require bonds in such amount as he might determine and to report to the court in case of misconduct by the defendants, is not appealable.[4] The court said: "Interlocutory orders, which may be reviewed on appeal under and within the purview of the statute just quoted, are orders in the nature of 'executions before judgment,' and in effect either ousting parties from the possession of property or injuriously controlling the management and disposition of property."[5] A stipulation not to object to the continuance of a receivership is a waiver of the right to appeal from the appointment.[6] When the court has jurisdiction to appoint a receiver its discretion in making the appointment will rarely be reviewed,[7] unless so improper and improvident, as to constitute an abuse of power.[8] But where the court in making the appointment departed from the rules of jurisprudence in equity its order will be reviewed.[9] The refusal of the court to appoint a receiver will rarely be reviewed on an appeal.[10]

The other decisions which apply to these appeals are discussed in the previous section upon appeals from injunction orders.[11] Upon an appeal from an order appointing an ancillary receiver, the propriety of the decree in the principal suit cannot be questioned.[12]

3 Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760. See Mann v. Gaddie, C. C. A., 158 Fed. 42, 47. *Contra*, Root v. Mills, C. C. A., 168 Fed. 688. It has been said: "This statute will afford defendants relief, where receivers are improperly appointed, whether with or without notice." Mann v. Gaddie, C. C. A., 158 Fed. 42, 47.

4 Gulf Refining Co. v. Vincent Oil Co., C. C. A., 185 Fed. 87.

5 Gulf Refining Co. v. Vincent Oil Co., C. C. A., 185 Fed. 87, 89, per Pardee, J.

6 Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328.

7 First Nat. Bank v. Detroit Trust Co., C. C. A., 248 Fed. 16; Ward v. Central Trust Co., C. C. A., 252 Fed. 127.

8 First Nat. Bank v. Detroit Trust Co., C. C. A., 248 Fed. 17.

9 Folk v. U. S., C. C. A., 233 Fed. 177.

10 Greenberg v. Lesanis, C. C. A., 203 Fed. 678.

11 *Supra*, § 300.

12 McGraw v. Mott, C. C. A., 179 Fed. 646, where it was said that the jurisdiction of the former court could not be questioned.

CHAPTER XX.

THE WRIT OF NE EXEAT REPUBLICA.

§ 326. Definition of the writ of ne exeat republica, and when it will issue. The writ of *ne exeat republica* is a writ which issues from a Federal court of equity or bankruptcy to restrain a defendant to a suit therein from departing from the United States without the leave of the court.[1] In England it was called *ne exeat regno*, and was considered a writ of high prerogative. It was originally applicable to purposes of state only, but afterwards extended to private transactions.[2] In the United States the writ has hitherto been issued only at the request of a private party. The Judicial Code provides that "writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."[3] It is unsettled whether the writ can now issue from a Federal court held in a State which has abolished imprisonment for debt.[4] It has been held that the intention of the defendant to depart from the judicial district, is not enough to authorize the issue of the writ,[5] except in case of bankruptcy.[6] The claim

§ 326. [1] *Re* Berkowitz, 173 Fed. 1012.

[2] Jackson v. Petric, 10 Ves. 164; Beames on Ne Exeat, 1-21.

[3] Jud. Code, § 261, 36 St. at L. 1087, re-enacting U. S. R. S., § 717.

[4] *Cf.* U. S. R. S., § 990; Mallory Mfg. Co. v. Fox, 20 Fed. 409; and *infra*, § 471. See also 24 Am. Law Rev. 535.

[5] Loewenstein v. Biernbaum, 8 W. N. C. (Pa.) 163.

[6] *Re* Berkowitz, 173 Fed. 1012, where upon the petition of creditors, accompanied by a certificate of the referee, the writ was issued against a bankrupt, who was about to leave the district and did not appear upon the adjourned day of his examination.

of the party applying for the writ must be one enforceable by a suit in a court of equity[7] or bankruptcy,[8] except where a decree for permanent alimony has been entered and no appeal therefrom is pending, in which case the English rule was that the writ might issue to compel obedience to the same.[9] The claim must be for the payment of a certain fixed sum of money[10] or for an accounting.[11] A claim for unliquidated damages is insufficient.[12] Thus, the writ cannot issue under a bill to set aside a bill of sale of a vessel, for a return of the vessel or her value, and for an account of her earnings.[13] The debt must be already due.[14] A debt which is contingent,[15] or certain but future,[16] is insufficient. The motives for the defendant's departure, no matter how innocent they may be,—as, for example, that he is about to sail upon a ship of which he is captain,[17] will not prevent the issue of the writ.[18]

§ 327. Against whom the writ will issue. The writ was originally confined to subjects of the King of England.[1] It has been extended, however, so as to apply to foreigners as well as subjects of the country from the courts of which the writ issued;[2] and where the court has jurisdiction, the writ may be issued at the suit of one foreigner against another.[3] It seems that the writ may be issued against a married woman in a suit

7 Pearne v. Lisle, Amb. 75; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

8 *Re* Berkowitz, 173 Fed. 1012.

9 Pearne v. Lisle, Amb. 75; Read v. Read, 1 Ch. Cas. 115; *ex parte* Whitemore, 1 Dick. 143; Shaftoe v. Shaftoe, 7 Ves. 171; Street v. Street, 1 Tr. & R. 322; Daniell's Ch. Pr. (2d Am. ed.) 1926, 1927.

10 Graham v. Stucken, 4 Blatchf. 50; Daniell's Ch. Pr. (2d Am. ed.) 1931.

11 Gooding v. Reid, Murdock & Co., C. C. A., 177 Fed. 684.

12 Graham v. Stucken, 4 Blatchf. 50.

13 Ibid.

14 Whitehouse v. Partridge, 3 Swanst. 365, 377; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

15 Anon., 1 Atk. 521.

16 Whitehouse v. Partridge, 3 Swanst. 365, 377; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

17 Dick v. Swinton, 1 V. & B. 371.

18 Stewart v. Graham, 19 Ves. 313; Daniell's Ch. Pr. (2d Am. ed.) 1934, 1935.

§ 327. 1 Daniell's Ch. Pr. (2d Am. ed.) 1933; Beames on *re exeat*, 1-20.

2 Flack v. Holm, 1 J. & W. 405; Daniell's Ch. Pr. (2d Am. ed.) 1933, 1934.

3 De Carriere v. De Calonne, 4 Ves. 577; Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669.

affecting her separate estate.[4] The writ will not issue against a defendant who is under arrest or held to bail in an action at law.[5] The Constitution provides that Senators and Representatives shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.[6] And the Revised Statutes, that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.[7] Whenever any writ or process is sued out in violation of this statute, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, is deemed a violator of the laws of nations and a disturber of the public repose, and is liable to imprisonment for not more than three years, and a fine at the discretion of the court.[8] These regulations do not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor to any case where the person against whom the process issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who is required, upon the receipt thereof, to post the same in some public place in his office.[9] All persons may have access to

4 Moore v. Hudson, Mad. & Geld. 218; Moore v. Meynell, 1 Dick. 30; Daniell's Ch. Pr. (2d Am. ed.) 191.

5 Raynes v. Wyse, 2 Meriv. 472; Daniell's Ch. Pr. (2d Am. ed.) 1930, 1931.

6 Const. art. I, § 6.

7 U. S. R. S., § 4063. See *ex parte* Cabrera, 1 Wash. C. C. 232; U. S. v. Benner, 1 Baldw. 234; U. S. v. Lafontaine, 4 Cranch, C. C. 173.

8 U. S. R. S., § 4064.

9 U. S. R. S., § 4065.

the list of names so posted in the marshal's office, and may take copies without a fee.[10]

§ 328. Practice in obtaining the writ of ne exeat. The application for a writ of *ne exeat republica* may be made *ex parte*, even after the defendant has appeared.[1] The reason for allowing this is, that notice might frustrate the object of the motion by giving the party an opportunity of removing himself out of the jurisdiction.[2] It has been held in England that the writ cannot be obtained until a bill has been filed.[3] It is the safer practice to ask for the writ in the bill, when it is needed pending the suit.[4] But it has been held that the writ may be granted at or after the decree, although the bill contains no such prayer.[5] And by the English practice, no prayer in the bill was required.[6] The writ must be supported by an affidavit made by the complainant himself, or some person acquainted with the facts.[7] The affidavit must be positive as to the facts, not merely upon information and belief,[8] except in the case of an account, when the plaintiff may swear that, to the best of his belief, the sum named will be due to him on the balance of the account.[9] A writ was discharged when it appeared from the affidavit that the affiant could not have had personal knowledge of the transaction to which he swore positively.[10] The affidavit must be positive as to the intention of the defendant to go abroad, or to his threats or declarations, or those of members of his family or his agents, showing such an intention on his part.[11] An affidavit stating information from a stranger will

10 U. S. R. S., § 4066.

§ 328. 1 Collinson v. ———, 18 Ves. 353; Elliot v. Sinclair, Jacob, 545.

2 Elliot v. Sinclair, Jacob, 545.

3 *Ex parte* Brunker, 3 P. Wms. 312; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75. But see Lloyd v. Cardy, Prec. in Ch. 171.

4 See Eq. Rule 25. But see the language of Lord Eldon in Collinson v. ——, 18 Ves. 353.

5 Lewis v. Shainwald, 7 Saw. 403, 417.

6 Collinson v. ——, 18 Ves. 353; Lewis v. Shainwald, 7 Saw. 403, 416, 417.

7 Collinson v. ——, 18 Ves. 353; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75.

8 Rico v. Gualtier, 3 Atk. 501; Jackson v. Petrie, 10 Ves. 164; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75.

9 Rico v. Gualtier, 3 Atk. 501; Jackson v. Petrie, 10 Ves. 164.

10 Roddam v. Hetherington, 5 Ves. 91.

11 Oldham v. Oldham, 7 Ves. 410; Collinson v. ———, 18 Ves. 353;

ordinarily be insufficient.[12] It is prudent to state in the affidavit that the debt will be endangered by the defendant's quitting the country.[13] Deficiencies in the affidavit may be supplied by admissions in the answer.[14] The court may require as a condition for the issue of the writ that the complainant give an undertaking to respond in damages should the writ be afterwards discharged.[15] The writ is directed to the marshal, and is in substantially the following form:—

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE SOUTHERN DISTRICT OF NEW YORK:

GREETING,—whereas it is represented to us in our District Court of the United States for the Southern District of New York in equity, on the part of JOHN ABER, complainant, against CHARLES DUTTON, defendant (among other things), that he, the said defendant, is greatly indebted to the said complainant and designs quickly to go into parts without the United States (as by oath made on that behalf appears), which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said CHARLES DUTTON personally to appear before you, and give sufficient bail or security in the sum of $1,000 that the said CHARLES DUTTON will not go, or attempt to go, into parts without the United States without leave of our said Court; and in case the said CHARLES DUTTON shall refuse to give such Bail or Security, then you are to commit the said CHARLES DUTTON to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and, when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said District Court of the United States for the Southern District of New York distinctly and plainly under your hand, together with this Writ.

Knight v. Watts, 2 C. P. Cooper *temp.* Cottenham, 257.

12 Oldham v. Oldham, 7 Ves. 410.

13 Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75, 76; Baker v. Haily, 2 Dick. 632; Daniell's Ch. Pr. (5th Am. ed.) 1708, and cases cited. But see McGehee v. Polk, 24 Ga. 406, 412.

14 Roddam v. Hetherington, 5 Ves. 91, 95.

15 Daniell's Ch. Pr. (5th Am. ed.) 1708.

WITNESS, the Honorable GEORGE C. HOLT, United States District Judge, at the City of New York, in the County and State of New York, the thirteenth of November, one thousand nine hundred and twelve.[16]

The writ should be endorsed with the amount of the sum demanded written out in words at length.[17] When it is issued against a personal representative by a person claiming a share of the residuary estate, it should be endorsed with the whole amount due from the defendant, not only to the plaintiff, but to all persons interested in the estate.[18] When the writ is endorsed for a larger sum than is due, the court will ordinarily refuse to quash it, but will require the defendant to give security only for so much as is really due.[19] The writ, upon its issue, must be delivered to the marshal. It is his duty thereupon to execute it by arresting the defendant named in it, and bringing him before the court.[20] He has no power to break open doors under the writ.[21] The defendant may be released upon giving sufficient security to satisfy the marshal.[22] After executing the writ, the marshal should make a return of what he has done.[23] The defendant may move at any time to discharge the writ, either for irregularity or upon the merits, by disproving the charges in the complainant's affidavits.[24] But it has been said by Lord Eldon, that where the plaintiff has sworn positively to the debt and to the defendant's declarations of his intention to go abroad, the defendant's unsupported affidavit will be insufficient to contradict this.[25] If the writ is discharged another writ may issue upon a new affidavit.[26] Upon payment into court of enough to satisfy the plaintiff's claim, the writ will always be discharged.[27] The writ may be discharged if the defendant gives sufficient

16 Beames on Ne Exeat, 23, 24.

17 Beames on Ne Exeat, 93.

18 Pannell v. Taylor, T. & R. 96, 100.

19 Ibid.

20 Daniell's Ch. Pr. (2d Am. ed.) 1943.

21 Beames on Ne Exeat, 95.

22 Beames on Ne Exeat, 96; Boehm v. Wood, T. & R. 332, 340; Daniell's Ch. Pr. (2d Am. ed.) 1943.

23 Daniell's Ch. Pr. (2d Am. ed.) 1945; Impey on Sheriffs (2d ed.) 532.

24 Gernon v. Boecaline, 2 Wash. 130; Grant v. Grant, 3 Russ. 598, 602.

25 Amsinck v. Barklay, 8 Ves. 594, 597; Jones v. Alephsin, 16 Ves. 470, 471.

26 Gernon v. Boecaline, 2 Wash. 130.

27 Evans v. Evans, 1 Ves. Jr. 96.

security to satisfy the court.[28] The security usually required conditioned that the defendant abide by the process and decree of the court;[29] but security that the defendant abide by and perform the process and decree of the court may be required.[30] The discharging order usually enjoins the defendant from bringing an action of false imprisonment;[31] and the prosecution of such an action may be restrained by a subsequent order.[32] If the court considers the writ improperly issued, it may direct a reference to a master to ascertain the damages sustained by the defendant, and direct the payment to him of the amount found due by the sureties upon the plaintiff's undertaking.[33] An amendment of the bill which does not materially alter the case does not discharge the writ.[34]

28 Roddam v. Hetherington, 5 Ves. 91, 95; Boon v. Collingwood, 1 Dick. 115; Beams v. Ne Exeat, 98, 99.

29 Griswold v. Hazard, 141 U. S. 260, 281, 35 L. ed. 678, 687.

30 For defenses to such a bond, see Ibid.

31 Quoted with approval by Grosscup, J., in Gooding v. Reid, Murdock & Co., C. C. A., 177 Fed. 684, 688; Darley v. Nicholson, 2 Dr. & War. 66.

32 Quoted with approval by Grosscup, J., in Gooding v. Reid, Murdock Co., C. C. A., 177 Fed. 684, 688; Darley v. Nicholson, 2 Dr. & War. 86.

33 Sichel v. Raphael, 4 L. T. (N. S.) 114.

34 Grant v. Grant, 5 Russ. 189.

CHAPTER XXI.

EVIDENCE AT LAW AND IN EQUITY.

§ 329. Evidence in general. The Revised Statutes provide that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses, in open court, except as hereinafter provided:" [1] and "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided for." [2] Evidence consists of admissions upon the record, documents, and the testimony of witnesses.

No objection can be taken, on an appeal to the Supreme Court, to the admissibility in evidence of any deposition, deed, grant, or other exhibit found in the record, unless the record shows that objection was taken thereto in the court below.[3]

It is the safer practice when evidence is admitted over the objection of irrelevancy to claim surprise and to apply for a postponement of the trial.[4]

§ 329a. Judicial notice. The Federal courts, including the District Court of Alaska,[1] take judicial notice: of all public statutes, whether State [2] or Federal,[3] including the statutes of a

§ 329. [1] U. S. R. S., § 861. See Beardsley v. Littell, 14 Blatchf. 102; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117.

[2] U. S. R. S., § 862. See Blease v. Garlington, 92 U. S. 1, 23 L. ed. 521.

[3] S. C. Rule 13.

[4] Arkansas Grand Prairie Oil & Gas Co. v. Davidson, 233 Fed. 641.

§ 329a. [1] Jesson v. Noyes, C. C. A., 245 Fed. 46.

[2] Owings v. Hull, 9 Pet. 607, 8 L. ed. 1061; Gormley v. Bunyan, 138 U. S. 623, 635, 34 L. ed. 1086, 1090; Mills v. Green, 159 U. S. 651, 40 L. ed. 293; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed; Kansas City Western Ry. Co. v. McAdoo, 240 U. S. 57, 54; Southern Pac. Co. v. De Valle Da Costa, C. C. A., 190 Fed. 689. Of the jurisdiction of the State courts within the district, Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83; U. S. v. Atlantic Coast Line Co., 224 Fed. 160, and whether

such a court is accustomed to try issues of fact by a jury, U. S. v. Atlantic Coast Line Co., 224 Fed. 160. Acts which provide for the construction, operation and lease of railroads are public acts of which the courts take judicial notice. Western & A. R. Co. v. Roberson, C. C. A., 61 Fed. 592. That a railroad company has been incorporated by a State statute, Peterborough R. R. v. Boston & M. R. R., C. C. A., 239 Fed. 97. That the Baltimore & Ohio Railroad Company is a common carrier and that it may be presumed to do business in Indiana, Baltimore & O. R. Co. v. Reed, C. C. A., 223 Fed. 689. The Federal courts will follow a State statute providing that judicial notice shall be taken of every act of the legislature whether public or private. Case v. Kelly, 133 U. S. 21, 23 L. ed. 513. They may take judicial notice of the State statutes which were in force before the adoption of the Federal Constitution. Loree v. Abner, C. C. A., 57 Fed. 159. They will also take judicial notice of any rule of law established by the decisions of the State courts. Lamar v. Micou, 114 U. S. 218, 29 L. ed. 94, such as the law of the road in the same or in another State, Lane v. Sargent, C. C. A., 217 Fed. 237. But, it has been held, not always of a rule of practice. Yarnell v. Felton, 104 Fed. 161; Randall v. New England Order of Protection, 118 Fed. 782. Nor of a municipal ordinance. This must be pleaded and proved. Choctaw, O. & G. R. Co. v. Hamilton, 182 Fed. 117.

They may take notice of a foreign statute regulating navigation. The New York, 175 U. S. 187, 44 L. ed. 126. And of public statutes of a foreign nation while exercising jurisdiction over territory since acquired by the United States. U. S. v. Perot, 98 U. S. 428, 25 L. ed. 251; U. S. v. Chaves, 159 U. S. 452, 40 L. ed. 215; Bouldin v. Phelps, 30 Fed. 547; Sandoval v. Priest, C. C. A., 210 Fed. 814. That the civil law is the foundation of the juris-prudence of a foreign country, Barrielle v. Bettman, 199 Fed. 838; Panama Elec. Ry. Co. v. Myers, C. C. A., 249 Fed. 19, and that consequently there is no presumption that the laws are the same as those of the common law; but not of any of the details of the foreign laws as to the right of heirs to collect a claim due their ancestors without appointment of a personal representative. Barrielle v. Bettman, 191 Fed. 858. Otherwise they do not take judicial notice of foreign statutes. Liverpool & G. W. Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. ed. 788; Coghlan v. South Carolina R. Co., 142 U. S. 101, 35 L. ed. 951.

The courts take judicial notice of the seals of State of foreign nations, but not of their inferior departments, officers and their seals. Schoerken v. Swift & C. & B. Co., 7 Fed. 469, 471. Nor of the local laws of the various tribes in the Indian Territory. Wilson v. Owens, C. C. A., 86 Fed. 571. *Cf.* Davison v. Gibson, C. C. A., 56 Fed. 443. Nor, it has been held, of the local rules and regulations of mines even when they are recognized by the mining laws of the United States. Meyer v. Stevens, 78 Fed. 787. Nor of the rules and ordinances of a

State in another Federal district.[4] Of treaties of the United States,[5] of the proceedings and reports of commissioners appointed thereunder.[6] Of the recognition by the United States of the *de facto* governments of foreign countries.[7] Of proclamations of the President of the United States.[8] Of the decisions of the Executive Departments concerning matters within their respective jurisdictions.[9] Of executive regulations authorized

religious body, such as the Presbyterian Church. Barclay v. Hayes, 208 Fed. 319, 324.

3 Such as an act of Congress authorizing the construction of a bridge. Pennsylvania Ry. Co. v. Baltimore & N. Y. Ry. Co., 37 Fed. 129.

4 Mather v. Stokely, 218 Fed. 764; Williams v. William B. Scaife & Sons Co., 227 Fed. 922.

5 Lacroix Fils v. Sarrazin, 15 Fed. 489.

6 Daigle v. U. S., C. C. A., 237 Fed. 159.

7 Oetjen v. Central Leather Company, 246 U. S. 297.

8 A public proclamation of general pardon and amnesty. Jenkins v. Collard, 145 U. S. 546, 36 L. ed. 812. Of the acts of the Executive Department in relation to a Guano island. Jones v. U. S., 137 U. S. 202, 34 L. ed. 691. Of proclamations concerning a blockade and of the practice in the Navy Department in regard to captures. The Paqueta Habana, 175 U. S. 677, 44 L. ed. 320. Of the necessity to take possession and control of railroads during the war. Meyer v. Louisville & N. R. Co., 247 Fed. 893. Of an executive order taking possession of ships owned by enemies. The Kaiser Wilhelm II, C. C. A., 246 Fed. 786.

9 Such as, the withdrawal of the Secretary of the Interior of public land from sale. S. Pac. R. Co. v. Groeck, 68 Fed. 609. The decision of the Secretary of War that a stream is navigable. U. S. v. Brewer-Elliott Oil & Gas Co., 249 Fed. 609, 619. The regulations of the Secretary of War under the Select Service Act. U. S. v. Casey, 247 Fed. 363. The date of the draft under that act. U. S. v. Sugarman, 245 Fed. 604. Correspondence between State and Federal officers concerning swamp lands. Kirby v. Lewis, 39 Fed. 66; Perovich v. Perry, C. C. A., 167 Fed. 789, a telegram signed by the surname of the Attorney General was presumed to be authentic.

The custom of issuing and dating land patents several years after the payment of the purchase-money and the issue of the certificates of entry. Bigelow v. Chatterton, C. C. A., 51 Fed. 614. The activities of the Red Cross during the war. U. S. v. Negeler, 252 Fed. 217, 220. But *not*, it has been held, of the filing of the map of a railroad route in the Interior Department. McKeoin v. No. Pac. R. Co., 45 Fed. 464. Nor of the issue of letters-patent for inventions. Bottle Seal Co. v. De La Vergne B. & S. Co., 47 Fed. 59. Of the seals of the Department of Labor, 37 St. at L. 736, Comp. St., § 932; the Interstate Commerce Commission, 24 St. at L. 385, Comp. St., § 8586; and the Federal Trade Commission, 38 St. at L. 717, Comp. St., § 8836a; and the

by acts of Congress which have the force of statute.[10] Of the boundaries of the State or county where they hold their sessions, of the judicial districts and of the municipal subdivisions within such State, and of the distance from the State capital to any State subdivision when estimated by a public survey.[11] Of the boundaries of all the States.[12] Of all proceedings in the same court with the same parties,[13] or in connected litigation even

U. S. Shipping Board, 39 St. at L. 729, Comp St., § 8146b.

10 Caha v. U. S. 153 U. S. 211, 222, 38 L. ed. 415, 419; *Ex parte* Lowe, 177 Fed. 789, 795; Leonard v. Lennox, 181 Fed. 760. Of the regulations of the Post-master General, under statutory authority as to the mailings of poisons. Bruce v. U. S., C. C. A., 202 Fed. 98. The authority of post office inspectors to demand money order funds. Foster v. U. S., C. C. A., 256 Fed. 207. But *not* of the regulations of the Light House Board. Smith v. Hakopee, C. C. A., 97 Fed. 974.

11 Hoyt v. Russell, 117 U. S. 401, 29 L. ed. 914. Of the boundaries of counties within the district. Ross v. Fort Wayne, C. C. A., 63 Fed. 466, 469; Bluefield W. & Imp. Co. v. Sanders, C. C. A., 63 Fed. 333. That certain counties are within the district in which the action is brought. U. S. v. Stainward, 207 Fed. 198. Of the county where an offense was committed after evidence of its location with reference to a city, a river and certain railroads. Bradley v. United States, C. C. A., 254 Fed. 289. That Kenly, North Carolina is about 10 miles south of Smithfield on the main line of the Atlantic Coast Line Railroad. U. S. v. Atlantic Coast Line Co., 224 Fed. 160. That there are several school houses within four miles of a point in the city of Memphis, Tennessee. Laughter & Fisher v. McLain, 229 Fed. 280. Of the existence or non-existence in a State of a port of entry, at which Europeans can be landed. *Ex parte* Lair, 177 Fed. 789, 795. That Asheville, N. C., is distant more than one hundred miles from Dubuque, Iowa. Mut. B. L. I. Co. v. Robinson, C. C. A., 22 L.R.A. 325, 58 Fed. 723. Of the States in which a railroad chartered by Congress is situated. Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871, 881.

12 Thornton v. Peters, 9 Fed. 517.

13 Dimmick v. Tompkins, 194 U. S. 540, 48 L. ed. 1110, 1113; Wilson v. Calculagraph Co., C. C. A., 153 Fed. 961; *Re* Sussman, 190 Fed. 111. *Contra*, U. S. v. McMahon, 175 Fed. 296. Of an order denying application for a certiorari in a proceeding between the same parties. Dimmick v. Tompkins, 194 U. S. 540, 548, 48 L. ed. 1110. Of the date of filing a petition for an adjudication in bankruptcy. Hall v. Glenn, 247 Fed. 997. Of proceedings upon a former appeal in the same case. Wilson v. Calculagraph Co., C. C. A., 153 Fed. 961. *Contra*, Merriman v. Chicago, D. & V. R. Co., C. C. A., 120 Fed. 240. Even it has been held upon an application for a *habeas corpus*, of the affirmance of a previous order denying the writ to the same petitioner. *Re* Durant, 84 Fed. 314; and of all proceedings between the

when the parties are not the same [14] such as a test case.[15] Of the history and state of an act or process the manufacture of which is generally known.[16] Of the facts of history, general [17] and

same parties upon another appeal in a suit for the same relief. Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217, 46 L. ed. 1132, 1134; Cushman Paper Box Mach. Co. v. Goddard, C. C. A., 95 Fed. 664, 665, 37 C. C. A., 221. See 11 L.R.A. (N.S.) 616.

[14] U. S. Fidelity & Guaranty Co. v. Sandoval, 223 U. S. 227, 233, 56 L. ed. 415, 418; De Bearn v. Safe Deposit & Tr. Co., 233 U. S. 24.

It has been held that the Federal courts will take *judicial notice* in collateral proceedings of their own orders appointing receivers. Pitkin v. Cowen, 91 Fed. 559. Of the proceedings in the suit in which such an appointment was made. Louisville Tr. Co. v. Cincinnati, C. C. A., 76 Fed. 296, 318. Of the filing of a petition in bankruptcy upon an application in the same proceeding. *Re* Goldberg, 117 Fed. 692, 694. Of previous applications and orders in the same bankruptcy proceeding. *Re* Sussman, 190 Fed. 111. Of the terms of an order restoring property to the defendant. Baltimore & O. R. Co. v. Burris, C. C. A., 111 Fed. 882, 884. When sitting in admiralty, of proceedings in the same court in bankruptcy affecting the custody of the property. Hudson Oil & Supply Co. v. Booraem, 216 U. S. 604, 54 L. ed. 636. See The Falcon, C. C. A., 177 Fed. 916. But *not* in general of the pendency of other proceedings in the same court. *Re* Manderson, C. C. A., 51 Fed. 501. Nor of the decisions upon the facts in other cases. Stewart v. Masterson, 131 U. S. 151, 33 L. ed. 114. But see De Bearn v. Safe Deposit and Trust Co., 233 U. S. 24. Nor whether an assignment in England by a party for the benefit of creditors was voluntary at common law or statutory. *Re* Berthoud, 231 Fed. 529. A Federal court will take *judicial notice* that several clauses of a will have been considered and construed by the highest court of the state. Barker v. Eastman, 192 Fed. 659. Upon an appeal from an allowance of a claim in a foreclosure suit in which the appellant described himself as "the person having trustee of defendant's property," the court of review *refused* to take judicial notice of the orders of the court below in the same suit directing the sale of the property or of the proceedings thereunder. Fitzgerald v. Evans, C. C. A., 49 Fed. 426. Courts will not take judicial notice of decisions of the Interstate Commerce Commission unless the official reports are offered in the manner required by statute. Robinson v. Baltimore & Ohio R. R. Co., 222 U. S. 506, 56 L. ed. 288. See *supra*, § 77f.

A court will usually take notice of the dates of its own sessions. George C. De Lacy v. William F. Kelly, 147 App. Div. (N. Y.) 37.

[15] Rumford Chemical Works v. Hygienic Chemical Co., 159 Fed. 436.

[16] Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; King v. Gallum, 109 U. S. 99, 3 Sup. Ct. 85, 27 L. ed. 870; Heaton P. B. F. Co. v. Schlochtmeyer, 69 Fed. 592; s. c., C. C. A., 72 Fed. 520; Charles Boldt Co. v. Turner Bros. Co., C. C. A., 199 Fed. 139; H. B. Smith & Co.

local.[18] Of science,[19] chemistry,[20] natural history,[21] geography [22]

v. Southington Mfg. Co., 235 Fed. 160, 163. Especially of the state of the art when disclosed by the court's own records in another case. Cushman P. B. Mach. Co. v. Goddard, C. C. A., 95 Fed. 664. See § 367, *infra;* Whitzel v. Berman, C. C. A., 212 Fed. 734, 736, per Coxe, J.: "We think, however, that no authority can be found for the introduction for the first time in an appellate court of eleven patents dealing with a complicated structure, with no word of explanation regarding them except from counsel at the argument and in the brief. The duty of an appellate court is to ascertain whether the court below has fallen into error and it would be manifestly unfair to the appellee and to the judge to reverse his decree upon documents which were not in evidence and which he never saw."

17 Of the presence in Congress of representatives chosen at a particular election. Jones v. Montague, 194 U. S. 147, 153, 48 L. ed. 913, 915; Richardson v. Chesney, 218 U. S. 487, 54 L. ed. 1121. Of the existence of war between the United States and another country at any time. Stephens v. U. S., C. C. A., 261 Fed. 590. Of the existence of civil war in a foreign State. Underhill v. Hernandez, 168 Fed. U. S. 250, 42 L. ed. 456. That the Dominion of Canada is a British possession. *Ex parte* Lane, 6 Fed. 34; Lumley v. Wabash Ry. Co., 71 Fed. 21; but see s. c., C. C. A., 76 Fed. 66, 69. But *not* it has been held, of the fact that during the Civil War the courts of a county were closed. Cross v. Sabin, 13 Fed. 308.

18 That the lands surrounding Seattle harbor have for years been selected and known as the site of a city. *Ex parte* Davidson, 57 Fed. 883. But *not* of the facts stated in reports and messages of Governors to State legislatures. Houston & T. C. Ry. Co. v. Texas, 177 U. S. 66, 94, 44 L. ed. 673, 686. But see Coeur d'Alene C. & M. Co. v. Miners' Union, 19 L.R.A. 382, 51 Fed. 260. Nor of a report of a State auditor concerning the amounts of the various kinds of property subject to taxation. First Nat. Bank v. Chapman, 173 U. S. 205, 43 L. ed. 669. Nor an established custom of State officers to assess property for taxation at less than its actual value. New York v. Barker, 179 U. S. 279. *Contra,* Railroad & Tel. Cos. v. Board of Equalizers, 85 Fed. 362.

19 In a suit for the infringement of a patent the court will take judicial notice of all matters of general scientific knowledge; all matters of common knowledge, and all matters in common use; such as mechanical devices which are of common knowledge among all; the nature of a patented invention; and as a deduction from these whether an invention claimed is patentable. Luten v. Allen, 254 Fed. 587.

20 Of the facts of chemistry contained in the United States Pharmocopoeia. Melanson v. U. S., C. C. A., 256 Fed. 783. That cocaine is a derivative of cocoa leaves, Ibid. That heroine and morphine are derivatives of opium. Ibid. *Contra,* That opium is not grown or produced in the United States. United States v. Yee Fing, 222 Fed. 154 United States v. Brown, 224 Fed 735. That crude glycerine is a product derived from animal fats. Illi

and of the manner of transacting business,[23] which are usually

nois Cudahy Packing Co. v. Kansas City Soap Co., 247 Fed. 556. That a "whiskey cocktail" is an intoxicating drink. U. S. v. Ash, 75 Fed. 651. But *not* that a beverage going through a malting process which contains no malt is not a malt liquor. Leisy Brewing Co. v. Atchison, 225 Fed. 753, nor that a beverage containing less than one-third of one percent of alcohol is intoxicating. Ibid. The Supreme Court of the United States has unanimously held that "champagne is a beverage singularly grateful to the taste." DeBary v. Arthur, 93 U. S. 420, 423, 23 L. ed. 936, 937. But *not* that there is any substantial difference between lead or other soft metal when wrought or drawn. McCloskey v. Du Bois, 8 Fed. 710, 712.

21 That the imported native sheep of all countries produce fleeces the value of which is depreciated by an excess of hair. Lyon v. Marine, C. C. A., 55 Fed. 964.

22 Of the general topography, characteristics and climatic conditions of the territory within its jurisdiction, such as that a place is in a remote and very sparsely settled part of Alaska transportation from which in the latter part of September is about to close, resulting in the departure therefrom of many who wish to go out for the season. Campbell v. U. S., C. C. A., 221 Fed. 186. That the pasturage upon unineloscd western lands is very slight evidence of possession. Whitney v. U. S., 167 U. S. 529, 42 L. ed. 263.

That the State of Sonora in the United States of Mexico is a large country containing numerous cities. U. S. v. Albert Steinfeld & Co., 209 Fed. 904. That all Frenchmen are not born in France, nor all Germans born in Germany, all Italians in Italy, all Japanese in Japan and all Chinese in China. U. S. v. Sisson, 230 Fed. 974.

That a river is navigable between two important cities. Lands v. A. Cargo of 227 Tons of Coal, 4 Fed. 478. But *not* it seems, that a river is navigable. U. S. v. Brewer-Elliott Oil & Gas Co., 249 Fed. 609, or non-navigable at a certain point. U. S. v. Rio Grande D. & I. Co., 174 U. S. 690, 698, 43 L. ed. 1136, 1139. Nor of the navigability of a river or lake of insignificant capacity, such as Big Lake and Little River in Northeastern Arkansas. Harrison v. Fite, C. C. A., 148 Fed. 781. The meandering of a river upon a public map, in view of the practice of public surveyors is evidence, but not conclusive evidence, of its navigability. U. S. v. Brewer-Elliott Oil & Gas Co., 249 Fed. 609. It has been held that a judge in admiralty may use his personal observation and experience in determining the strength and effect of cross-currents in a certain channel. The Eleanore, C. C. A., 248 Fed. 472. Whether a State Court may take judicial notice of the navigability of a stream, is a question of local law, which cannot be reviewed by the Supreme Court of the United States, because it deprives the unsuccessful litigant of his right of trial by jury. Wear v. State of Kansas, 245 U. S. 154, 38 Sup. Ct. 55, — L. ed. —.

23 That it is the custom and the duty of a railroad agent to sell tickets on demand for any railroad, over the line of which, coupon tickets

known in the community where the court is held. And in general of all facts of which judicial notice is taken by other courts.[24]

§ 330. Admissions. Admissions upon the record are either actual or constructive. Actual admissions are made either in the pleadings or by agreement. Every statement of a fact material to the issues made in the pleadings,[1] affidavits,[2] or other

may be issued from the agent's line and the intervening connections. General Inv. Co. v. Lake Shore & M. S. Ry. Co., 226 Fed. 976. The increasing difficulty of assessment insurers to continue an existence because of the increasing age of the survivors and the consequent enhanced death rate which discourages new members. Sherg v. Merchants Life Ins. Co., 237 Fed. 484. That expensive patented machinery made up of many parts, manufactured for a particular plant but not installed, has no staple value. Fisher Hydraulic Stone & Machinery Co. v. Warner, C. C. A., 233 Fed. 527.

24 Not of all statements in encyclopaedias, dictionaries and textbooks which are not matters of common knowledge. Kaolatype Eng. Co. v. Hoke, 30 Fed. 444.

§ 330. 1 No. Pac. R. Co. v. Paine, 119 U. S. 561, 30 L. ed. 513. But see Smith v. Davison, 41 Fed. 172. It has been held that an admission in a pleading may be offered in evidence, although it has been amended so as to withdraw same. Greenhall v. Carnegie Tr. Co., 180 Fed. 812; Ranken v. Probey, 136 App. Div. (N. Y.) 134. But it is not conclusive. Ibid. An admission in an unverified pleading in another suit which was signed only by an attorney cannot be admitted in evidence. Delaware Co. Com'rs v. Diebold S. & L. Co., 133 U. S. 473, 33 L. ed. 674. See Creal v. Gallup, C. C. A., 231 Fed. 76; Oregon & C. R. Co. v. Grubissich, C. C. A., 206 Fed. 577. Statements in a pleading, verified by a party in another suit, are admissible in evidence. Balloch v. Hooper, 146 U. S. 363, 36 L. ed. 1008; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393; Cook v. Barr, 44 N. Y. 156; Illinois Cent. R. Co. v. Norris, C. C. A., 245 Fed. 926. But see U. S. Gramaphone Co. v. Nat. Gramaphone Corp., 107 Fed. 129; Am. Coat Pad Co. v. Phœnix Pad Co., C. C. A., 113 Fed. 629, 632; Keith Lumber Co. v. Houston Oil Co., C. C. A., 257 Fed. 1. Except in a criminal prosecution or in an action to enforce a penalty or forfeiture. U. S. R. S., § 860; Daly v. Brady, 69 Fed. 285. An attorney has been allowed to testify that the admission was made as a matter of form, without information as to its truth and in order to raise a question of law. Ranken v. Probey, 136 App. Div. (N. Y.) 134. The record on appeal in an action in a State court, including evidence, was held inadmissible in an action in a Federal court between two of the defendants, in which the issues were not the same. Rinehart & Dennis Co. v. Childress & Taylor, C. C. A., 257 Fed. 37. As to the admissibility of testimony by a party in another case, see Cimiotti Unhairing Co. v. Bowsky, 113 Fed. 698; s. c., 113 Fed. 699.

For the construction of an admission, see Union Casualty Co. v.

documents used in support of the claim of any party to a suit, who is of full age, whether sworn to or not,[3] may be used as evidence against him upon the hearing. An admission in a pleading[4] is conclusive and cannot be withdrawn or modified by the party who makes it unless the proceeding is amended. The filing of the general replication did not waive the right to rely on admissions in an answer or plea.[5] The statement by a defendant that he believes, or is informed and believes, that a certain fact occurred, is treated as an admission, unless coupled with some clause to prevent its being so considered.[6] For it is a rule in equity that what the defendant believes, the court will believe in such a case.[7] This rule, however, does not apply to the statement of a defendant that he believes that a paper was executed as charged in the bill.[8] Admissions in an answer made on behalf of an infant in such a case cannot be used against him,[9] unless he adopts the answer after he has reached his majority.[10] An admission of one defendant, whether in his answer or otherwise, is not evidence against any of his co-defendants,[11] who is not his partner,[12] or who does not derive

Gray, C. C. A., 114 Fed. 422; General Acc. Fire & L. Assur. Corp. v. Pacific Coast C. Co., C. C. A., 247 Fed. 416. An admission that a town made a contract admits that it had power to make it. Plankington v. Gray, C. C. A., 63 Fed. 415.

2 Hyman v. Wheeler, 29 Fed. 347; Tugman v. National S. S. Co., 30 Fed. 802, Nat. S. S. Co. v. Tugman, 143 U. S. 28, 36 L. ed. 63. An affidavit offered by a party in a litigation may be admitted as evidence against him upon the trial although it is made upon information and belief. Chicago & N. W. Ry. Co. v. Ohle, 117 U. S. 123; *Cf.* Carey v. Williams, 79 Fed. 906.

3 Smith v. Potter, 3 Wis. 432.

4 Turner Const. Co. v. Union Terminal Co., C. C. A., 248 Fed. 120; Clark-Montana R. Co. v. Butte & Superior Copper Co., 233 Fed. 543. The court may refuse to accept an admission in a collusive case. L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co., C. C. A., 253 Fed. 914.

5 Cavender v. Cavender, 8 Fed. 641.

6 Potter v. Potter, 1 Ves. Sen. 274; Hill v. Binney, 6 Ves. 738.

7 Potter v. Potter, 1 Ves. Sen. 274; Hill v. Binney, 6 Ves. 738.

8 Potter v. Potter, 1 Ves. Sen. 274; Davies v. Davies, 3 Deg. & Sm. 698.

9 Leigh v. Ward, 2 Vent. 72; Eccleston v. Petty, Carth. 79; Savage v. Carroll, 1 B. & B. 548, 553; Wrotesley v. Bendish, 3 P. Wms. 235. See Kingsbury v. Buckner, 134 U. S. 650, 680, 33 L. ed. 1047, 1059.

10 Hinde's Ch. Pr. 422.

11 Leeds v. Marine Ins. Co., 2 Wheat. 380, 4 L. ed. 266; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 3 L. ed. 688.

12 Crosse v. Bedingfield, 12 Sim-

title from him.[13] An admission of facts by a demurrer was of no effect after the demurrer had been withdrawn or overruled.[14] The parties to a suit may, by an agreement signed by themselves or their solicitors or made in open court by their counsel, admit any fact as proven, or allow testimony to be taken in any manner, unless they thus commit an act repugnant to public policy,[15] but not as to a question of law.[16] An attorney of record has implied authority to make such a stipulation.[17] Where it had been stipulated that certain evidence should be treated as if taken and afterwards a commission was issued, which it was claimed was inconsistent with the stipulation, it was held that the stipulated evidence could only be expunged by a motion before the hearing, and that an objection to it at the hearing should be overruled.[18] No agreement between counsel will ordinarily be enforced unless reduced to writing or made in open court.[19] A stipulation made by a party who is represented by an attorney may be disregarded.[20]

§ 331. Constructive admissions. Constructive admissions are those which are implied by law from a party's act. Under the former practice a constructive admission was made by the plaintiff when he set the cause down for a hearing upon bill and

ons, 35; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 156, 3 L. ed. 688, 689.

13 Field v. Holland, 6 Cranch, 8, 3 L. ed. 136; Osborn v. Bank of U. S., 9 Wheat. 738, 6 L. ed. 204.

14 Anheuser-Busch B. Co. Ass'n v. Bond, 66 Fed. 653; Illinois Cent. R. Co. v. Norris, C. C. A., 245 Fed. 926. But see Washington & C. Ry. Co. v. Mobile & O. R. Co., C. C. A., 255 Fed. 12.

15 Barker v. Dixie, Reports *temp.* Hardwicke, 252; Owen v. Thomas, 3 M. & K. 353, 357; Nixon v. Albion Ins. Co., L. R. 2 Ex. 38; Lyman v. Kansas C. & A. R. Co., 101 Fed. 636. For a case where the court refused to relieve a party from a stipulation, see McNeill v. Andes, 40 Fed. 45.

16 Swift & Co. v. Hocking Valley Ry. Co., 243 U. S. 281; Bear River Paper & Bag Co. v. City of Petoskey, C. C. A., 241 Fed. 53.

17 Christy v. Atchison, T. & S. F. Ry. Co., C. C. A., 235 Fed. 255. As as to the power of the next friend of an infant to stipulate, see Kingsbury v. Buckner, 134 U. S. 650, 680, 33 L. ed. 1047, 1059. *Supra*, §§ 90, 106. As to the power of a receiver to bind the estate by a stipulation, or admission, see Bosworth v. Terminal R. R. Ass'n of St. Louis, 174 U. S. 182, 43 L. ed. 941; *supra*, § 311.

18 Dickerson v. Matheson, 50 Fed. 73, 75.

19 Evans v. State Nat. Bank, 19 Fed. 676; Lee v. Simpson, 42 Fed. 434.

20 Bonifield v. Thorp (D. C.), 71 Fed. 924.

answer only; or when, in his bill, he did not expressly waive an answer under oath. In the former case, he admitted for the purposes of the suit that all the allegations in the answer responsive to his bill were true;[1] in the latter, that all were true which he could not contradict by the testimony of two witnesses, or of a single witness with corroborating circumstances.[2] This rule did not apply, however, unless the allegations in the answer were made positively.[3] Thus, a denial according to the defendant's recollection and belief was insufficient for this purpose.[4] So was an allegation upon information and belief.[5] It has been said that this rule is still in force,[6] and applies to denials by a defendant whose testimony under the State statute was incompetent,[7] but does not apply to allegations in the answer which were not responsive.[8]

Constructive admissions are also made by a default in pleading.[9] Averments in a bill not denied in an answer are taken as confessed except when the defendant is an infant, a lunatic, or other person *non compos* and not under guardianship.[10]

It has been held by several State courts that where a judgment by default was entered against a party such judgment was competent as an admission in favor of a third person in another suit.[11]

§ 332. Documentary evidence in general. Documentary evidence consists of all matters not contained in depositions or affidavits, which are submitted to the court in the shape of

§ 331. 1 U. S. v. Scott, 3 Woods, 334; Kennedy v. Baylor, 1 Wash. (Va.) 162.

2 Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 160, 3 L. ed. 688, 690; Union Bank of G. v. Geary, 5 Pet. 99, 110, 8 L. ed. 60, 64; Seitz v. Mitchell, 94 U. S. 580, 582, 24 L. ed. 179, 180; Vigel v. Hopp, 104 U. S. 441. See § 153, *supra*.

3 Carpenter v. Providence Washington Ins. Co., 4 How. 185, 11 L. ed. 931; Taylor v. Luther, 2 Sumn. 228; Berry v. Sawyer, 19 Fed. 286.

4 Taylor v. Luther, 2 Sumn. 228.

5 Berry v. Sawyer, 19 Fed. 286.

6 Kirkpatrick v. M'Bride, 202 Fed. 144.

7 Ibid.

8 Ibid.

9 Eq. Rule 16, *supra*, §§ 171, 172.

10 Eq. Rule 30.

11 Ellis v. Jameson, 17 Me. 235; Cragin v. Carleton, 21 Me. 492; Eisenlord v. Clum, 126 N. Y., 552, 27 N. E. 1024, 12 L.R.A. §36; Millard v. Adams, 1 Misc. R. 431, 21 N. Y. Supp. 424; 1 Greenleaf on Evidence, § 427a, 16 Cyc. 971. *Contra*, Miller v. Journal Company (Missouri, December, 1912), 152 S. W. 40.

written documents. The rules regulating its admission are substantially the same in equity as at common law.[1]

In equity, however, under the former practice such documents as merely required proof of their execution or of the handwriting contained in them might be admitted in evidence at the hearing of the cause if accompanied by an affidavit of these facts, provided that an order, which was granted as of course, had been obtained and served upon the opposite side at least two days before.[2] In some cases, the courts then permitted the proof of such documents by word of mouth under oath at the hearing, when their existence and execution was not denied by the answer.[3] There seems to be no reason now why this cannot be done even when the answer denies their execution.[4]

Evidence that a letter properly addressed, postage prepaid, was placed in a post office or Government letter box, establishes a presumption that it was received.[5] The denial of the party to who it was addressed that he received such a letter is not conclusive but raises a question of fact for the jury.[6]

Although usually a judicial record is not admissible as evidence against a stranger,[7] it is admissible when it is a link in the chain of title of the party who offers it.[8] The best evidence of a judgment is the record itself or a copy duly certified or examined in accordance with the law, unless there is proof of its destruction.[9] When the decree contains sufficient

§ 332. 1 Lake v. Philips, 1 Ch. R. 110; Stevens v. Cooper, 1 J. Ch. (N. Y.) 425, 429, 7 Am. Dec. 499, and cases cited.

2 Clare v. Wood, 1 Hare, 314. For the English practice of admitting exhibits upon the hearing, see Wood v. Strickland, 2 Mer. 461. Quoted with approval in Utah Const. Co. v. Montana R. Co., 145 Fed. 981, 983.

3 Wood v. Mann, 2 Sumn. 316; Nesmith v. Calvert, 1 W. & M. 34; Atty. Gen. v. Pearson, 7 Sim. 290, 303.

4 Eq. Rule 46, § 352, *infra*.

5 Weniger v. Success Mining Co., C. C. A., 227 Fed. 548; General Acc. Fire & L. Assur. Corp. v. Pacific Coast C. Co., C. C. A., 247 Fed. 416; U. S. v. Feldman, C. C. A., 247 Fed. 482.

6 Ibid, N. Y. & Phila. C. & C. Co. v. Meyersdale Coal Co., C. C. A., 217 Fed. 747.

7 See *supra*, §§ 186, 186a-187.

8 Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83, 115.

9 Kalloch v. Hoagland, C. C. A., 239 Fed. 252; *infra*, §§ 333m, 333o, 350a. An *office copy of a will* not under seal was admitted as an ancient document. Pineland Club v. Robert, C. C. A., 213 Fed. 545. As

recitals, it is admissible without the remainder of the roll.[10]

The English rule was that in a suit against the heir-at-law to establish the validity of a will, all the witnesses to the will who were alive, sane, and within the jurisdiction of the court, must be examined;[11] and the testator's sanity must be proved affirmatively.[12] This rule did not, however, apply to suits to establish the trusts of a will, or to appoint a new trustee, or in any other case when the validity of the will was not directly in issue.[13]

Under a rule of court requiring the parties to an action for the recovery of real property to file copies of their abstracts of title, in order to enable the court to learn whether they trace their title from a common source, and, if so, to limit the proofs to subsequent conveyances and transactions; the fact that an entry in an abstract is admitted in evidence as showing a source of title common to both parties does not render the subsequent entries admissible as evidence in favor of the proponent of such abstract.[14]

It has been held that entries in the books of a corporation showing a transfer of stock to a person and payment by him of instalments of the subscription thereto are not *prima facie* evidence that he is a stockholder.[15] In a criminal prosecution for

to *docket entries*, see Raskin v. U. S., C. C. A., 209 Fed. 740. As to transcripts of *stenographers' minutes*, see Raskin v. U. S., C. C. A., 209 Fed. 740; Lueders v. U. S., C. C. A., 210 Fed. 419; N. Y. Life Ins. Co. v. Neasham, C. C. A., 250 Fed. 787.

10 Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83.

11 Bootle v. Blundell, 19 Ves. 494b, 505.

12 Harris v. Ingledew, 3 P. Wms. 91; Wallis v. Hodgeson, 2 Atk. 56.

13 Bootle v. Blundell, 19 Ves. 494b, 505; Concannon v. Cruise, 2 Molloy, 332.

14 Davis v. Jennie Bros., C. C. A., 152 Fed. 696. As to *ancient deeds*, see Houston Oil Co. of Texas v. Goodrich, C. C. A., 213 Fed. 136; Pineland Club v. Robert, C. C. A., 213 Fed. 545; Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83.

15 Carey v. Williams, C. C. A., 79 Fed. 906. But see Turnbull v. Payson, 95 U. S. 418, 24 L. ed. 437; Liggett v. Glenn, C. C. A., 51 Fed. 381. The entries in the books of a corporation are competent evidence against its officers and employees, upon proof of such connection and familiarity therewith as to justify an inference of actual acquaintance with their contents. Foster v. U. S., C. C. A., 178 Fed. 165. Where the receiver of a State court refused to obey a subpœna for the production of certain books, secondary evidence of their contents was admitted.

defrauding the United States, it was held: that entries of the weights made by city weighers, which were recorded in books by checkers employed by a corporation in which the defendant was employed, were admissible when they were so far as possible authenticated by the persons who made the entries, and it was shown that statements of the weights showing a discrepancy between these amounts and those at which the same merchandise was entered by the Government had been brought to the attention of the defendants;[16] and that dock books kept by assistant weighers in the custom service were admissible.[17] The rule which governed the admissibility of entries in books, made by private parties, "with some exceptions, requires for the admissibility of the entries, not merely that they should be contemporaneous with the facts to which they relate, but that they shall be made by parties having knowledge of the facts, and be corroborated by their testimony if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the jurisdiction of the court."[18]

Foster v. U. S., C. C. A., 178 Fed. 165.

16 Heike v. U. S., C. C. A., 192 Fed. 83, aff'd 227 U. S. 131, 144, 57 L. ed. 450; Parker v. U. S., C. C. A., 203 Fed. 950.

17 Ibid.

18 Field, J., in Chaffee & Co. v. U. S., 18 Wall. 516, 541, 21 L. ed. 908, 612. See Carlin v. Conlon, 106 App. Div. (N. Y.) 204. See Bates v Breble, 151 U. S. 149, 155, 14 Sup. Ct. 227, 38 L. ed. 106, criticized in Wigmore on Evidence, sect. 754; Carlin v. Conlon, 106 App. Div. N. Y. 204, in which the author was counsel; but see Mississippi River Logging Co. v. Robson, C. C. A., 69 Fed. 773; Insurance Co. v. Weides, 9 Wall. 677, 19 L. ed. 810, s. c., 14 Wall. 375, 20 L. ed. 894; Raburn v. Queen City Savings Bank & Tr. Co., C. C. A., 171 Fed. 609; Rutan v. Johnson & Johnson, 231 Fed. 369, 378-380. aff'd C. C. A., 231 Fed. 369, 376; Moline Plow Co. v. Rock Island Plow Co., C. C. A., 212 Fed. 727; Pineland Club v. Robert, C. C. A., 213 Fed. 545. When an account in one of a person's books is received as a declaration against his interest and it is proved that it is incomplete, accounts in other books kept by him should be received if they tend to replace or correct it, although the latter are with individuals and the former with the firm of which they are members. Sheatz v. Markley, C. C. A., 249 Fed. 315. As to *Ledger Sheets,* Watson Nav. Co. v. United Engineering Works, C. C. A., 213 Fed. 293; Spann v. United States, C. C. A., 252 Fed. 517. As to *Inventories,* Thrush v. Fullhart, C. C. A., 210 Fed. 1; Rutan v. Johnson & Johnson, 231 Fed. 369, 379; Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83; Insurance Co. v. Weides, 14 Wall. 375, 380. As to *time cards,* Wisconsin Steel Co. v.

A paper should be tendered to the counsel for the adversary after its identification, before or upon its offer in evidence.[19] It has been held that when a party inspects a document which he has compelled his adversary to produce under a subpœna *duces tecum*, and then fails to offer it in evidence, his adversary may put it in.[20]

Where a book or document contains relevant and irrelevant matters, the matter that is irrelevant should be concealed and sealed before it is submitted to the jury.[21] Where the relevant parts of a document were of little evidential value and were inseparably mixed with matters inadmissible and highly prejudicial the materiality was merged in the prejudice and the document was not received.[22] Upon hearsay evidence of the destruction of a public record, secondary evidence of its contents was admitted.[23]

An objection to the admission of a copy is cured by the subsequent introduction of the original.[24]

An objection that a document admitted in evidence is not restricted as to probative form by the court is waived unless made at the time it is admitted.[25]

It has been held that a general offer of documentary evidence, without any statement of its purpose, is insufficient to support an exception to the exclusion of it.[26] It has been said

Maryland Steel Co., C. C. A., 203 Fed. 403; Breitmayer v. U. S., C. C. A., 249 Fed. 929; One Locomotive Co. v. Hawbleau, Mass., 105 N. E. 371. *Diaries*, De Witt v. Skinner, C. C. A., 232 Fed. 443. As to *Baptismal Records*, Phelan v. U. S., C. C. A., 249 Fed. 43. As to oral evidence by an interpreter as to account books in a foreign language, see George v. Meyers, C. C. A., 241 Fed. 653.

19 Prdjun v. U. S., C. C. A., 237 Fed. 799. For a case where it was held no error to refuse a request by counsel that a translation be read or shown to him before it was read to the jury, see Ibid.

20 Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. 55. But see Treadwell v. Lennig, 50 Fed. 872.

21 Bates v. Breble, 151 U. S. 149, 158, 14 Sup. Ct. 277, 38 L. ed. 106.

22 Harrison v. U. S., C. C. A., 200 Fed. 662, 665.

23 Denver & R. G. R. R. Co. v. Ariz. & Col. R. R. Co., 233 U. S. 601; Norma Mining Co. v. MacKay, C. C. A., 241 Fed. 640; Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83.

24 Lauderdale County v. Kittel, C. C. A., 229 Fed. 593.

25 Lauderdale County v. Kittel, C. C. A., 229 Fed. 593.

26 Canada-Atlantic & Plant S. S. Co. v. Flanders, C. C. A., 145 Fed. 875.

that a party who has fraudulently altered documents which he offers in evidence is thereby debarred from all relief in equity.[27]

§ 332a. Proof of handwriting. In the absence of a statute, as a general rule, the genuineness of handwriting cannot be determined by comparing it with any other manuscript of the party except other papers admitted to be in his handwriting, which are in evidence for some other purpose.[1]

The act of February 26, 1913, provides, "In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, or court, or officer conducting such proceeding, to prove, or disprove such genuineness."[2] This statute applies to criminal as well as to civil cases.[3]

Proof of the genuineness of the handwriting admitted as a basis of comparison may be made either directly or by inference.[4] A notebook containing entries of a personal nature which was found in the possession of the defendant was admitted for the purpose although he denied that the book was his.[5] A copy of a letter, the address and signature being in initials only found in the office of a corporation in which a party was an officer but not in his possession was excluded.[6] A man who has only once seen another write can testify to the latter's signature and handwriting.[7]

It has been held that a party cannot introduce in his own behalf letters written subsequent to one offered by his opponent, under the rule that, where part of a letter or document or conversation is received, the whole may come in for purposes of explanation which rule has been extended to admit prior letters referred to in the letter admitted.[8]

27 Horton v. McKee, 73 Fed. 556.

§ 332a. 1 Hickory v. U. S., 151 U. S. 303, 38 L. ed. 170. See Moore v. U. S., 91 U. S. 271, 23 L. ed. 346; Rogers v. Ritter, 12 Wall. 317, 20 L. ed. 417.

2 The Act of Feb. 26, 1913, 37 St. at L. 683, ch. 79, Comp. St. § 1471.

3 Dean v. U. S., C. C. A., 246 Fed. 568.

4 Ibid.

5 Ibid.

6 Myrick v. United States, 219 Fed. 1.

7 Murray v. United States, C. C. A., 247 Fed. 874.

8 Varley Duplex Magnet Co. v.

Before the enactment, a Federal court followed an analogous statute of the State.[9]

§ 332b. Proof of messages by telephone. The courts ordinarily require that messages by telephone be proved by a witness, who has heard them sent at either end and then recognized the speaker.[1] But some authorities argue for the more liberal rule, that business usages should be recognized and it should be presumed that the speaker is the person whom he represents himself to be.[2]

When a telephone is sent through another, his statements over the wire, like those of any other agent are evidence against the person whom he represents.[3] In an action for criminal conversation where the wife testified to sending telephone message to defendant to meet her, it was held competent for the husband to testify to the contents of the message handed to him by mistake.[4] The better opinion seems to be that upon proof that a witness has called up a party at the number given by the telephone company he can testify to the statements made by the person who answered him.[5]

§ 332c. Proof of telegrams. Telegrams from a postmaster to the Postmaster-General are competent evidence of the facts therein stated presumed to be within the sender's official knowledge.[1]

Telegrams do not prove themselves, and are ordinarily inadmissible without evidence that they were sent by the persons whose names are signed to the copies delivered.[2]

A telegram purporting to be signed by a cabinet officer of the United States[3] and during the Great War cablegrams pur-

Ostheimer, C. C. A., 159 Fed. 655.

9 Green v. Terwilliger, 56 Fed. 384, 393.

§ 332b. 1 People v. McCane, 143 N. Y. 455; Wigmore on Evidence, §§ 669, 2155, and cases cited.

2 See Wigmore Evidence, §§ 669, 2155; Wolfe v. Missouri Pac. Ry. Co., 97 Mo. 473, 481; Godiar v. National Bank, 225 Ill. 572, 574; Bench & Bar, Jan. 1908 and cases cited.

3 Harper v. Harper, C. C. A., 252 Fed. 39.

4 Ibid.

5 Globe Printing Co. v. Stahl, 23 Mo. App. 451, 458.

§ 332c. 1 U. S. v. McCoy, 193 U. S. 593, 48 L. ed. 805.

2 Drexel v. True, C. C. A., 74 Fed. 12. See Dunbar v. U. S., 156 U. S. 185, 195, 196, 39 L. ed. 390, 394; s. c., 60 Fed. 75.

3 Perovitz v. Perry, C. C. A., 167 Fed. 789 (the Attorney General).

porting to be signed by officers of European governments[4] were admitted without further proof and in the absence of contradiction.

Where the government sought to prove a telegram alleged to have been sent by accused as an incriminating circumstance, the message filed at the sending office was held to be the original, and proof of its loss or destruction was required before secondary evidence of its contents was admissible.[5]

§ 333. Evidence of books and papers in the Executive Departments—In general. The Revised Statutes of the United States provide as follows concerning the admission of documentary evidence: "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."[1]

Such are documents used as evidence in a court martial in the Navy, which have been filed in the Navy Department in pursuance of the statute.[2] Accounts and papers filed in the office of the Quartermaster-General, and applications for pensions, may thus be proved.[3]

The original canceled register of a lost vessel has been held to come within the statute.[4]

A letter from the President's secretary to a senator stating a commutation of a sentence, is not evidence thereof. It must be proved by a warrant of commutation or a certified copy.[5]

The mode of authentication prescribed by the statute must be strictly followed.[6] The words, "papers or documents,"

4 Agency of Canadian Car & F. Co. v. American Can Co., 253 Fed. 152.

5 Montgomery v. U. S., C. C. A., 219 Fed. 162.

§ 333. 1 U. S. R. S., § 882. See Barney v. Schneider, 9 Wall. 248, 19 L. ed. 648; Chadwick v. U. S., 3 Fed. 750; Block v. U. S., 7 Ct. Cl. 406; U. S. v. Liddle, 2 Wash. 205; U. S. v. Benner, 1 Bald. 234; White v. St. Guirons, Minor (Ala.), 331, 12 Am. Dec. 56; Catlett v. Pac. Ins. Co., 1 Paine, 594; Bleecker v. Bond, 3 Wash. 529; Thompson v. Smith, 2 Bond, 320; Wetmore v. U. S., 10 Pet. 647, 9 L. ed. 567; Wickliffe v. Hill, 3 Litt. (Ky.) 330.

2 Cohn v. U. S., C. C. A., 258 Fed. 355.

3 Thompson v. Smith, 2 Bond, 320. See Crowell v. Hopkinson, 45 N. H. 9.

4 Catlett v. Pacific Ins. Co., 1 Paine, 612. See Bleecker v. Bond, 3 Wash. 29.

5 *Ex parte* Harlan, 180 Fed. 119.

6 Smith v. U. S., 5 Pet. 291, 300, 8 L. ed. 130, 133; Block v. U. S., 7 Ct. Cl. 406; Bleecker v. Bond, 3

mean only such as are made by an officer and an agent of the government in the discharge of his official duty; and copies of such are not competent evidence unless it was the duty of the officer to file the originals.[7] In cases described in section 886 of the Revised Statutes, proof must be given in accordance with the provisions of that section.[8] The original papers may also be put in evidence.[9] In cases where the government is a party, duly authenticated copies should be procured and the fees therefor paid, and a mere notice to produce the original is not sufficient.[10] Papers which were a part of the archives of the late so-called "Confederate Government" must be proved by proper testimony.

A certified copy of a record, which is made competent evidence by statute, establishes a presumption that the original was in the public office when the copy was made, and is not overcome by testimony that seven years later the original cannot be found there.[11] If the officer having charge of the paper certifies that the copy is correct, and the head of a department certifies to the officer's character, the paper is sufficiently authenticated, provided that the seal from the department is attached thereto.[12] In the case of documents filed in the Treasury Department, an authentication under the seal of that department and the signature of the Secretary and the Assistant Secretary of the Treasury is sufficient.[13] A certified copy of a ship's manifest, delivered to the inspection officers as a report under 26 St. at L. 1085, and preserved in the immigration office, containing a list of the alien immigrants on board, with their names, nationality, last residence and destination, is competent evidence concerning the identity of an individual.[14] A pass-

Wash. 531; U. S. v. Harrill, McAll. 243; Wickliffe v. Hill, 3 Litt. (Ky.) 330.

7 Block v. U. S., 7 Ct. Cl. 406.

8 Chadwicke v. U. S., 3 Fed. 750; White v. St. Guirons, Minor (Ala.), 331; U. S. v. Humason, 8 Fed. 71.

9 Bruce v. Manchester & K. R. Co., 19 Fed. 342.

10 Barney v. Schneider, 9 Wall. 248, 19 L. ed. 648; Chadwick v. U. S., 3 Fed. 750; U. S. v. Scott, 25 Fed. 470; U. S. v. Benner, 1 Bald. 234; U. S. v. Perchman, 7 Pet. 51, 8 L. ed. 604; Winn v. Patterson, 9 Pet. 663, 9 L. ed. 266; James v. Gordon, 1 Wash. 333.

11 U. S. v. Brelin, C. C. A., 166 Fed. 104; Phelan v. U. S., C. C. A., 249 Fed. 43.

12 Ballew v. U. S., 160 U. S. 187, 40 L. ed. 388.

13 Chadwicke v. U. S., 3 Fed. 750.

14 McInerney v. U. S., C. C. A.,

port issued by the Secretary of State was held not to be evidence of the citizenship of the person who received it.[15] A certificate of a State census enumerator for the information of the governor, compilations in the report of the State auditor and a certificate to the auditor by the county clerk, are not competent evidence.[16]

"The only evidence of a refusal to accept, or of a resignation of the office of President or Vice-President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State."[17]

§ 333a. Evidence of books and papers in the Treasury Department. In accordance with the Revised Statutes copies of books, records, papers and documents in the Department of the Treasury authenticated under the seal of the Department and admitted in evidence, equally with the originals.[1] Printed books, showing the miscellaneous receipts and disbursements of the Government printed from the written records of the Department, and used as original records in the daily business of the Department and produced from its custody are competent evidence without authentication by the seal.[2] They may be admitted in evidence to prove both payment and non-payment.[3]

"Copies of any documents, records, books or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacated, by the officer acting as Solicitor for the time, shall be evidence equally with the originals."[4]

"Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all

143 Fed. 729. But see U. S. v. Wilson, 60 Fed. 890, 896.

15 Edsell v. D. Charlie Mark, C. C. A., 179 Fed. 292.

16 Coffin v. Board of Commissioners, of Kearney County, 114 Fed. 518.

17 U. S. R. S. § 151, Pierce's Fed. Code 3424.

§ 333a. 1 U. S. R. S., § 882, *supra*, § 333.

2 Chesapeake & Delaware Canal Co. v. U. S., 250 U. S. 124, affirming C. C. A., 240 Fed. 903.

3 Ibid.

4 U. S. R. S., § 883.

places and courts; and all copies of papers in his office certified by him and authenticated by the said seal shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer."[5]

"Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate."[6] Such a certificate is sufficient in the absence of any evidence that there is any other national bank of the same name at the same place.[7]

"When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department certified by the" Secretary and Assistant Secretary "and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those accounts and authenticated under the seal of the Treasury Department shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified" by the Register or by such Auditor as the case may be "to be true copies of the original on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: provided, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads '*non est factum*,' or makes his motion to the court, verifying such plea or motion

[5] U. S. R. S., § 884.

[6] U. S. R. S., § 885; First Nat. Bank v. Kidd, 20 Minn. 234; Washington Co. Nat. Bank v. Lee, 112 Mass. 521; Merchants' Nat. Bank v. Glendon Co., 120 Mass. 97.

[7] Washington Co. Nat. Bank v. Lee, 112 Mass. 521.

by his oath, the court may take the same into consideration, and, if it appears, to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit."[8] This section applies to sureties as well as to principals.[9] It applies only to suits against persons accountable for public moneys as such.[10] It does not apply to an action on the official bond of a superintendent of the mint for failure to keep safely property intrusted to his care.[11]

"There are two kinds of transcripts which the statute authorizes the proper officer to certify. First, a transcript from the 'books and proceedings of the treasury;' and second, 'copies of bonds, contracts, and other papers, etc., which remain on file, and relate to the settlement.' Under the first head are included charges of moneys advanced or paid by the department to the agent, and an entry of items suspended, rejected, or placed to his credit. These all appear upon the books of the department. The decision made on the vouchers exhibited, and the statement of the amount, constitute, in part, the proceedings of the treasury. Under the second head copies of papers which remain on file, and which have a relation to the settlement, may be certified. In this case it is essential that the officer certify that the transcripts 'are true copies of the originals which remain on file.'"[12] "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In

8 U. S. R. S., § 886, as amended by 28 Stat. 764, 809; Bechtel v. U. S., 101 U. S. 597, 25 L. ed. 1019; U. S. v. Bell, 111 U. S. 477, 28 L. ed. 477; U. S. v. Stone, 106 U. S. 525, 27 L. ed. 163; Moses v. U. S., 166 U. S. 571, 598, 41 L. ed. 1119, 1129; U. S. v. Pierson, C. C. A., 145 Fed. 814.

9 U. S. v. Gaussen, 19 Wall. 198, 22 L. ed. 41.

10 U. S. v. Radowitz, 8 Rep. 263. See U. S. v. Griffith, 2 Cranch, C. C. 666.

11 U. S. v. Bosbyshell (D. C.), 73 Fed. 616.

12 Smith v. U. S., 5 Pet. 291, 300, 301, 8 L. ed. 130, 133, per Mr. Justice M'Lean.

these cases, the officers may well certify, for they must have official knowledge of the facts stated. But where moneys come in to the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made."[13] A transcript from the books may be evidence of charges for moneys advanced or paid by the department to the agent, and claims, suspended, rejected, or placed to his credit; but not of moneys received by him for the benefit of the United States from other sources than the department.[14] A transcript showing the moneys expended by the officers in supplying the default of the contractor to carry out his contract is competent evidence.[15] The certificate should show that the transcript exhibits the final adjustment of the debits, as shown not by mere copies of original papers on the files, but upon the books and records of the department.[16] It seems that the balances struck by the treasury and charged as such are not evidence, but that the items should be stated.[17] The errors made in striking the balance may be proved by the defendant by the procuring of the original vouchers, or otherwise.[18] The defendant by accepting the credits given him does not waive the objection to the items on the debit side.[19] The government need not show that the party had notice of the adjustment or of the

13 U. S. v. Buford, 3 Pet. 12, 29, 7 L. ed. 585, 590, per Mr. Justice M'Lean.

14 U. S. v. Buford, 3 Pet. 12, 7 L. ed. 585; U. S. v. Jones, 8 Pet. 375, 8 L. ed. 979.

15 U. S. v. Griffith, 2 Cranch, C. C. 666.

16 U. S. v. Pinson, 102 U. S. 548, 26 L. ed. 226; Tiernan v. Jackson, 5 Pet. 592, 8 L. ed. 239; U. S. v. Buford, 3 Pet. 12, 7 L. ed. 585; Cox v. U. S., 6 Pet. 172, 8 L. ed. 359; U. S. v. Jones, 8 Pet. 375, 8 L. ed. 979; Gratton v. U. S., 15 Pet. 336, 10 L. ed. 759; Hoyt v. U. S., 10 How. 109, 13 L. ed. 348; Bruce v. U. S., 17 How. 437, 15 L. ed. 129.

17 U. S. v. Edwards, 1 McLean, 347; U. S. v. Jones, 8 Pet. 375, 8 L. ed. 979; Gratiot v. U. S., 15 Pet. 336, 10 L. ed. 759; Hoyt v. U. S., 10 How. 109, 13 L. ed. 348; U. S. v. Martin, 2 Paine, 68; U. S. v. Gaussen, 19 Wall. 198, 22 L. ed. 41; U. S. v. Smith, 35 Fed. 490; U. S. v. Van Zandt, 2 Cranch, C. C. 338; U. S. v. Kuhn, 4 Cranch, C. C. 401.

18 Soule v. U. S., 100 U. S. 8, 25 L. ed. 536; Bruce v. U. S., 17 How. 437, 15 L. ed. 129; U. S. v. Stone, 106 U. S. 525, 27 L. ed. 163.

19 U. S. v. Jones, 8 Pet. 375, 8 L. ed. 979.

balance against him in the transcript.[20] Treasury statements are only *prima facie* evidence of the correctness of the balance. The accounting officer may correct mistakes and restate balances.[21] "The statute says that a transcript from the books shall be admitted as evidence. A transcript or a transcribing is substantially a copy. A copy from the books and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books."[22] A copy of a bond certified by the Secretary of the Treasury without the certificate of the register and auditor is insufficient.[23] "Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section."[24]

An assessment by the commissioner of internal revenue, after a finding that a distiller has not accounted for all spirits produced by him, is *prima facie* evidence of its validity.[25] The rules and regulations concerning the internal revenue, which are prescribed and promulgated by the Treasury Department, have no force as rules of evidence in an action to collect an assessment for internal revenue.[26]

[20] Watkins v. U. S., 9 Wall. 759, 19 L. ed. 820.

[21] Soule v. U. S., 100 U. S. 8, 11, 25 L. ed. 536, 537; U. S. v. Ecksford, 1 How. 250, 263, 11 L. ed. 120, 125; U. S. v. Eggleson, 4 Saw. 201; U. S. v. Hunt, 105 U. S. 183, 187, 26 L. ed. 1037, 1039. But see U. S. v. Collier, 3 Blatchf. 325; *Ex parte* Randolph, 2 Brock. 44.

[22] U. S. v. Gaussen, 19 Wall. 212, 214, 22 L. ed. 43, per Justice Hunt.

[23] U. S. v. Humason, 8 Fed. 71.

[24] U. S. R. S., § 887. See U. S. v. Gaussen, 19 Wall. 198, 22 L. ed. 41.

[25] U. S. v. Cole, 134 Fed. 697.

[26] U. S. v. Cole, 134 Fed. 697.

§ 333b. Evidence of books and papers in the Post Office Department. Copies of books, records, papers and documents in the Post Office Department are admitted in evidence equally with the originals when authenticated under the seal of the Department.[1] The records of a Post Office are presumptively correct.[2]

"Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the Post Office Department, when certified by the sixth auditor under the seal of his office shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law to proceedings in such civil suits."[3]

"In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster-General, or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster, at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail, and the payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a

§ 333b. 1 U. S. R. S., § 882, *supra*, § 333.

2 Kenney v. U. S., C. C. A., 254 Fed. 262.

3 U. S. R. S., § 889; U. S. v. Dumas, 149 U. S. 278, 37 L. ed. 734; U. S. v. Carlowitz, C. C. A., 80 Fed. 852; Soule v. U. S., 100 U. S. 8, 11, 25 L. ed. 536, 537; U. S. v. Harrill, McAll. 243; U. S. v. Hodge, 13 How. 478, 14 L. ed. 231; U. S. v. Hillrad, 3 McLean, 324; U. S. v. Wilkinson, 12 How. 246, 13 L. ed. 974; U. S. v. McCoy, 193 U. S. 593, 48 L. ed. 805; Postmaster-General v. Rice, Gilp. 554; Lawrence v. U. S., 2 McLean, 581; U. S. v. Snyder, 14 Fed. 554.

demand has been made for the balance appearing to be due, and afterward allowances are made on credits entered, it shall not be necessary to make a further demand for the new balance found to be due."[4] Upon the trial of a postmaster for presenting a false account in a report of cancellation of stamps the court admitted the testimony of an inspector who had examined the records of many offices of the same class as to the ratio of sales to cancellation of stamps there recorded, as to the ratio between such sales and cancellations in the defendant's post office before the latter's appointment, and that there were no industrial plants in the vicinity to be supplied with postage stamps from other offices, although the records of no other post office were produced.[5]

A finding by the Postmaster General, that a contractor has abandoned the performance of his contract is *prima facie* evidence of that fact.[6]

"Whenever the sender shall so request, a receipt shall be taken on the delivery of any registered mail matter, showing to whom and when the same was delivered, which receipt shall be returned to the sender, and be received in the courts as *prima facie* evidence of such delivery."[7]

"It shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cottonseed-oil mill, manufacturing establishment, refinery, or warehouse, where cottonseed products are produced, manufactured, or stored, when requested by the Director of the Census or by any special agent or other employee of the Bureau of the Census acting under the instructions of the said director, to furnish completely and correctly, to the best of his knowledge, all of the information concerning the quantity of cotton seed received, consumed, or on hand, and the quantity of crude and refined oil, cake and meal, hulls, and linters produced, and the quantity of these products shipped and on hand. The request of the Director of the Census for information concerning the quantity of cotton seed received, consumed, and on hand, the

4 U. S. R. S., § 890.

5 Kenney v. U. S., C. C. A., 254 Fed. 262.

6 U. S. v. McCoy, 193 U. S. 593, 601, 48 L. ed. 805, 808.

7 U. S. R. S., § 3928, amended, May 23, 1910, ch. 255, 36 St. at L. 416, Comp. St. § 7410.

quantity of crude oil shipped, and the quantity of crude oil consumed and stocks on hand may be made in writing or by a visiting representative, and if made in writing shall be forwarded by registered mail, and the registry receipt of the Post Office Department shall be accepted as prima facie evidence of such demand."[8]

"The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift, enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money-orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-orders.

"But this shall not authorize any person to open any letter not addressed to himself.

"The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way."[9]

§ 333c. Evidence of books and papers in the Department of the Interior—In general. Copies of books, records, papers, and documents in the Department of the Interior are admitted in evidence equally with the originals when authenticated under

[8] (August 7, 1916, c. 274, § 3, 39 St. at L. 437, Comp. § 4434c.)

[9] U. S. R. S., § 4041, amended, Sept. 19, 1890, ch. 908, § 3, 26 St. at L. 466, Comp. St. § 7573.

the seal of the Department.[1] Applications for pensions and other records and papers in the Pension Bureau may thus be proved.[2]

"A copy of any return of a contract returned and filed in the returns-office of the Department of Interior, as provided by law, when certified by the clerk of said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against an officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract as required by law, to said returns-office."[3]

§ 333d. Evidence of books and papers in the Land Office and as to land grants and tax sales. "Copies of any records, books, or papers in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record."[1] The section determines the question of competency but not of materiality.[2] It only applies to official documents.[3] The words, "evidence equally with the originals," do not mean that in all cases the copy shall have the same probative force as the original, and that on a question as to some particular word or figure, the copy shall be as convincing as the original; it merely requires the copy to be regarded as of the same class in the grades of evidence, as to written and parol, and primary and secondary.[4]

"The Commissioner of the General Land Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office

§ 333c. [1] U. S. R. S., § 882, *supra*, § 333.

[2] Pheland v. U. S., C. C. A., 249 Fed. 43.

[3] U. S. R. S., § 888. See U. S. R. S., 3744.

§ 333d. [1] U. S. R. S., § 891.

[2] Howard v. Perrin, 200 U. S. 71, 73, 50 L. ed. 374, 376.

[3] Block v. U. S., 7 Ct. Cl. 406.

[4] Campbell v. Laclede Gas Co., 119 U. S. 445, 449, 30 L. ed. 459, 460. See Galt v. Galloway, 4 Pet. 331, 7 L. ed. 876.

as may be applied for, to be used in evidence in courts of justice."[5]

"Literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record."[6]

"Copies of any patents, records, books, or papers in the General Land Office authenticated by the seal and certified by the recorder of such Office shall be evidence equally with the originals thereof to the same force and effect as when certified by the Commissioner of said Office."[7]

A party is not deprived of his title because of a defective record, if he has a perfect patent. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record.[8] The defective record in the General Land Office does not deprive a party of his rights, and the contents of the original may be shown if the record or transcript is not a true copy.[9] "The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued."[10] A perfect record of a perfect patent is presumptive evidence of its delivery to and acceptance by the grantee.[11] An entry in the books of the Land Office, that the balance of the purchase-money was paid by the person "to whom

5 U. S. R. S., § 2469. This statute and U. S. R. S., § 891, do not forbid the testimony of a witness from a tract book used in his office which is not certified by the commissioner. Jesse D. Carr Land & Live Stock Co. v. U. S., C. C. A., 118 Fed. 821.

6 U. S. R. S., § 2470. A certificate by a commissioner after he has made an adjudication is inadmissible, unless a copy of the adjudication is annexed. U. S. v. Lew Poy Dew, 119 Fed. 786.

7 33 St. at L. 185, Pierce's Fed. Code § 7570.

8 McGarrahan v. Mining Co., 96 U. S. 316, 323, 24 L. ed. 630, 635; Campbell v. Laclede Gas Co., 119 U. S. 445, 449, 30 L. ed. 459, 460.

9 Culver v. Uthe, 133 U. S. 655, 33 L. ed. 776.

10 McGarrahan v. Mining Co., 96 U. S. 316, 323, 24 L. ed. 630, 635.

11 Ibid.

the patent had issued," is some evidence that a patent issued, although no patent is produced.[12] A certificate by a receiver that a party has made full payment is evidence that such party has taken the steps necessary for a pre-emption.[13] The tract book of a local land office is *prima facie* evidence that the lands therein shown to be public lands are such.[14] A book prepared by the Commissioner of the General Land Office, as a substitute for the original tract book of a local land office which has been destroyed, and sent by him to the register and receiver of the latter office for official use is admissible in evidence without authentication or certification by the Commissioner.[15] A copy of a plat and description duly authenticated is admissible.[16] A connected plat of sundry tracts of land made and put together by an officer of the Land Office, which is not the copy of any record in such office, is not competent evidence.[17]

Under this statute a certified copy of the records of the Land Office at Washington, concerning the location of a land warrant containing a description of the various acts of the register and receiver at the Land Office at Chicago, and of the locator in regard to the location, showing that the land was subject to location at the time, and that the land warrant was properly delivered up and deposited with the Commissioner of the Land Office, is admissible in evidence.[18]

A map which states on its face that it was issued from the General Land Office under the authority of the Secretary of the Interior is admissible without further authentication.[19]

The hydrographic maps of the United States coast and Geodetic survey are entitled to full credence as to all that they purport to show;[20] but a Circuit Court of Appeals affirmed the ruling of the trial court in excluding such a map and a photograph of a coast line made several years after the date of the

12 Willis v. Bucher, 3 Wash. C. C. 369.

13 McDonald v. Edmonds, 44 Cal. 328.

14 Jesse D. Carr Land & Live Stock Co. v. U. S., C. C. A., 118 Fed. 821.

15 Ibid.

16 Harris v. Barnett, 4 Blatchf. 369.

17 Griffith v. Truckhomer, Pet. C. C. 166.

18 Culver v. Ulthe, 133 U. S. 655, 33 L. ed. 776.

19 Stewart v. U. S., C. C. A., 21 Fed. 41, 45.

20 U. S. v. Romaine, C. C. A., 255 Fed. 253.

facts in controversy in the absence of evidence that there had been no change.[21]

A map of property, prepared by an agent to aid in selling it, is admissible as evidence of an act of ownership by his principal.[22]

A copy of a survey certified by the register, by the proper judge and by the Secretary of State under the great seal was admitted in evidence.[23]

The field notes of government surveyors are not conclusive.[24] A discrepancy between them and the calls for quantity will discredit them.[25]

"It shall be lawful for any keeper or person having custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed under or by the United States may come into question, equally with the originals."[26]

"The official seals heretofore authorized to be provided for the offices of the surveyors-general of Oregon, California, and

21 Beach Front Hotel Co. v. Sooy, C. C. A., 210 Fed. 265.

22 Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83, 111.

23 Smith v. Ridden, 5 Harr. (Del.) 321.

24 U. S. v. Redondo Development Co., C. C. A., 254 Fed. 656.

25 Ibid.

26 U. S. R. S., § 907; Ten Cases v. U. S., 34 Fed. 101; Chadwick v. U. S., 3 Fed. 753; Williams v. U. S., 137 U. S. 113, 136, 34 L. ed. 590, 597.

Louisiana shall continue to be used; and any copy of or extract from the plats, field-notes, records, or other papers on file in those offices, respectively, when authenticated by the seal and signature of the proper surveyor-general, shall be evidence in all cases in which the original would be evidence."[27]

"Any copy of a plat of survey, or transcript from the records of the office of surveyor-general of Louisiana, duly certified by him, shall be admitted as evidence in all the courts of the United States and the Territories thereof."[28]

"All official books, papers, instruments of writing, documents, archives, official seals, stamps, or dies, which have been heretofore authorized by law to be collected and deposited in the surveyor-general's office in California, shall be safely and securely kept by such surveyor-general in the archives of his office; and copies thereof, authenticated by the surveyor-general under his seal of office, shall be evidence in all cases where the originals would be evidence."[29]

The certificate of the Secretary of the Spanish Governor of Florida is *prima facie* evidence of the existence of a grant of land.[30]

A party claiming under a tax deed, must affirmatively show that every requisite to its legal execution was performed unless it was the result of a judicial proceeding or there was long and open possession thereunder.[31]

"It shall be the duty of every collector to keep a record of all sales of land made in his collection-district, whether by himself or his deputies, or by another collector, in which shall be set forth the tax for which any such sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making said sale, amount of fees and expenses, the name of the purchaser and the date of the deed; and said record shall be certified by the officer making the sale. And on or before the fifth day of each succeeding month he shall transmit a copy of such record of the preceding month to the Com-

27 U. S. R. S., § 2224, Comp. St. § 4458.

28 U. S. R. S., § 2225, Comp. St. § 4459.

29 U. S. R. S., § 2229, Comp. St. § 4464.

30 U. S. v. Wiggins, 14 Pet. 334, 10 L. ed. 481; U. S. v. Acosta, 1 How. 24, 11 L. ed. 33.

31 Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83, 119.

missioner of Internal Revenue. And it shall be the duty of every deputy making sale, as aforesaid, to return a statement of all his proceedings to the collector, and to certify the record thereof. In case of the death or removal of the collector, or the expiration of his term of office from any other cause, said record shall be delivered to his successor in office; and a copy of every such record, certified by the collector, shall be evidence in any court of the truth of the facts therein stated.'' [32]

''Upon any sale of real estate to satisfy an assessment for internal revenue the deed of sale given in pursuance of the preceding section shall be prima-facie evidence of the facts therein stated; and if the proceedings of the officer as set forth have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto.'' [33]

Where the plaintiff derived his title by a deed of the designated collectors of the Federal Direct Tax of 1916, the court admitted an extract from the Senate Journal duly authenticated which showed the nomination and confirmation of the grantor as collector of direct taxes although it did not show that he was appointed designated collector.[34] A recital in a tax deed that the sale had been advertised in a newspaper authorized to publish the laws of the United States created no presumption that such newspaper was so authorized.[35]

Papers, purporting to be original tax receipts for payments more than thirty years before, when produced from the possession of the party who made the payments are admissible as evidence of such payments [36] and of acts of ownership by the payer.[37] Deeds and powers of attorney for the sale of land are admissible as acts of ownership.[38] Deeds of bargain and sale create no presumption of possession.[39]

32 U. S. R. S., § 3203, amended March 1, 1879, c. 125, § 3, 20 St. at L. 332, Comp. St. § 5925.

33 U. S. R. S., § 3199, Comp. St. § 5921.

34 Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83.

35 Ibid.

36 Virginia & West Virginia Coal Co. v. Charles, 251 Fed. 83, 111.

37 Ibid.

38 Ibid.

39 Ibid.

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."[40]

§ 333e. Evidence of matters in the Patent Office. "Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters-patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law, shall have certified copies thereof."[1] Printed copies which are not certified are inadmissible.[2]

A transcript of certain documents on file is competent, although not a transcript of the whole proceedings.[3]

Proof that there is no record must be made by deposition or attendance in court of the proper officer; and a mere certificate that diligent search has been made is not sufficient.[4]

It seems that the court will presume that a person who signs as "Acting Commissioner" holds such office, in the absence of evidence to the contrary.[5] A certificate by a commissioner after he has made an adjudication is inadmissible, unless a copy of the adjudication is annexed.[6]

"The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the District Courts, shall when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained."[7]

40 U. S. R. S., § 2126, Pierce's Fed. Code § 5725.

§ 333e. 1 U. S. R. S., § 892, 29 St. at L. 692. *Cf.* Edison E. L. Co. v. U. S. E. L. Co., 44 Fed. 294.

2 National Cash Register Co. v. Gratigny, C. C. A., 213 Fed. 463.

3 Toohey v. Harding, 1 Fed. 174.

4 Stoner v. Ellis, 6 Ind. 152; Bullock v. Wallingford, 55 N. H. 619; Am. Depot Co. v. Sheldon, 17 Blatchf. 210; Stone v. Palmer, 28 Mo. 539.

5 Woodworth v. Hall, 1 Wood & M. 248.

6 U. S. v. Lew Poy Dew, 119 Fed. 786.

7 U. S. R. S., § 894. 29 St. at L. 693. *Cf.* U. S. R. S., § 4898.

An assignment of a patent cannot be proved by an abstract showing its record in the patent office.[8] The original or a copy duly proved must be produced.[9] An assignment of a patent executed in a foreign country in pursuance of the laws of the United States is valid although it fails to comply with the requirements of the laws of the foreign country.[10] "If any such assignment, grant, or conveyance of any patent shall be acknowledged before any notary public of the several States or Territories or the District of Columbia, or any commissioner of the United States circuit court, or before any secretary of legation or consular officer authorized to administer oaths or perform notarial acts under section seventeen hundred and fifty of the Revised Statutes, the certificate of such acknowledgment, under the hand and official seal of such notary or other officer, shall be *prima facie* evidence of the execution of such assignment, grant or conveyance." [11]

"Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters-patent, and of the date and contents thereof." [12]

Ordinarily, the issue of a patent is *prima facie* evidence that the patentee was the first discoverer or inventor of the thing patented which can be disputed only by proof beyond a reasonable doubt.[13] It has been said that this rule does not apply to combinations of materials ordinarily used for structural purposes.[14]

8 Johnston v. Southern Well Works Co., C. C. A., 208 Fed. 145.

9 Ibid.

10 Linde Air Products Co. v. Morse Dry Dock & R. Co., 239 Fed. 909.

11 Mayor, etc., City of New York v. American Cable R. Co., C. C. A., 60 Fed. 1016; Paine v. Trask, C. C. A., 56 Fed. 233; Lee v. Blandy, 1 Bond, 361; Brooks v. Jenkins, 3 McLean, 432; Parker v. Haworth, 4 McLean, 370.

12 Am. Graphophone Co. v. Leeds & Catlin Co., 140 Fed. 981. U. S. R. S., § 893. A copy of a French patent certified by the director of the Conservatoire Nationale des Arts et Metiers of France, under the seal of that department, verified by the minister of foreign affairs, under their seals, but not by the great seal of France, may be admitted in evidence. Schoerken v. Swift C. & B. Co., 7 Fed. 469, 471. See Deflorz v. Reynolds, 17 Blatchf. 436.

13 Adamson v. Gilliland, 242 U. S. 350; Crone v. John J. Gibson Co., 237 Fed. 637. See *supra*, § 146, 147, 277.

14 Turner v. Lauter Piano Co., 236 Fed. 252.

In a suit to restrain an infringement the record of interference proceedings in the patent office is admissible to strengthen the presumption of validity arising from the allowance of the patent [15] as regards the scope and patentability of the invention, although the parties are not the same, but not to establish prior inventions.[16] Testimony before the patent office, in interference proceedings between the same parties, is not ordinarily admissible in a suit to compel the issue of a patent.[17]

Letters written by an applicant for a patent, when properly certified as papers remaining in the departments, are admissible in evidence.[18] The documents which make up the original papers belong to the public archives, and a duly certified copy thereof is competent evidence, although some of these documents may contain private stipulations between the parties concerned.[19] Putting in evidence the file wrapper of a patent for which priority of invention is claimed, for the purpose of contradicting testimony of the inventor as to the date of the invention, does not make the depositions contained therein evidence in the case for all purposes.[20]

A certified copy of a patent surrendered and canceled is admissible to show that an improvement subsequently patented is not original, although the certificate does not show when it was canceled, or how or to what defect.[21] A Circuit Court granted a certificate that a certified copy of such a paper would be admitted in evidence, subject to all legal objections, in a suit in equity.[22]

By the Trade-Mark Law, "That the registration of a trademark under the provisions of this Act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably

15 Western Electric Co. v. Williams-Abbott Electric Co., C. C. A., 83 Fed. 842; Milner Seating Co. v. Yesbera, C. C. A., 111 Fed. 386; Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., C. C. A., 133 Fed. 167; Bishop-Babock-Becker Co. v. Arnholt & Schaefer Brewing Co., 220 Fed. 676.

16 Elliott & Co. v. Youngstown Car Mfg. Co., 180 Fed. 345.

17 Dover v. Greenwood, 154 Fed. 854.

18 Pettibone v. Deringer, 4 Wash. C. C. 215, 219.

19 Hanriek v. Barton, 16 Wall. 166, 21 L. ed. 350.

20 Richardson v. Campbell, 72 Fed. 525.

21 Delano v. Scott, Gilp. 489.

22 MacWilliam v. Connecticut Web Co., 119 Fed. 509.

imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."[23]

He who desires a copy of papers filed in the patent office must make demand therefor in a proper manner, without insulting or abusing the officers; but if a second demand is properly made, the commissioner cannot refuse to comply because of the applicant's previous improper conduct.[24]

§ 333f. Copyright records. "In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and

[23] Act of Feb. 20, 1905, 33 St. at L. 728, Pierce's Fed. Code, § 8822.

[24] Boyden v. Burke, 14 How. 575, 14 L. ed. 548.

the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration."[1] Prima facie proof of copyright is made by the certificate and the receipt for the affidavit required.[2]

"Every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgement under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument."[3]

§ 333g. Evidence of books and papers in the Pension Bureau and presumptions in pension cases. The books and papers in the Pension Bureau are proved by the production of the originals or copies under the seal of the Secretary of the Interior.[1]

"All applicants for pensions shall be presumed to have had no disability at the time of enlistment; but such presumption may be rebutted."[2]

§ 333f. [1] March 4, 1909, ch. 320, § 55, 35 St. at L. 1086, amended March 2, 1913, ch. 97, 37 St. at L. 724, Comp. St. § 9576.

[2] Chautauqua School of Nursing v. National School of Nursing, 211 Fed. 1014.

[3] Act of March 4, 1909, ch. 320, § 43, 35 St. at L. 1084, Comp. St. § 9564. See *supra*, §§ 150, 278; *infra*, § 389g. The evidence admissible in suits to restrain the infringement of copyrights is well discussed in "A Treatise on the Law of Copyright and Literary Property" by William B. Hale, 13 Corpus Juris. 1211-1218.

§ 333g. [1] U. S. R. S., § 882, Pheland v. U. S., C. C. A., 249 Fed. 43.

[2] Act of March 3, 1885, ch. 340, 23 St. at L. 362, Comp. St. § 8943.

"In considering claims filed under the pension laws, the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received. And any pension granted under this Act shall cease upon proof that such officer or enlisted man is still living."[3]

"The failure of any pensioner to claim his pension for three years after the same shall have become due shall be deemed presumptive evidence that such pension has legally terminated by reason of the pensioner's death, remarriage, recovery from the disability, or otherwise, and the pensioner's name shall be stricken from the list of pensioners, subject to the right of restoration to the same on a new application by the pensioner, or, if the pensioner is dead, by the widow or minor children entitled to receive the accrued pension, accompanied by evidence satisfactorily accounting for the failure to claim such pension, and by medical evidence in cases of invalids who were not exempt from biennial examinations as to the continuance of the disability."[4]

§ 333h. Evidence of proceedings before the Interstate Commerce Commission. "The Interstate Commerce Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."[1]

"The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commis-

[3] Act of March 13, 1896, ch. 54, 29 St. at L. 57, Comp. St. § 8978.

[4] U. S. R. S., § 4719, Comp. St. § 9018.

§ 333h. [1] Act of Feb. 4, 1887, 24 St. at L. 379, § 14, as amended March 2, 1889, 25 St. at L. 855, June 29, 1906, 34 St. at L. 584, Feb. 28, 1920, 41 St. at L. 491.

sion as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence, with like effect as the originals."[2]

By the Accident Reports Act, "It shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roabed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said Commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided*, That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the Commission."[3]

"Any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same."[4]

"The Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents re-

[2] Ibid, § 16, sub'd (13) as amended March 2, 1889, 25 St. at L. 855, June 29, 1906, 34 St. at L. 584, June 18, 1910, 36 St. at L. 539, Feb. 28, 1920, 41 St. at L. 491.

[3] Act of September 6, 1916, 36 St. at L. 350, § 1.

[4] Ibid, § 2.

sulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Commission, or any impartial investigator thereunto authorized by said Commission, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances, and for that purpose may subpœna witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence, and shall be provided by said carriers with all reasonable facilities: *Provided*, That when such accident is investigated by a commission of the State in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the State commission investigation. Said Commission shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper."[5]

"That neither said report or any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."[6]

"The Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports hereinbefore provided."[7]

By the Boiler Inspection Act, "That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector; whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall

5 Ibid, § 3.
6 Ibid, § 4.
7 Ibid, § 5.

be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

"The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."[8]

In the case of investigations to determine whether there has been a violation of the Clayton Anti-Trust Act made by the Interstate Commerce Commission as to common carriers, by the Federal Reserve Board as to banks, banking associations, and trust companies, and by the Federal Trade Commission "as to all other character of commerce" "the findings of the Commission or Board as to the facts, if supported by testimony, shall be conclusive."[9]

In a suit in a District Court to collect damages awarded by an order of the Interstate Commerce Commission "The findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."[10] When no evidence is offered except the order and the finding of the Commission which supports such order there is a *prima facie* case, in favor of the plaintiff's right to recover,[11] which cannot be rejected by the court or

[8] Act of Feb. 17, 1911, 36 St. at L. 913, § 8.

[9] Act of Oct. 15, 1914, § 11, 38 St. at L. 730, *supra*, §§ 32a, 77a.

[10] Act of Feb. 4, 1887, § 16, 24 St. at L. 379, as amended March 2, 1889, 25 St. at L. 855, June 29, 1906, 34 St. at L. 584, June 18, 1910, 36 St. at L. 539, Feb. 28, 1920, 41 St. at L. 456, see *supra*, § 32a.

[11] Mills v. Lehigh Valley R. R. Co., 238 U. S. 473; St. Louis, S. W. Ry. Co. v. S. Samuels & Co., C. C. A., 211 Fed. 588; Clark Bros. Coal Min. Co. v. Pennsylvania R. Co., 238 Fed. 642.

jury in the absence of any contervailing evidence,[12] but where the evidence before the Commission is offered upon the trial the court can inquire whether this is sufficient to justify the order and if not should direct judgment for the defendant.[13] Either party may offer additional evidence.[14] The omission from the Commission's report of the evidential or primary facts, does not affect its force as creating a *prima facie* case.[15] The finding is sufficient if it discloses: (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and if so, the amount of his damages; (6) whether the rate collected from the shipper was excessive and unreasonable, and if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and if so, the amount of this damage.[16]

This statute does not authorize the admission of a copy of testimony shown by a report of the Commission to have been given by a witness, but not otherwise authenticated.[17]

There is no presumption that a carrier is violating the law unless the evidence justifies such an inference or there is a finding of the Commission to that effect.[18]

§ 333i. Evidence of official correspondence. "The volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various of-

12 Meeker v. Lehigh Valley R. R. Co., 238 U. S. 436, 439.

13 Michigan Cent. R. Co. v. Elliott, C. C. A., 256 Fed. 78; Pennsylvania R. R. Co. v. W. F. Jacobi & Co., 242 U. S. 89, where all the evidence before the commission was not before the court.

14 Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co., C. C. A., 235 Fed. 474.

15 Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412; Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 434; Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, reversing Lehigh Valley R. R. Co. v. Clark, C. C. A., 207 Fed. 717.

16 Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 477.

17 U. S. v. Reading Co., 183 Fed. 427.

18 Cincinnati & Pac. Ry. v. Rankin, 241 U. S. 319.

ficers of state, communicated by the President of the United States to the Senate, is as competent evidence as the original documents themselves."[1]

"The design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication. Had the officer been testifying under oath, such an assertion would have been excluded as inadmissible, upon the ground that the statement itself implied the existence of primary and more original and explicit sources of information. The courts hold this rule which has been invoked to be limited to only such a statement in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances, and is therefore rejected."[2]

§ 333j. Evidence of proceedings of Congress. "Extracts from the journals of the Senate, or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court."[1] The right to hold an office may thus be proved.[2]

§ 333k. Evidence of Federal statutes. "The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further

§ 333i. [1] Whiton v. Albany Ins. Co., 109 Mass. 30. *Cf.* Doe v. Roe, 13 Fla. 602.

[2] U. S. v. Corwin, 129 U. S. 381, 386, 32 L. ed. 710, 711. *Cf.* The Ship Parkman, 35 Ct. Cl. 406.

§ 333j. [1] U. S. R. S., § 895. See Field v. Clark, 143 U. S. 649, 679, 36 L. ed. 294, 305; U. S. v. Burr, 159 U. S. 78, 85, 40 L. ed. 82, 84; Virginia & West Virginia Coal Co., 251 Fed. 83, 112, Comp. St. § 1508.

[2] Virginia & West Virginia Coal Co., 251 Fed. 83, 112.

proof of authentication thereof."[1] "The publication by the Government printing office of the supplements to the Revised Statutes are *prima facie* evidence[2] and the publication by that office of the pamphlet copies of the statutes and the bound copies of the acts of each Congress are legal evidence of the laws and treaties therein contained in all courts of the United States and of the several States therein."[3]

"The Secretary of State is hereby charged with the duty of causing to be prepared for printing, publication and distribution the revised statutes of the United States enacted at this present session of Congress; that he shall cause to be completed the head notes of the several titles and chapters and the marginal notes referring to the statutes from which each section was compiled and repealed by said revision; and references to the decisions of the courts of the United States explaining or expounding the same, and such decisions of State courts as he may deem expedient, with a full and complete index to the same. And when the same shall be completed, the said Secretary shall duly certify the same under the seal of the United States, and when printed and promulgated as hereinafter provided, the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories."[4]

"That the certificate to the printed volume of the revised statutes of the United Staes required by section two of "An act providing for publication of the revised statutes and laws of the United States," approved June twentieth, eighteen hundred and seventy-four, shall be made by the Secretary of State under the seal of the Department of State, and so much of said section as provides that such certificate shall be under the seal of the United States, is hereby repealed."[5]

§ 333k. [1] U. S. R. S., § 908.

[2] 28 St. at L. 601; 26 St. at L. 50; 21 St. at L. 308.

[3] U. S. R. S., § 909. See also Locke v. U. S., 7 Cranch, 339, 3 L. ed. 364; The Luminary, 8 Wheat. 407, 5 L. ed. 647; Wood v. U. S., 16 Pet. 342, 10 L. ed. 987; The John Griffin, 15 Wall. 29, 21 L. ed. 80; Clifton v. U. S., 4 How. 242, 11 L. ed. 957; Taylor v. U. S., 3 How. 197, 11 L. ed 559; Buckley v U. S., 4 How. 251, 11 L. ed. 961; Cliquot's Champagne, 3 Wall. 114, 18 L. ed. 116; U. S. v. Walla Walla, 44 Fed. 796; The Coquitlam, 57 Fed. 706, 714.

[4] Act of June 20, 1874, 18 St. at L 113, Pierce's Fed. Code, § 11230.

[5] An act providing for the au-

§ 333 l. Evidence of books and papers in consular offices and consular certificates. "Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such officer, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States."[1]

"The Supervising Surgeon-General of the Marine Hospital Service shall, immediately after this act takes effect, examine the quarantine regulations of all State and municipal boards of health, and shall, under the direction of the Secretary of the Treasury, cooperate with and aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards and in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia; and all rules and regulations made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place; and at such ports and places within the United States as have no quarantine regulations under State or municipal authority, where such regulations are, in the opinion of the Secretary of the Treasury, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and at such ports and places within the United States where quarantine regulations exist under the authority of the State or municipality which, in the opinion of the Secretary of the Treasury, are not sufficient to prevent the introduction of such diseases into the United States, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, the Secretary of the Treasury shall, if in his judgment it is necessary and

thentication of the revised statutes of the United States and for preserving the originals of all laws in the Department of State. Approved December 28, 1874. 18 Stat. L. 293, Pierce's Fed. Code, § 11231.

§ 333l. [1] U. S. R. S., § 896; The Atlantic, Abbott's Adm. 451.

proper, make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and when said rules and regulations have been made they shall be promulgated by the Secretary of the Treasury and enforced by the sanitary authorities of the States and municipalities, where the State or municipal health authorities will undertake to execute and enforce them; but if the State or municipal authorities shall fail or refuse to enforce said rules and regulations the President shall execute and enforce the same and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose. The Secretary of the Treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure, the best sanitary condition of such vessel, her cargo passengers, and crew; which shall be published and communicated to and enforced by the consular officers of the United States. None of the penalties herein imposed shall attach to any vessel or owner or officer thereof until a copy of this act, with the rules and regulations made in pursuance thereof, has been posted up in the office of the consul or other consular officer of the United States for ten days, in the port from which said vessel sailed; and the certificate of such consul or consular officer over his official signature shall be competent evidence of such posting in any court of the United States."[2]

"All masters of vessels of the United States, and bound to some port of the same, are required to take such destitute seaman on board their vessel, at the request of consular officers, and to transport them to the port in the United States to which such vessel may be bound, on such terms, not exceeding ten dollars for each person for voyages of not more than thirty days, and not exceeding twenty dollars for each person for longer voyages, as may be agreed between the master and the consular

[2] Feb. 15, 1893, c. 114, § 3, 27 Stat. 450, Comp. St. § 9158.

officer. When the transportation is by a sailing vessel; and the regular steerage-passenger rate, not to exceed two cents per mile, when the transportation is by steamer. And said consular officer shall issue certificates for such transportation, which certificates shall be assignable for collection. If any such destitute seaman is so disabled or ill as to be unable to perform duty, the consular officer shall so certify in the certificate of transportation, and such additional compensation shall be paid as the First Comptroller of the Treasury shall deem proper. Every such master who refuses to receive and transport such seamen on the request or order of such consular officer shall be liable to the United States in a penalty of one hundred dollars for each seaman so refused. The certificate of any such consular officer, given under his hand and official seal, shall be presumptive evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty. No master of any vessel shall, however, be obliged to take a greater number than one man to every one hundred tons burden of the vessel on any one voyage, or to take any seaman having a contagious disease."[3]

The certificate of a consul is competent evidence to prove his official acts, but not acts which are not official or not within his personal knowledge.[4] The consul's certificate is competent to prove that the ship's papers were lodged with him,[5] that a seaman was discharged in a foreign court with his own consent,[6] and when it sets out all the essential facts it is *prima facie* evidence that a master violated the law in refusing to receive a discharged seaman in a foreign port.[7] A consular certificate is not competent to prove facts to justify imprisonment of a seaman by the master in a foreign port,[8] nor to authenticate the record of the condemnation of a vessel in a court of vice-admiralty;[9] nor to prove a foreign law or the correctness of a translation;[10] nor to prove any fact between third

3 Ibid.

4 Brown v. The Independence, Crabbe, 54.

5 U. S. v. Mitchell, 2 Wash. 478.

6 Lamb v. Briard, Abb. Adm. 367.

7 Matthews v. Offly, 3 Sumn. 115.

8 Johnson v. Cariolanus, Crabbe, 239. *Cf.* The W. F. Babcock, C. C. A., 85 Fed. 978.

9 Catlett v. Pacific Ins. Co., 1 Paine 594.

10 Church v. Hubbard, 2 Cranch, 187, 2 L. ed. 249.

persons, unless made so by statute;[11] nor to prove a copy of a bill of lading in another's possession.[12] A certificate with an undecipherable seal and signature is not admissible in evidence.[13]

§ 333m. Evidence of state and territorial statutes and public records. "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto."[1]

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."[2] This statute does not apply to court records.[3]

11 U. S. v. Mitchell, 2 Wash. 478; The Alice, 12 Fed. 923; Stein v. Bowman, 13 Pet. 209, 10 L. ed. 129; Levy v. Burley, 2 Sumn. 355.

12 The Alice, 12 Fed. 923.

13 The Atlantic, Abb. Adm. 451.

§ 333m. 1 U. S. R. S., § 905.

2 U. S. R. S., § 906; Hodge v. Palms, C. C. A., 117 Fed. 396. See also Snyder v. Wise, 10 Pa. St. 157; Lawrence v. Gauntley, Cheves Law (S. C.) 7; King v. Dale, 2 Ill. 513; Henthorn v. Doe, 1 Blackf. (Ind.) 157; Russell v. Kearney, 27 Ga. 96;

Where a deed of land in Texas had been executed in accordance with the civil laws in Louisiana, and a copy furnished to the grantee as a second original, this copy was admitted in evidence, upon proof by the witness that he had examined the originals on file in the notary's book; that the copy was a true one; that the notary before whom the conveyance was executed was dead; that the witness knew the handwriting, which was genuine; that the witness knew the handwriting of one of the subscribing witnesses; that such witness was dead; and that the signature of such subscribing witness was genuine.[4] A pardon certified under the great seal of the State was admitted in evidence.[5] A copy of a survey certified by the register, by the judge, and by the Secretary of State under the great seal, was admitted in evidence.[6] The clerk's certificate should show that the judge is the presiding judge, or that he is the presiding judge for the district.[7]

§ 333n. Evidence of the records of the State and Territorial Courts. "The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."[1] This statute applies to the Federal courts as well as to the State courts.[2]

Paca v. Dutton, 4 Mo. 371; Kerr v. Jackson, 28 Mo. 316; Grant v. Henry Clay Coal Co., 80 Pa. St. 208; and authorities cited in Bump's Fed. Proc., 617-619.

3 Tarlton v. Briscoe, 1 A. K. Marsh. (Ky.) 67; U. S. R. S., § 905; Snyder v. Wise, 10 Pa. St. 157; Law v. Gaultney, Cheves (S. C.) Law, 7.

4 White v. Bromley, 20 How. 235, 250, 15 L. ed. 886, 890.

5 U. S. v. Wilson, Baldw. 78.

6 Smith v. Redden, 5 Harr. (Del.) 321.

7 Paca v. Dutton, 4 Mo. 370.

§ 333n. 1 U. S. R. S., § 905. The cases construing this section of the Revised Statutes are very numerous, and may be found collected in Greenleaf on Evidence, §§ 504-506.

2 Gormley v. Bunyan, 138 U. S. 623, 635, 34 L. ed. 1086, 1090; Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; Galpin v. Page, 3 Saw. 93.

Printed copies of State statutes purporting to be published by authority of the State have been held to be *prima facie* evidence in the courts of the United States.[3]

It will be presumed that the seal of a State was annexed to a paper by the proper officer under due authority.[4] The certificate must show that the person who signed it as judge was, when he signed it, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record.[5] If the laws of a State show that the court in which the judgment was rendered consisted of but a single judge, it is not material in a Federal court that the certificate to the attestation of the clerk did not show that the certifying officer was the sole judge, chief justice, or presiding magistrate.[6] The certificate of the judge that he is "one of the judges" of the court is insufficient.[7] The judge should certify that the attestation is in due form according to the laws of the State.[8] If a clerk of a court certifies at the foot of a paper which purports to be a record that the foregoing is truly taken from the record of proceedings of his court, and if the judge, chief justice, or presiding magistrate certifies that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is in due form, and is a full copy of the proceedings in the case, and is admissible in evidence; but if it proves to be a mere transcript of minutes taken from the docket of the court, it is not admissible.[9]

If a judgment has been recovered against a corporation by a wrong name, there may be a recovery in a suit on such judgment in another suit brought against it by the proper name.[10]

This statute does not prevent the admission of evidence to prove that the court, which rendered the judgment had no jurisdiction over the person or subject matter.[11]

3 Beatrice v. Edminson, C. C. A., 117 Fed. 427.

4 United States v. Johns, 4 Dall. 412, 1 L. ed. 888; s. c., 1 Wash. 363; U. S. v. Amedy, 11 Wheat. 392, 6 L. ed. 502.

5 Stewart v. Gray, Hemps. 94; U. S v. Biebusch, 1 McCrary, 42, 32.

6 Bennett v. Bennett, Deady, 299. See Bohlander v. Heikes, C. C. A., (April 8, 1909) Fed. 167.

7 Stewart v. Gray, Hemps. 94; Gardner v. Lindo, 1 Cranch, C. C. 78.

8 Craig v. Brown, Pet., C. C. 352.

9 Ferguson v. Harwood, 7 Cranch, 408, 3 L. ed. 386. *Cf.* Woodbridge & T. Eng. Co. v. Ritter, 70 Fed. 677.

10 La Fayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451.

11 Cooper v. Brazelton, C. C. A., 135 Fed. 476, *supra*, § 187.

The statute does not provide for the authentication of judicial proceedings in foreign countries.[12] A certified copy of what purported to be a judgment entered by a court of British Columbia was not admitted when authenticated only by the certificate of the district registrar together with an impress of what purported to be a seal of the court and a certificate of the consul general of the United States, that the registrar was duly appointed as such.[13]

§ 3330. Evidence of the records of the Federal Courts. Where the statutes are silent, the record of a Federal court is proved by the original, or by the production of a copy certified by the clerk to be correct under the court seal,[1] or by a copy sworn to be correct by a witness who has compared it with the original.[2]

"The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk; and a new bond may be required whenever the court deems proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safe-keeping as the court may direct. A certified copy of such entry shall be prima facie proof of the execution of such bond and of the contents thereof."[3]

"The transcripts into new books, made by the clerks of the District Courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks

12 American Surety Co. of New York v. Sandberg, 225 Fed. 150.

13 Ibid.

§ 3330. 1 Kalloch v. Hoagland, C. C. A., 239 Fed. 252; Pazier v. Westcott, 26 N. Y. 146; Buller's Nisi Prius, 226b, 228; Cowenn & Hill's ed. of Phillips on Evidence, Vol. II, p. 346; Greenleaf on Evidence, Vol. I, §§ 588, 501; Chase's ed. of Steven's on Evidence, Art. 77.

2 Kalloch v. Hoagland, C. C. A., 239 Fed. 252; Doe v. Ross, 7 M. & W. 106; Hubbell v. Meigs, 50 N. Y. 480; Cowenn & Hill's ed. of Phillips on Evidence, Vol. II, p. 344; Chase's ed. of Stephen on Evidence, Art. 75. Greenleaf on Evidence, Vol. I, § 485.

3 U. S. R. S., § 795, Comp. St. § 1322.

of the Circuit Courts in the said districts, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit Courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as is made by the clerk of the court in which the proceedings were had."[4]

"The transcripts into new books made by the clerks of the Circuit and District Courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit and District Courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed."[5]

"When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had."[6] "When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost

4 U. S. R. S., § 897.

5 U. S. R. S., § 898.

6 U. S. R. S., § 899; Cornett v. Williams, 20 Wall. 226, 22 L. ed. 254.

or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with a written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make the cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed."[7]

"When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court room from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed."[8]

"In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country, the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal."[9]

"A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of

[7] U. S. R. S., § 900.

[8] U. S. R. S., § 901.

[9] U. S. R. S., § 902, as amended by 20 St. at L. 277.

which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect to all intents and purposes, as the originals thereof would have been entitled to." [10]

"Whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation, for services in the matter and for lawful disbursements, as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund." [11]

§ 333p. Presumptions in suits under the anti-trust laws. Where the statutes are silent the presumption of innocence pre-

[10] U. S. R. S., § 903, as amended by 20 St. at L. 277.

[11] U. S. R. S., § 904, as amended by 20 St. at L. 277.

vails;[1] and the burden of proof is upon the plaintiff to show that the corporation has acted in violation of the law.[2]

In proceedings in a Circuit Court of Appeals by the Interstate Commerce Commission, the Federal Reserve Board or the Federal Trade Commission to enforce an order requiring a person to seize and to desist from unlawful discrimination in price in the course of Interstate or foreign commerce sold for use, consumption of re-sale within a place under the jurisdiction of the United States or to divest itself of stock held in violation of the Clayton Anti-Trust Act or rid itself of directors ineligible under that act, "the findings of the Commission or board as to the facts, if supported by testimony, shall be conclusive."[3]

By the act of October 15, 1914, "A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: Provided further, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."[4]

Before this statute, a judgment against a defendant in a proceeding instituted by the United States could not be offered in evidence in a suit by an individual against him.[5] The statute does not apply to acts committed before its enactment.[6]

§ 333q. Presumptions under the prohibition law. "After February 1, 1920, the possession of liquors by any person not

§ 333p. [1] Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin, 241 U. S. 319.

[2] Ibid.

[3] Act of October 15, 1914, § 11, 38 St. at L. 730. See *supra*, § 77g.

[4] Act of October 15, 1914, ch. 323, § 5, 38 St. at L. 731, Comp. St. § 8835c. See *supra*, § 151a.

[5] Buckeye Powder Co. v. E. I. Dupont De Nemours Powder Co., 248 U. S. 55.

[6] Ibid.

legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."[1]

The claimant of a lien upon property seized under the statute[2] must establish his claim by competent evidence.[3]

§ 333r. Presumptions as to citizenship, expatriation and unlawful entry into the United States. "If any alien who shall have secured a certificate of citizenship under the provisions of the Naturalization Law shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration" and Naturalization; "and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally

§ 333q. [1] Ch. 885, § 36, Comp. St. § 10136½t.
[2] Ibid, § 26.
[3] U. S. v. Masters, 264 Fed. 250.

issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration'' and Naturalization ''of such cancellation.

''The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.'' [1]

''Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

''When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.'' [2]

When an alien is admitted by the Secretary of Commerce and Labor under bond it will be presumed that the matter came before the Secretary in the regular course of official business and that the Secretary acted in conformity to law.[3]

By the Chinese Exclusion Act of May 5, 1892, ''Any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such

§ 333r. [1] Act of June 29, 1906, ch. 3592, § 15, 34 St. at L. 601, Comp. St. § 4374. See *supra*, § 151b.

[2] Act of March 2, 1907, ch. 2534, § 2, 34 St. at L. 1228, Comp. St. § 3959.

[3] Norddentscher Lloyd v. U. S., C. C. A., 213 Fed. 10.

justice, judge, or commissioner, his lawful right to remain in the United States."[4]

By the Act of February 5, 1917, for the deportation of certain classes of aliens, "The management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempts to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: Provided, That the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation

[4] Act of May 5, 1892, ch. 60, § 3, 27 St. at L. 25, Pierce's Fed. Code, § 4822.

under this Act: Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: Provided further, That the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof: Provided further, That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final." [5]

"In order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted

5 Act of Feb. 5, 1917, ch. 29, § 19, 39 St. at L. 889.

person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word 'merchant,' hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be vised by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate vised as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part

of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."[6]

§ 333s. Presumptions upon the assessment and collection of duties upon imports. By the Revised Statutes "When any merchandise is admitted to an entry upon invoice, the collector of the port in which the same is entered shall certify the same under his official seal; and no other evidence of the value of such merchandise shall be admitted on the part of the owner thereof, in any court of the United States, except in corroboration of such entry."[1]

In matters within the jurisdiction of the Board of General Appraisers, their decision, unless reversed upon appeal and the decision of the Collector of Customs if not appealed from, to them, is conclusive.[2]

"In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: Provided, That probable cause is shown for such prosecution, to be judged of by the court."[3]

"In all suits or informations brought, where any seizure has been made pursuant to any Act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant, and in all actions or proceedings for the recovery of the value of merchandise imported contrary to any Act providing for or regulating the collection of duties on imports or tonnage, the burden of proof shall be upon the defendant: Provided, That probable cause is shown for such prosecution, to be judged of by the court."[4]

"On and after July first, nineteen hundred and thirteen, all smoking opium prepared for smoking found within the United

6 Act of May 6, 1882, ch. 126, § 6, 22 St. at L. 60, amended, July 5, 1884, ch. 220, 23 St. at L. 116, Comp. St. § 4293.

§ 333s. 1 U. S. R. S., § 2852, Comp. St. § 5540.

2 *Supra*, § 76.

3 U. S. R. S., § 909, Pierce's Fed. Code, § 7588.

4 Act of Oct. 3, 1913, ch. 16, § 3, 38 St. at L. 189, Comp. St. § 5791.

States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption." [5]

§ 333t. Presumptions upon the assessment and collection of internal revenue. "For the purpose of the additional tax, the taxable income of any individual shall include the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint stock companies or associations, or insurance companies, however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation, joint-stock company or association, or insurance company, is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business. When requested by the Commissioner of Internal Revenue, such corporation, joint-stock company or association, or insurance company shall forward to him a correct statement of such gains and profits and the names and addresses of the individuals or shareholders who would be entitled to the same if divided and distributed." [1]

"If the Secretary of the Treasury or the Commissioner of Internal Revenue shall have reason to be dissatisfied with the return as made, or if no return is made, the commissioner is authorized to make an investigation and to determine the amount of net profits and may assess the proper tax accordingly. He shall notify the person making, or who should have made, such return and shall proceed to collect the tax in the same manner

[5] Act of Jan. 17, 1914, ch. 9, § 3, 38 St. at L. 275, Comp. St. § 8801a.

§ 333t. [1] Act of September 8, 1916, ch. 463, § 3, 39 Stat. 758, Comp. St. § 6336e.

as provided in this title, unless the person so notified shall file a written request for a hearing with the commissioner within thirty days after the date of such notice; and on such hearing the burden of establishing to the satisfaction of the commissioner that the gross amount received or accrued or the amount of net profits, as determined by the commissioner, is incorrect, shall devolve upon such person."[2]

"The absence of the proper stamp on any package of manufactured tobacco or snuff shall be notice to all persons that the tax has not been paid thereon, and shall be prima-facie evidence of the non-payment thereof. And such tobacco or snuff shall be forfeited to the United States."[3]

"Whenever seizure is made of any distilled spirits found elsewhere than in a distillery or distillery warehouse, or other warehouse for distilled spirits authorized by law, or than in the store or place of business of a rectifier, or of a wholesale liquor dealer, or than in transit from any one of said places; or of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which have not been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or of the store-keeper, wholesale dealer, or rectifier, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said spirits, has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with."[4]

By the Act of December 17, 1914, imposing a tax upon opium and coca leaves, and their respective compounds and derivations.

"It shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his

2 Act of Sept. 8, 1916, ch. 463, § 306, 39 St. at L. 782, Comp. St. § 6336¼g.

3 U. S. R. S., § 3373, Pierce's Fed. Code, 6141.

4 U. S. R. S., § 3333, Comp. St. § 6130.

control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: Provided, That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this Act; or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouse-man holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: Provided further, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant." [5]

§ 333u. Presumptions upon distress sales. "When any collector fails either to collect or to render his account, or to pay over in the manner or within the times provided by law, the First Comptroller of the Treasury shall, immediately after evidence of such delinquency, report the same to the Solicitor of the Treasury, who shall issue a warrant of distress against such delinquent collector, directed to the marshal of the district, expressing therein the amount with which the said collector is chargeable, and the sums, if any, which have been paid over by him, so far as the same are ascertainable. And the said marshal shall, himself, or by his deputy, immediately proceed to levy and collect the sum which may remain due, with five per centum thereon, and all the expenses and charges of collection, by distress and sale of the goods and chattels, or any personal effects of the delinquent collector, giving at least five days' notice of the time and place of sale, in the manner provided by law for

[5] Act of December 17, 1914, ch. 1, § 8, 38 Stat. 789, Comp. St. § 6287n.

advertising sales of personal property on execution in the State wherein such collector resides. And the bill of sale of the officer of any goods, chattels, or other personal property, distrained and sold as aforesaid, shall be conclusive evidence of title to the purchaser, and prima-facie evidence of the right of the officer to make such sale, and of the correctness of his proceedings in selling the same. And for want of goods and chattels, or other personal effects of such collector, sufficient to satisfy any warrant of distress, issued as aforesaid, the real estate of such collector, or so much thereof as may be necessary for satisfying the said warrant, after being advertised for at least three weeks next before the time of sale, in not less than three public places in the collection district, and in one newspaper printed in the county or district, if any there be, shall be sold at public auction by the marshal or his deputy. Upon such sale, the marshal shall make and deliver to the purchaser of the premises sold a deed of conveyance thereof, to be executed and acknowledged in the manner and form prescribed by the laws of the State in which said lands are situated, and said deed so made shall invest the purchaser with all the title and interest of the defendant named in said warrant, existing at the time of the seizure thereof. And all moneys that may remain of the proceeds of such sale of personal or real property, after satisfying the said warrant of distress, and paying the reasonable costs and charges of sale, shall be returned to the proprietor of the property sold as aforesaid."[1]

"The deed of sale given in pursuance of the preceeding section shall be prima-facie evidence of the facts therein stated; and if the proceedings of the officer as set forth have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto."[2]

§ 333v. Miscellaneous statutes as to burden of proof and prima facie evidence. A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either

§ 333u. [1] U. S. R. S., § 3217, Comp. St. § 5941.

[2] U. S. R. S., § 3217, Comp. St. § 5941.

[2] U. S. R. S., § 3199, Comp. St. § 5944.

by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure."[1]

By the Criminal Code, in any Territory or District or other place within the exclusive jurisdiction of the United States: "Every ceremony of marriage, or in the nature of a marriage ceremony of any kind, whether either or both or more of the parties to such ceremony be lawfully competent to be the subjects of such marriage or ceremony or not, shall be certified by a certificate stating the fact and nature of such ceremony, and the full name of each of the parties concerned, and the full name of every officer, priest, and person, by whatever style or designation called or known, in any way taking part in the performance of such ceremony, which certificate shall be drawn up and signed by the parties to such ceremony and by every officer, priest, and person taking part in the performance of such ceremony, and shall be by the officer, priest, or other person solemnizing such marriage or ceremony filed in the office of the probate court, or, if there be none, in the office of the court having probate powers in the county or district in which such ceremony shall take place, for record, and shall be immediately recorded, and be at all times subject to inspection as other public records. Such certificate, or the record thereof, or a duly certified copy of such record, shall be prima-facie evidence of the facts required by this section to be stated therein in any proceeding, civil or criminal, in which the matter shall be drawn

§ 333v. [1] Act of Aug. 29, 1916, ch. 415, § 8, 39 St. at L. 539, Comp. St. § 8604dd.

in question. But nothing in this section shall be held to prevent the proof of marriages, whether lawful or unlawful, by any evidence otherwise legally admissible for that purpose. Whoever shall willfully violate any provision of this section shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both. The provisions of this section shall apply only within the Territories of the United States."[2]

In Alaska: "The protest of a notary public under his hand and seal of a bill of exchange or promissory note for nonacceptance or nonpayment, stating the presentment for acceptance or payment and the nonacceptance or nonpayment thereof, the service of notice on any and all parties to such bill of exchange or promissory note and specifying the mode of giving such notice and the reputed place of residence of the party to such bill of exchange or promissory note and of the party to whom same was given and the post-office nearest thereto is prima-facie evidence of the facts contained therein."[3]

By the Act of August 10, 1917: "For gathering authoritative information in connection with the demand for, and the production, supply, distribution, and utilization of food, and otherwise carrying out the purpose of section two of this Act; extending and enlarging the market news service; and preventing waste of food in storage, in transit, or held for sale; advice concerning the market movement or distribution of perishable products; for enabling the Secretary of Agriculture to investigate and certify to shippers the condition as to soundness of fruits, vegetables and other food products, when received at such important central markets as the Secretary of Agriculture may from time to time designate and under such rules and regulations as he may prescribe: Provided, That certificates issued by the authorized agents of the department shall be received in all courts as prima-facie evidence of the truth of the statements therein contained; and otherwise carrying out the purposes of this Act, $2,522,000: Provided further, That the Sec-

[2] Act of March 3, 1887, ch. 397, §§ 9, 10, 24 St. at L. 636; March 4, 1909, ch. 321, § 319, 35 St. at L. 1149, Comp. St. § 10492.

[3] Act of June 6, 1900, ch. 786, § 19, 31 St. at L. 329, Comp. St. § 3581.

retary of Agriculture shall, so far as practicable, engage the services of women for the work herein provided for."[4]

By the Act providing for the insurance of the lives of persons in the military service: "In any proceeding under this Act a certificate signed by The Adjutant General of the Army as to persons in the Army or in any branch of the United States Service while serving pursuant to law with the Army, signed by the Chief of the Bureau of Navigation of the Navy Department as to persons in the Navy or in any other branch of the United States service while serving pursuant to law with the Navy, and signed by the Major General, Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced be prima facie evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service.

It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same.

(2) Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for; and no period herein limited which begins or ends with the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of com-

[4] Ch. 52, § 8, 40 St. at L. 274, Comp. § 3115¼d.

petent jurisdiction: Provided, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the termination of the war."[5]

§ 334. Definition and use of an affidavit. An affidavit is a declaration upon oath or affirmation before some person having competent and lawful power and authority to administer the same. Affidavits are used in a suit in equity in three ways. In certain cases they must be annexed to a bill before it can be properly filed;[1] certain documents may be proved by them at the hearing;[2] and they are used in support of interlocutory applications.[3] The manner of their use has been already described.[4] *Ex parte* affidavits were not admissible before a general appraiser sitting as referee, for the introduction of evidence in the Circuit Court.[5]

Pending a reference concerning it, an affidavit cannot be used, except by leave of the court, which is usually granted only upon terms.[6]

In the absence of a State statute or a court rule it was held that a Federal court had no power to compel any one to have his affidavit taken,[7] or to cross-examine an affiant.[8] Such a cross-examination might perhaps be had by means of a feigned issue.[9]

§ 335. Manner of verifying an affidavit. An affidavit must be sworn to; unless the affiant is conscientiously scrupulous of taking an oath, when he may, in lieu thereof, make solemn affirmation of the truth of the facts stated by him.[1] If the deponent be blind or unable to read, the affidavit must be read over to

5 Act of March 8, 1918, ch. 20, § 601, 40 Stat. L. ——, Comp. St. 3078¼r.

§ 334. 1 See § 156.

2 See § 332.

3 See ch. xvi.

4 *Supra*, §§ 198, 252, 293.

5 James F. White & Co. v. U. S., 154 Fed. 175. See Importers' & Traders' Nat. Bk. v. Lyons, 134 Fed. 510; *supra*, §§ 76, 77.

6 Pearse v. Brook, 3 Beav. 337; Daniell's Ch. Pr. 1777.

7 Crenshaw v. Miller, 111 Fed. 450. See Hammerschlag Mfg. Co. v. Judd, 26 Fed. 292; Bacon v. Magee, 7 Cowen (N. Y.) 515; Day v. Boston B. Co., 6 Law R. (N.S.) 329. As to the right to compel a party to file an affidavit which he has read upon a motion, see Sinnot v. First Nat. Bank, 34 App. Div. 161.

8 See Day v. Boston B. Co., 6 Law Reg. (N.S.) 329; Hammerschlag Mfg. Co. v. Judd, 26 Fed. 292.

9 *Infra*, §§ 378-383.

§ 335. 1 Eq. Rule 78; U. S. R. S. §§ 1, 5013. *Cf.* Loney v. Bailey, 43 Md. 10.

him by the officer before whom he swears to its truth.[2] Ordinarily an affidavit, if made within the United States, must be verified before a judge of the court in which it is to be used, or a United States commissioner, or a notary public.[3] A verification before a city commissioner is insufficient.[4]

The Equity Rules provide: "Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public."[5] If made without the United States, it may be verified before any secretary of legation, or consular officer within the limits of his legation, consulate, or commercial agency;[6] or, perhaps, before any person who, by the laws of the country in which the affidavit is made is authorized to administer an oath or affirmation.[7] It was said to be irregular to have an affidavit entitled in a suit in equity sworn to before the bill was filed.[8]

§ 336. Title of an affidavit. An affidavit should be correctly entitled in the cause or matter in which it is made,[1] for, otherwise, it is said that the affiant cannot be convicted of perjury if his statements are false.[2] But, it seems that, if there are several parties on either side or both sides, it will be sufficient to entitle it in the name of a single plaintiff and defendant, and after each to insert the word "others" or "another," according to the circumstances of the case.[3] The omission of a party's

2 Matter of Christie, 5 Paige (N. Y.) 242.

3 U. S. R. S., §§ 725, 945; L. 1876, ch. 304; 19 St. at L. 206; Haight v. Morris Aq., 4 Wash. C. C. 601. *Cf.* 27 St. at L. 7.

4 Stationary Engineer Pub. Co. v. Comerford, 155 Fed. 667.

5 Eq. Rule 36.

6 U. S. R. S., § 1750.

7 Pinkerton v. Barnsley C. Co., 3 Y. & J. 277, n.

8 Baldwin v. Bernard, 9 Blatchf., note; s. c., Fed. Cas. No. 797. See Blake Cr. Co. v. Ward, Fed. Cas. No. 1,505. But see Modox Co. v. Moxie Nerve Food Co., C. C. A., 162 Fed. 649; *infra*, § 335.

§ 336. 1 Hawley v. Donnelly, 8 Paige (N. Y.) 415; Stafford v. Brown, 4 Paige (N. Y.) 360; Goldstein v. Whelan, 62 Fed. 124. But see Bowman v. Sheldon, 5 Sand. (N. Y.) 657; Shook v. Rankin, 6 Biss. 477; s. c., Fed. Cas. 12,804. *Cf. supra*, § 335.

2 Hawley v. Donnelly, 8 Paige (N. Y.) 415.

3 White v. Hess, 8 Paige (N. Y.) 544; Seymour v. Bailey, 66 Ill. 288. But see Arnold v. Nye, 11 Mich. 456.

christian name will not be a fatal defect.[4] If the affidavit is correctly entitled when made, it can still be used after the title of the cause has been subsequently changed.[5] If an affidavit of service be attached to papers which are themselves correctly entitled, it needs no separate title.[6] An affidavit made or entitled in one cause cannot, it has been held, be used in another;[7] unless, perhaps, when the affiant is dead, insane, imbecile, or beyond the jurisdiction of the court; but affidavits which were not entitled were admitted upon a motion for an injunction, when they were made and signed before the suit was begun and it appeared from their context that they were made for the purpose of being used in a suit between the same parties.[8]

§ 337. Form of an affidavit. Every affidavit should begin with the venire,—that is, the name of the county,[1] and in a Federal court the name of the judicial district;[2] and if sworn to elsewhere than in that where the court is held, with the name of the State where it is taken; which is usually followed by the abbreviation *ss.* for *scilicet*, or the English words *to wit*. Otherwise, it has been held, though not by a Federal court, that it may be disregarded as a nullity, even though the residence of an officer before whom it is sworn appear in the jurat.[3]

The English rule was that in all affidavits the true place of residence, description, and addition of every person swearing to the same, must be inserted: unless the affidavits were made by parties to the cause, who might describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence, or addition, or other description.[4] This

4 Maury v. Van Arnum, 1 Hill (N. Y.) 370.

5 Hawes v. Bamford, 9 Sim. 653.

6 Anon., 4 Hill (N. Y.) 597.

7 Lumbrozo v. White, 1 Dick. 150; Daniell's Ch. Pr. 1774; Milliken v. Selye, 3 Denio (N. Y.) 54; Stacy v. Farnham, 2 How. Pr. (N. Y.) 26. But see Barnard v. Heydrick, 49 Barb. (N. Y.) 62, 72; s. c., 2 Abbott's Pr. N. S. (N. Y.) 47; Langston v. Wetherell, 14 Mees. & W. 104.

8 Modox Co. v. Moxie Nerve Food Co., C. C. A., 162 Fed. 649. See *supra*, § 293.

§ 337. 1 Belden v. Devoe, 12 Wend. (N. Y.) 223.

2 Sterrick v. Pugsley, 11 Flipp. 350.

3 Cook v. Staats, 18 Barb. (N. Y.) 407; Lane v. Morse, 6 How. Pr. (N. Y.) 394; Burns v. Doyle, 28 Wis. 460; Smith v. Richardson, 1 Utah, 194; Barhydt v. Alexander, 59 Mo. 189. But see Mosher v. Heydrick, 45 Barb. (N. Y.) 549; s. c., 30 How. Pr. (N. Y.) 161; Stone v. Williamson, 17 Ill. App. 175; Young v. Young, 18 Minn. 90; State v. Henning, 3 S. D. 492.

4 Daniell's Ch. Pr. (2d Am. ed.)

rule, however, is not always adhered to or insisted upon by practitioners in the courts of the United States.

The English rule was that the stating part of the affidavit must be preceded by the statement that the deponent was duly sworn.[5]

The affidavit should state "sufficient to sustain the case made by the motion or petition of which it is the groundwork."[6] Its statements must be made with sufficient certainty, and with all necessary circumstances of time, place, manner, and other material incidents.[7] When, however, the affiant deposes to words spoken, the addition "or to that effect" is not improper.[8] Special fullness is required of affidavits of service.[9]

Objections to the form of affidavits should be made before the hearing of the motion, when they have been previously served or filed.[10]

When the affidavit states matters not within the deponent's knowledge, it should show how he knows them to be true.[11] Otherwise it may be disregarded.[12]

1775. See also Hindee's Pr. 451; Crockett v. Bishton, 2 Madd. 446.

5 Phillips v. Prentice, 2 Hare, 542; Daniell's Ch. Pr. (2d Am. ed.) 1776.

6 Daniell's Ch. Pr. (2d Am. ed.) 1776; Hinde's Pr. 451; Van Wyck v. Reid, 10 How. Pr. (N. Y.) 366.

7 Sea Insurance Co. v. Stebbins, 8 Paige (N. Y.) 565; Meach v. Chappell, 8 Paige (N. Y.) 135.

8 Ayliffe v. Murray, 2 Atk. 58, 60.

9 Hinde's Pr. 453.

10 Modox Co. v. Moxie Nerve Food Co., C. C. A., 162 Fed. 649.

11 U. S. v. Moore, 2 Low. 232; Thompson v. Ward, 199 Fed. 861; Lacker v. Dreher, 38 N. Y. App. Div. 75, 55 N. Y. Suppl. 979; Wallace v. Baring, 21 N. Y. App. Div. 477, 48 N. Y. Suppl. 692; Tucker v. E. L. Goodsell Co., 14 N. Y. App. Div. 89, 43 N. Y. Suppl. 460, 4 N. Y. Annot. Cas. 86; Hoormann v. Climax Cycle Co., 9 N. Y. App. Div. 579, 41 N. Y. Suppl. 710, N. Y. St. 1100; *affirming* 17 Misc. (N. Y.) 734, 40 N. Y. Suppl. 1067, 26 N. Y. Civ. Proc. 25, 3 N. Y. Annot. Cas. 201; Ladenburg v. Commercial Bank, 5 N. Y. App. Div. 219, 39 N. Y. Suppl. 119; Kahle v. Muller, 57 Hun (N. Y.) 144; 11 N. Y. Suppl. 26, 32 N. Y. St. 448; Crowns v. Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208; James v. Richardson, 39 Hun (N. Y.) 399; National Broadway Bank v. Barker, 16 N. Y. Suppl. 75, 40 N. Y. St. 771; Thomas v. Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786; Doctor v. Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52; Ellison v. Bernstein, 60 How. Pr. (N. Y.) 145. See article by the Author on "Attachment," 4 Cyc. 470-483. *Cf.* Crowns v. Vail, 51 Hun (N. Y.) 204; Cook v. de la Garza, 13 Tex. 431.

12 Thompson v. Ward, 199 Fed. 861.

An affidavit should state facts and not conclusions of law;[13] and must be pertinent, material, and not scandalous.[14] The court may, upon examination of the paper, order such matter expunged with costs, to be paid by the party or solicitor seeking to use the same;[15] or a reference may be ordered to determine whether the statements in it are proper.[16] A reference can only be demanded upon exceptions in writing similar to those to a pleading;[17] and the filing or reading of affidavits in opposition to such parts of his opponent's affidavits as are excepted to may be construed as a waiver of the exceptions.[18]

§ 338. Execution of an affidavit. It is usual, though it seems not indispensable, for the affiant to subscribe his christian name and surname at the foot of the affidavit.[1] In England the signature had to be on the left side of the page;[2] but in this country it is usually at the right. In one case where a marksman had signed with his name at length, his hand having been guided for that purpose, the affidavit was ordered taken off the file.[3] The jurat, which is indispensable, is placed upon the opposite side from the signature. It is usually in substantially the following form: "Sworn to before me this —— day of ———, 19—." If the affiant be blind or a marksman, the jurat should be in substance thus: "Sworn," &c., "the whole of the above affidavit having been first read over and explained to the said A. B., who appeared perfectly to understand the same, he made his mark in

13 Powell v. Kane, 5 Paige (N. Y.) 265. *Cf.* Spies v. Munroe, 35 App. Div. 527, 528. An allegation that one is a creditor is a conclusion of law. Wallace v. Chicago & E. S. Co., 46 Ill. App. 571.

14 Powell v. Kane, 5 Paige (N. Y.) 265.

15 Powell v. Kane, 5 Paige (N. Y.) 265; Ex parte Smith, 1 Atk. 139.

16 Daniell's Ch. Pr. (2d Am. ed.) 1777. See § 68.

17 Daniell's Ch. Pr. (2d Am. ed.) 1777. See § 68.

18 Bickford v. Skewes, 8 Sim. 206; Daniell's Ch. Pr. 1777.

§ 338. 1 Noble v. U. S., Dev., C. C. A., 83; Haff v. Spicer, 3 Caines (N. Y.) 190; Jackson ex dem. Kenyon v. Virgil, 3 J. R. (N. Y.) 540; Soule v. Chase, 1 Rob. (N. Y.) 222; Hitsman v. Gerrard, 1 Harr (N. J.) 124; Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326; Watts v. Womack, 44 Ala. 605; Alford v. McCarmac, 9 N. C. 151; Gill v. Ward, 23 Ark. 16; Redus v. Wofford, 4 Sm. & M. (Miss.) 579; Bates v. Robinson, 8 Iowa 318. But see Laimbeer v. Allen, 2 Sand. (N. Y.) 648; Hathaway v. Scott, 11 Paige 173.

2 Daniell's Ch. Pr. (2d Am. ed.) 1778.

3 —— v. Christopher, 11 Sim. 409.

my presence."[4] If the affiant have been previously found by the inquisition of a jury to be an idiot, a lunatic, or imbecile, the officer before whom the affidavit is sworn should state in the jurat that he has examined the deponent for the purpose of ascertaining the state of his mind, and that the latter was apparently of sound mind and capable of understanding the nature and contents of the affidavit.[5] The omission of the addition to the officer's signature of his title,[6] and even the omission of his signature, will not, it seems, be a fatal defect.[7] It is usual and more prudent, even if not absolutely essential, for the officer to mark with his initials all interlineations and erasures in the body of the affidavit.[8] The better opinion is that the seal of a notary in another State needs no authentication.[9]

§ 339. Competency of witnesses in civil cases. The testimony of witnesses may be taken either solely for use in the court taking the same or for use in other courts as well.

The Revised statutes as amended provide: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."[1]

4 Daniell's Ch. Pr. (2d Am. ed.) 1776; Matter of Christie, 5 Paige (N. Y.) 242.

5 Matter of Christie, 5 Paige (N. Y.) 242.

6 Hunter v. Le Conte, 6 Cowen (N. Y.) 728; People v. Rensselaer C. P., 6 Wend. (N. Y.) 543.

7 Chase v. Edwards, 2 Wend. (N. Y.) 283.

8 Daniell's Ch. Pr. (2d Am. ed.) 1777; Didier v. Warner; 1 Code R. (N. Y.) 42.

9 *Re* Pancost, 129 Fed. 643.

§ 339. 1 U. S. R. S., § 858, as amended by 34 St. at L. 618. Formerly the Revised Statutes provided: "In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party or interested in the issue tried: *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." This may modify some of the rulings subsequently stated in this section. It was held not to apply to Territorial courts. Corbus v. Leonhardt, 114 Fed. 10. For its general application see James v. Atlantic D. Co., 3 Cliff. 614; Monon-

This statute is remedial, and deserves, therefore, a liberal construction.[2]

It applies as well to civil causes to which the United States is a party as to those between private persons.[3] It applies in equity,[4] in admiralty.[5] It has been held to apply to proceedings in bankruptcy.[6] It applies to patent cases.[7] It does not apply

gahela Nat. Bank v. Jacobus, 109 U. S. 275, 27 L. ed. 935; Whitney v. Fox, 166 U. S. 637, 41 L. ed. 1145; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940; Jacksonville M. P. Ry. & N. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515; Slavens v. No. Pac. Ry. Co., C. C. A., 97 Fed. 255; McMullen v. Ritchie, 64 Fed. 253. See § 359.

The cases where the court would require a party to testify when otherwise he would not be obliged or allowed so to do, were rare. It would usually only do so upon its own motion, and, if upon his suggestion, only after hearing the other party, if the latter objected. Eslava v. Mazange, 1 Woods 623. It would do so, however, when a party had died after his testimony had been taken and before trial, and his administrator insisted upon reading or submitting his testimony at the hearing. Mumm v. Owens, 2 Dill. 475. It was said that the court would not, of its own motion, require such testimony to be taken, if by so doing it would adopt a rule of decision for a Federal court different from that prescribed by the legislature for courts of the State wherein it was held. Robinson v. Mandell, 3 Cliff. 169.

2 Texas v. Chiles, 21 Wall. 488, 22 L. ed. 650.

3 Green v. U. S., 9 Wall. 655, 19 L. ed. 806. *Contra*, Jones v. U. S., 1 Ct. Cl. 383.

4 Nash v. Williams, 20 Wall. 226, 22 L. ed. 254; Butler v. Fayerweather, C. C. A., 91 Fed. 458; Rowland v. Biesecker, 181 Fed. 128, S. C., C. C. A., 185 Fed. 515.

5 Downs v. Wall, C. C. A., 176 Fed. 657.

6 U. S. v. Sims, 161 Fed. 1008; U. S. v. Hughes, 175 Fed. 238; *Re* Hoffman, 199 Fed. 448.

7 Rowland v. Biesecker, C. C. A., 185 Fed. 515; affirming 181 Fed. 128. It has been held, that where the direct testimony of an expert, called by the complainant, is confined to a description of the invention in suit, and the alleged infringing device, together with the expression of an opinion as to the infringement; the defendant cannot, upon cross-examination, require him to compare the patent in suit with one in the prior art. Hussong Dyeing Mach. Co. v. Philadelphia Drying Machinery Co., 173 Fed. 236. See Thompson-Houston El. Co. v. Johns Mfg. Co., 105 Fed. 249; Aeolian Co. v. Simpson-Crawford Co., 157 Fed. 320. In a suit to compel the issue of the patent, evidence taken in interference proceedings is not admissible, except where it would, in ordinary cases, be admitted as secondary evidence. Dover v. Greenwood, 177 Fed. 946. Upon the issue of a prior invention, witnesses who testify as to the use of such invention by others may properly refresh their memories as to the dates of such use by reference to contemporaneous newspaper ar-

to criminal cases.[8] It regulates the admission of communications between husband and wife,[9] client and attorney,[10] physician and patient,[11] as to personal transactions with a dead man [12] acquisi-

ticles describing the invention, which they read at the time. Bragg Mfg. Co. v. N. Y., 141 Fed. 118.

8 U. S. v. Simms, 161 Fed. 1008; U. S. v. Miller, 236 Fed. 798. See U. S. v. Reid, 12 How. 361, 13 L. ed. 1023; Logan v. U. S., 144 U. S. 263, 36 L. ed. 429; U. S. v. Hall, C. C. A., 53 Fed. 352; *infra* § 523.

9 *Re* Hoffman, 199 Fed. 448. See § 523, *infra*. The former statute did not allow a wife to testify in behalf of, or against, her husband, unless the laws of the State permitted her so to do. For her incompetency by the common law was due not to interest, but to grounds of public policy. Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779. It has been held that letters from a husband to his wife, whether competent evidence or not, must, if called for by subpœna, be produced and made a part of the record in equity for use in case of a review by appeal on the ruling as to their admissibility. Lloyd v. Pennie, 50 Fed. 4, 11. See *infra*, § 352.

10 Butler v. Fayerweather, C. C. A., 91 Fed. 458; *Re* Ruos, 159 Fed. 252. See U. S. v. Louisville & Nashville R. R. Co., 236 U. S. 335; York v. U. S., C. C. A., 224 Fed. 88; Lew Moy v. United States, C. C. A., 237 Fed. 150; Beaven v. Stuart, C. C. A., 250 Fed. 972. See *infra*, § 523.

Under the former statute it was held that a state statute permitting confidential communications to an attorney to be put in evidence would not be followed at common law in a Federal court; Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Liggett v. Glenn, C. C. A., 51 Fed. 381. And that a contract between an attorney and his client is privileged and cannot be put in evidence, although on file in a court of probate. Liggett v. Glenn, C. C. A., 51 Fed. 381. *Cf.* Mutual L. Ins. Co. v. Selby, C. C. A., 72 Fed. 980; Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. 294, 297, 299.

11 Conn. Mut. L. Ins. Co. v. Union Tr. Co., 112 U. S. 250, 28 L. ed. 708; Mutual Ben. Life Ins. Co. v. Robinson, 22 L. R. A. 325, 58 Fed. 723; Union Pac. R. Co. v. Thomas, C. C. A., 152 Fed. 365.

12 Rowlan v. Biesecker, C. C. A., 185 Fed. 515; affirming 181 Fed. 128 (N. Y.). Simons v. Cromwell, C. C. A., Jan. 1920, Fed.; Kirkpatrick v. McBride, C. C. A., 202 Fed. 144 (West Virginia); Johnson v. Johnson, 233 Fed. 756 (Nevada); Brawner v. Royal Indemnity Co., C. C. A., 246 Fed. 637 (Florida); M. B. Fahey Tobacco Co. v. Senior & Heusner, 247 Fed. 809; Central Iron & Coal Co. v. Hamacher, C. C. A., 248 Fed. 50 (Alabama); Bright v. Virginia & Gold Hill Water Co., 254 Fed. 175 (Nevada). See Updike v. Mace, 194 Fed. 1,001, 1,004 (N. Y.). A State statute does not affect the rule in equity that when there is no waiver of an answer under oath responsive averments in such an answer are evidence for the defendant. Kirkpatrick v. McBride, C. C. A., 202 Fed. 144, West Virginia.

But see Updike v. Mace, 154 Fed. 1001. The former statute permitted persons interested to testify on their own behalf to transactions with decedent in all cases not excepted by the Federal Statute, although the state Statutes included such evi-

tion of competency by an interested witness upon his executing a release,[13] and as to the authentication of foreign statutes in civil cases.[14]

dence. Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. ed. 111; Goodwin v. Fox, 129 U. S. 601, 631, 32 L. ed. 805, 816; Snyder v. Fiedler, 139 U. S. 478, 35 L. ed. 218; White v. Wansey, C. C. A., 116 Fed. 345; Smith v. Township of Au Gres, Michigan, C. C. A., 9 L.R.A. (N.S.) 876, 150 Fed. 257; Huntington Nat. Bank v. Huntington Distilling Co., 152 Fed. 240; Miller v. Steele, C. C. A., 153 Fed. 714. It permitted a party or interested person to testify concerning a transaction with a decedent, in an action by or against the latter's legatee; Miller v. Steele, C. C. A., 153 Fed. 714; devisee, Harman v. Harmon, C. C. A., 70 Fed. 894; donee or grantee, under a deed of gift, Fitzpatrick v. Graham, C. C. A., 122 Fed. 401; or trustee in bankruptcy, Smith v. Township of Au Gres, Michigan, C. C. A., 9 L.R.A.(N.S.) 876, 150 Fed. 257. Where an administratrix had commenced a suit and subsequently resigned, and the suit was continued by her successor, it was held that she who began the suit was a competent witness as to transactions with the testator. Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Bassett v. U. S., 137 U. S. 496, 505, 34 L. ed. 762. She could not testify in the District of Columbia. Hopkins v. Grimshaw, 165 U. S. 342, 349, 41 L. ed. 739. If there are several defendants, one of whom has a similar interest in the result to that of the complainant, such defendant cannot, by requiring the complainant to testify, obviate the effect of the proviso in this statute. Eslava v. Mazange, 1 Woods 623.

[13] Alexander v. Fidelity Trust Co., 238 Fed. 938.

[14] Nashua Sav. Bank v. Anglo-American Land, Mtge. & Agency Co., 189 U. S. 221, 228, 47 L. ed. 782, 785; Pierce v. Indseth, 106 U. S. 546, 27 L. ed. 254; Calderon v. O'Donohue, U. S. C. C., S. D. N. Y., per Wheeler, D. J., June, 1891; in which latter case the writer was counsel. The evidence of an attorney of a foreign country, when accompanied by a book which he states is an official copy of the statute, is sufficient to prove the same. Nashua Sav. Bank v. Anglo-American Land, Mtge. & Agency Co., 189 U. S. 221, 227, 47 L. ed. 782, 785. It is the better practice to have the attorney also testify to the construction of the statute. The Asiatic Prince, C. C. A., 108 Fed. 287, 289; Badische Anilin & Soda Fabrik v. Klipstein & Co., 125 Fed. 543; where German lawyers testified that certain acts under the German law made the parties a corporation. The testimony of an attorney, who does not produce the statute upon the subject may also be sufficient. *Re* International Mahogany Co., C. C. A., 147 Fed. 147; The Asiatic Prince, C. C. A., 108 Fed. 287, 289; where the attorney testified that by the law of Brazil, the delivery of dutiable goods must be made to the custom authorities, upon whom devolved the allowance of entry and the responsibility for a delivery of the goods to the proper persons on payment of the duties.

A certificate of an ambassador was admitted as evidence of the law of the country which he represented.[15]

In civil cases the State law is now followed in determining the disqualification of a witness because of his conviction of a crime.[16] Evidence of an indictment is not competent to affect a witness's credibility.[17]

The Michigan statute as to statements to tax assessors [18] makes them inadmissible in evidence in the Federal courts.[19] The New York statute which provides that when a mortgage tax has not been paid the mortgage shall not be admitted in evidence, was not followed by the Federal court.[20] Where a State statutes authorized the admissibility in evidence of a notarial certificate of a form inadmissible at common law,[21] and the indorsement of negotiable paper without proof of handwriting,[22] the Federal courts there held followed them.

The Circuit Court of Appeals for the second circuit has formally disapproved the practice of testimony as an expert by counsel for a party to the suit.[23]

15 Agency of Canadian Car & F. Co. v. American Can Co., 253 Fed. 152.

16 Wise v. Williams, 162 Fed. 161. It has been held that an objection and exception to evidence upon this ground were not waived because the objector's counsel afterwards said before the jury: "We are not seeking to keep anything back, for the damage has already been done, and it is all for the jury; but we would like for him to explain, as he stated he could a while ago." Walker Grain Co. v. Blair Elevator Co., C. C. A., 254 Fed. 422.

17 Walker Grain Co. v. Blair Elevator Co., C. C. A., 254 Fed. 422.

18 Compiled Laws 1897, § 3846.

19 *Re* Reid, 155 Fed. 933.

20 Marsh v. Leseman, C. C. A., 242 Fed. 484.

21 Sims v. Hundley, 6 How. 1, 12 L. ed. 319.

22 M'Niel v. Holbrook, 12 Pet. 84, 9 L. ed. 1009.

23 N. Y. C. & H. R. R. Co. v. Henney, C. C. A., 207 Fed. 78. As to testimony of experts as to profits and damages in patent cases, see *infra*, §§ 389b, 389e. The testimony of experts as to the meaning of words which were not technical contained in letters patent was excluded. Safety Car Heating & Lighting Co. v. Gould Coupler Co., C. C. A., 239 Fed. 861. In an action for personal services in effecting a settlement resulting in the confession of a judgment for infringement of filter patents, a witness familiar with the patent situation with respect to filters was allowed to testify as to the value of such services. Moore Filter Co. v. Taugher, C. C. A., 239 Fed. 105.

A witness in a position to form an intelligent estimate was allowed to testify to the proportion of subscribers to a magazine for a year which has been secured by the plaintiff and the defendant, respec-

It is the rule in the Federal courts that cross examinations must be limited to the testimony given in chief and to such other matter as affect the credibility of the witness.[24] A State statute giving a party an unlimited right to cross examine his adversary will not be followed;[25] but in Massachusetts the Federal court followed the rule established by the State decisions, that the former testimony of a witness may be introduced to impeach his testimony upon the trial without calling his attention thereto, unless he has been called by the party seeking to impeach him.[26] There are matters largely within the discretion of the trial court.[27]

It has been said that the statute making the State law govern as to competency of witnesses and not to the admissibility of evidence,[28] such as conversations to contradict a written instrument.[29] In the Federal courts, no matter what the decisions of the State courts may be, a verbal collateral agreement cannot be proven to vary, qualify, contradict, add to or subtract from the absolute terms of a written instrument, in the absence of

tively, when it was practically impossible to ascertain the exact number secured by each. Chautauqua Institution v. Zimmerman, C. C. A., 233 Fed. 371. An expert was allowed to testify that scars were caused by acid burns. Am. Agricultural Chemical Co. v. Hogan, C. C. A., 213 Fed. 416. In a criminal case a witness who had heard all the testimony taken upon the trial and read the testimony taken out of court and read to the jury was allowed to testify what function an alleged remedy had had in curing the diseases mentioned: where he analyzed the medical cases into three groups; those in which the presence of other diseases which he enumerated and described were indicated and those in which the narratives of patients described no pathological condition or disease capable of identification; and as to each group gave the reasons why in his opinion the device accomplished nothing which would not have happened without its use. Moses v. U. S., C. C. A., 221 Fed. 863.

24 Am. Issue Pub. Co. v. Sloan, C. C. A., 248 Fed. 251; Myrick v. U. S., 219 Fed. 1.

25 Am. Issue Pub. Co. v. Sloan, C. C. A., 248 Fed. 251, affirming D. C. S. D. Ohio.

26 Am. Agricultural Chemical Co. v. Hogan, C. C. A., 213 Fed. 416, 420.

27 Am. Agricultural Chemical Co. v. Hogan, C. C. A., 213 Fed. 416, 420; Cuomo v. U. S., C. C. A., 231 Fed. 116.

28 Downs v. Wall, C. C. A., 176 Fed. 657; Union Pac. Ry. Co. v. Yates, C. C. A., 40 L.R.A. 553, 79 Fed. 584. But see Hinds v. Keith, C. C. A., 57 Fed. 10; Baltimore & O. R. Co. v. Rambo, C. C. A., 59 Fed. 75; Stewart v. Morris, C. C. A., 88 Fed. 461.

29 Ibid.

fraud, accident, or mistake;[30] nor to show by parol that payment was to be made in some other way than that specified in the writing.[31]

Statements made by a party through an interpreter upon an examination by an administrative officer, are admissible when the interpreter testifies that they are correct translations of the answers then given, although the questions were not recorded.[32]

At least in the absence of a State law to the contrary, in the courts of the United States a party may be examined *de bene esse* by his adversary in cases where a stranger could be so examined,[33] and he may testify in his own behalf, as well as when called upon by the others.[34] Upon the second trial of an action in a Federal court, a party can prove the testimony given at the former trial by a witness, who has since died[35] but when such testimony does not materially differ from that given by the same witness in a deposition read in the second case, it is not error to exclude it.[36] It is insufficient proof of the same merely to produce a witness, who testifies to the correctness of the printed transcript of such testimony in the record in the former suit, and then to offer in evidence such parts of the printed testimony as counsel deems material or important to his case.[37] It has been held that the testimony of a living witness, given upon a former

30 Brown v. Spofford, 95 U. S. 474, 24 L. ed. 508; Am. El. C. Co. v. Consumers' Gas Co., 47 Fed. 43, 46.

31 Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145; Bast v. First Nat. Bank, 11 U. S. 93, 25 L. ed. 794.

32 Toy Dip v. U. S., C. C. A., 198 Fed. 603. In Guan Lee v. U. S., C. C. A., 198 Fed. 596, 601, the answers were admissible, although they were written down at the time by a different person than the interpreter and the writer did not testify that he could not recollect what was said without referring to the paper.

33 Lowrey v. Kusworm, 66 Fed. 539. A deposition as to transactions with one, taken while the latter was alive, was admitted in evidence, although the latter died without giving his deposition, and the suit was revived in the name of the executors. McMullen v. Ritchie, 64 Fed. 253; Steiner v. Eppinger, C. C. A., 61 Fed. 253.

34 Stevens v. Bernays, 42 Fed. 488; Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. ed. 111.

35 Green v. Terwilliger, 56 Fed. 384, 393.

36 Brown v. Spofford, 95 U. S. 474; Am. El. C. Co. v. Consumers' Gas Co., 47 Fed. 43, 46.

37 Rumford Chemical Works v. Hygienic Chemical Co., 148 Fed. 862.

trial of the same case, cannot be read in evidence, although he is beyond the district and more than one hundred miles from the place of trial.[38] The testimony of a party that he does not know the whereabouts of a witness, without proof of any effort to ascertain it,[39] or that the witness promised, but failed, to be present, is insufficient as a basis for the introduction of the testimony of the witness in a former case as secondary evidence.[40] It has been said that, where a transcript of such testimony is admissible by the State practice, it may be admitted in the Federal court in an action at common law,[41] but not where material exhibits, to which he referred when examined, are not offered in evidence.[42]

It has been held, that parol evidence of a judge to show the grounds of an order made by him is incompetent.[43]

The admissions of a party are competent evidence against him, even though, upon his cross-examination, when testifying in his own behalf, he was not asked if he made them.[44]

The exclusion of a question, asked of an arresting officer on cross-examination as to what defendants said when arrested, was held not error reversible where they testified fully in denial of the charge.[45]

The rules for the collection of internal revenue forbid the collectors to produce the records, or copies thereof, in a State court.[46] They are also directed to decline to testify as to facts

38 Diamond Coal & Coke Co. v. Allen, C. C. A., 137 Fed. 705.

39 Dover v. Greenwood, 177 Fed. 946.

40 Chicago, M. & St. P. Ry. Co. v. Newsome, C. C. A., 174 Fed. 394.

41 Chicago, St. P., M. & O. Ry. Co. v. Myers, C. C. A., 80 Fed. 361, 365, 25 C. C. A., 486. *Contra*, dicta in Diamond Coal & Coke Co. v. Allen, 137 Fed. 705.

42 Chicago, St. P., M. & O. Ry. Co. v. Myers, C. C. A., 80 Fed. 361, 365, 25 C. C. A. 486.

43 Blue M. I. & S. Co. v. Portner, C. C. A., 131 Fed. 57, 60.

44 The Stranger, 1 Brown's Adm. 281.

45 Fields v. U. S., C. C. A., 221 Fed. 242.

46 "All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a State court, whether in answer to subpœnas *duces tecum* or

contained in the records, or coming to their knowledge in their official capacity; and this prohibition is extended to include also internal revenue storekeepers and gaugers, and agents. This rule was authorized by the general authority conferred upon the Secretary of the Treasury by the Revised Statutes of the United States;[47] and a revenue officer, who has been punished by a State court for contempt in refusing to produce copies of reports made to him by distillers, or of other records, will be released upon a writ of habeas corpus by the Federal courts.[48]

By statute, on the trial of all indictments, informations, complaints, and other proceedings against persons charged with the

otherwise. Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted. As to any other records than those relating to special tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: 'In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of the court upon the Secretary of the Treasury requesting the same.' Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such a copy.'' *Re* Valecia Condensed Milk Co., C. C. A., 240 Fed. 310, 313.

[47] U. S. R. S., § 161.

[48] Boske v. Comingore, 177 U. S. 459, 460, 461, 44 L. ed. 846, 847; s. c., *Re* Comingore, 96 Fed. 552; Stegall v. Thurman, 175 Fed. 813. See *Re* Lamberton, 124 Fed. 446.

commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness.[49]

A conviction of embezzlement,[50] or of forgery,[51] or of making false reports under them to the Comptroller of the Currency,[52] does not disqualify a witness, unless the laws of the State so provide.

By the Act of June 13, 1898: "Hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law: Provided, That any bond, debenture, certificate of stock, or certificate of indebtedness issued in any foreign country shall pay the same tax as is required by law on similar instruments when issued, sold, or transferred in the United States; and the party to whom the same is issued, or by whom it is sold or transferred, shall, before selling or transferring the same, affix thereon the stamp or stamps indicating the tax required." [53]

§ 339a. Self incrimination. The Fifth Amendment to the Federal Constitution ordains that no person "shall be compelled in any criminal case to be a witness against himself." [1] This

[49] 20 St. at L. 30; Allison v. U. S., 160 U. S. 203, 40 L. ed. 395; Wolfson v. U. S., C. C. A., 101 Fed. 430, s. c., 102 Fed. 134.

[50] U. S. v. Sims, 161 Fed. 1008; Keliher v. U. S., C. C. A., 193 Fed. 8; both under U. S. R. S., § 5209, Comp. St. 1901, p. 3497.

[51] O'Leary v. U. S., C. C. A., 158 Fed. 796; under U. S. R. S., § 5425, Comp. St. 1901, p. 3669.

[52] Wise v. Williams, 162 Fed. 161; under 12 St. at L. Ch. 189, p. 588. It has been held that this does not render competent a defendant who, by a previous conviction of an infamous crime, had lost the privilege of testifying. U. S. v. Hollis, 43 Fed. 248.

[53] 30 St. at L. 455, Comp. St., § 6318.

§ 339a. [1] For the prerevolutionary history of this constitutional provision, see Harv. L. Rev., XV., 610. It was held that a witness compelled to testify before a pension examiner without notice or knowledge of his constitutional privilege cannot be indicted for perjury thereupon. U. S. v. Bell, 81 Fed. 830. A witness, at least if not a party to the suit, may be compelled to testify as

ordinance which was intended merely to forbid tortures has been given such a forced construction by many courts of the United States that it is a serious impediment to the administration of justice.

It applies to criminal proceedings to punish for contempt of court.[2] It does not apply to corporations.[3] It has been held that it does not apply to proceedings before a grand jury,[4] although a witness there has the right under the common law to refuse to criminate himself.[5] "The constitutional provision is but the affirmance of the common law maxim, '*Nemo tenetur seipsum accusare.*' It cannot be understood without knowledge of the common law rule, and is to be interpreted thereby. It is intended solely to prevent disclosures by persons acting as witnesses in any investigation and has no logical or historical relation to the rights of parties as such."[6] An involuntary con-

to an infringement of a patent by himself, when relevant, and is not shielded by the Constitution because he may thereby prove his own liability to treble damages. Masseth v. Johnston, 59 Fed. 613. A defendant when called by the complainant as a witness may be compelled to state whether he has in his possession a machine claimed to be an infringement of the plaintiff's patent, although the plaintiff has not previously made out a *prima facie* case of infringement. Delamater v. Reinhardt, 43 Fed. 76, S. D. N. Y. *Contra*, Celluloid Co. v. Crane Co., 3d Circuit. A party may be compelled to produce an application for a patent which has not been issued and correspondence with the Patent Office upon the subject, although he claims that the result will be to disclose confidential communication with his attorneys. Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. 55; and s. c., 44 Fed. 294. But see Rule 15 of Patent Office; U. S. R. S., § 4902.

This does not prevent the denial of an application for a discharge in bankruptcy because of the refusal of the bankrupt to answer questions upon his examination in the proceeding although his answer may tend to criminate him. *Re* Dresser, C. C. A., 146 Fed. 383. But it has been held that a petitioner in admiralty for limitation of liability may refuse upon this ground to answer an interrogatory annexed to the answer. La Bourgogne, 104 Fed. 823.

[2] Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 Fed. 809; *infra*, §§ 430, 430a, 430b, 430c.

[3] Hale v. Henckel, 202 U. S. 43, 50 L. ed. 652; Wilson v. U. S., 221 U. S. 361, 55 L. ed. 771.

[4] U. S. v. Price, 163 Fed. 904.

[5] Ibid. But see Counselman v. Hitchcock, 142 U. S. 574; 15 Sup. Ct. 195; 35 L. ed. 140.

[6] U. S. v. Price, 163 Fed. 904, per Hough, J., citing, Counselman v. Hitchcock, 142 U. S. 574, 12 Sup. Ct. 195, 35 L. ed. 1110; Kepner v. U. S., 195 U. S. 100, 24 Sup. Ct. 797, 49 L. ed. 114; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456,

fession cannot be put in evidence, even to impeach an accused, who has testified in his own behalf.[7]

This does not permit a corporation,[8] or officer,[9] or employee [10] thereof, to refuse to produce its books because it might tend to criminate the company or the individual subpœnaed. The dissolution of the corporation does not relieve its officer or employee from such production of any books or papers in his possession.[11] It is the safer practice, when books are needed for this purpose, to serve a *subpœna duces tecum* without the clause *ad testificandum* and to address this to the corporation, not to the individual having the custody of the books.[12]

It does not permit a bankrupt to refuse to deposit his books with his receiver in bankruptcy, because he claims that they would tend to criminate him.[13]

An attorney may be compelled to produce books and papers, belonging to his client, or to a corporation, in which his client is the sole stockholder, when they tend to incriminate the latter; provided that they were given to him not for the purposes of

42 L. ed. 890; Brown v. Walker, C. C. A., 70 Fed. 48.

7 Harrold v. Oklahoma, C. C. A., 169 Fed. 47. The retention, however, by the prosecuting authorities, of a statement made by the accused, is not the ground of an exception if they do not use it upon the trial. Pendleton v. U. S., 216 U. S. 305, 54 L. ed. 491. Under U. S. R. S., § 860, which has been repealed, it was held that a party who had testified voluntarily did not waive his right to object to the subsequent use of such testimony. Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 Fed. 809.

8 Wilson v. U. S., 221 U. S. 361, 55 L. ed. 771; *Re* Bornn Hat Co., 184 Fed. 506; U. S. v. Armour & Co., 142 Fed. 808. Orvig Dampskibselskap Aetieselskabat v. N. Y. & Bermuda Co., 229 Fed. 293.

It is no excuse for a failure to produce the books, that the tribunal intends to extend its examination to matters over which it has no jurisdiction, when the matter subpœnaed is relevant to a proceeding legitimately before it. U. S. v. Calhoun, 184 Fed. 499.

9 Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652; Dreier v. U. S., 221 U. S. 394, 55 L. ed. 784; Wilson v. U. S., 221 U. S. 361, 55 L. ed. 771; Wheeler v. U. S., 226 U. S. 478, 57 L. ed. —; Grant v. U. S., 227 U. S. 74, 80, 57 L. ed. —; *Re* Bornn Hat Co., 184 Fed. 506; *Contra*, *Re* Chapman, 153 Fed. 371.

10 Grant v. U. S., 227 U. S. 74, 57 L. ed. —, affirming 198 Fed. 708.

11 Wheeler v. U. S., 226 U. S. 478, 57 L. ed. —; Grant v. U. S., 227 U. S. 74, affirming 198 Fed. 708.

12 Wilson v. U. S., 221 U. S. 361, 55 L. ed. 771; Wheeler v. U. S., 226 U. S. 478.

13 Matter of Harris, 221 U. S. 274, 55 L. ed. 732.

advice, but in order to keep them from the prosecuting officers, and he may be compelled to open the package containing them in order to ascertain their contents.[14]

The privilege cannot be claimed until the person affected has been sworn as a witness,[15] and he must satisfy the court, by something more than his mere assertion, that there is reasonable ground for the objection.[16] A remote or speculative possibility of danger to a witness does not justify his refusal.[17]

Upon the trial of Aaron Burr, Chief Justice Marshall said:

"If the question be of such a description that an answer to it may or may not incriminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact."

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw from thence, and he is exposed to a prosecution. The

14 Grant v. U. S., 227 U. S. 74, 57 L. ed. —, affirming 198 Fed. 708.

15 U. S. v. Collins, 145 Fed. 709; Marshall, C. J., in Burr's Trial, Robertson's Rep., I, 243; Wigmore on Evidence, § 2271.

16 U. S. v. Collins, 145 Fed. 709; Mason v. U. S., 244 U. S. 362; Barr v. People, 30 Colo. 522, 71 Pac. 392; Bolen v. People, 184 Ill. 338, 56 N. E. 408; New York Life Ins. Co. v. People, 195 Ill. 430, 63 N. E. 264; South Bend v. Hardy, 98 Ind. 577, 583; Clifton v. Granger, 86 Ia. 573, 575, 53 N. W. 316; Foster v. People, 18 Mich. 266, 271; White v. State, 52 Miss. 216, 225; Fries v. Brugler, 12 N. J. Law 79; *Re* Tobias, Greenthal & Mendelson, 225 Fed. 815; Southard v. Rexford, 6 Cow. (N. Y.) 254, 259; Cloyes v. Thayer, 3 Hill (N. Y.) 564, 566; Ward v. People, 6 Hill (N. Y.) 144, 146; People v. Bodine, 1 Denio (N. Y.) 281, 314; Ingersol v. McWillie, 87 Tex. 647, 30 S. W. 869; State v. Olin, 23 Wis. 309, 319.

17 Mason v. U. S., 244 U. S. 362.

rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."[18] The matter is largely within the discretion of the trial judge.[19]

It has been held that a denial, by a witness, that he had a cash book containing certain entries, did not debar him from refusing to produce the book on the ground that it would tend to criminate him.[20]

The objection to the question must be made by the witness himself, not by a party,[21] and must expressly invoke the constitutional privilege.[22] A witness, who has testified without objection, cannot object to the subsequent admission of his testimony against himself, on the ground that he could not have been compelled to give it.[23]

Testimony, before a grand jury, of a person subpœnaed to attend before it, does not invalidate his indictment by such grand jury.[24] and a proceeding to punish a defendant, for the violation of an injunction, will not be quashed because the petition shows that certain of the facts therein set forth were obtained from testimony given by defendant as a witness in another case, it not appearing that such facts may not be proved by other testimony.[25]

Statutes were held to be constitutional which required regis-

18 Burr's Trial, Vol. I. 244.

19 Mason v. U. S., 244 U. S. 362.

20 Ballmann v. Fagin, 200 U. S. 186, 50 L. ed. 433.

21 Southard v. Rexford, 6 Cowen (N. Y.) 254, 259; Ward v. People, 6 Hill (N. Y.) 144, 146; Wigmore, § 2270.

22 *Re* Knickerbocker Steamboat Co., 139 Fed. 713.

23 Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122; Knoell v. U. S., C. C. A., 239 Fed. 116; Orth v. U. S., C. C. A., 252 Fed. 569; U. S. v. Bryant, 245 Fed. 682. But see People v. Sharp, 107 N. Y. 427.

24 U. S. v. Kimball, 117 Fed. 156; U. S. v. Wetmore, 218 Fed. 227. See *Re* Hale, 139 Fed. 496, aff'd as Hale v. Henkel, 201 U. S. 43; U. S. v. Swift, 186 Fed. 1002.

25 Hammond Lumber Co. v. Sailors' Union of the Pacific, 149 Fed. 577.

trants under the selective draft act,[26] to exhibit their registration cards at the demand of police officers[27] and required the operators of automobiles that cause personal injuries to stop and give their names, addresses, and car numbers to the person injured.[28]

An act was held to be unconstitutional which required the keeper of a house of prostitution who kept an alien woman there to make a report to the Commissioner General of Immigration.[29]

The Fourth Amendment ordains: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It has been held that this does not forbid the seizure of all the books of a corporation without a search warrant when its organization and entire business were part of a scheme of fraud,[30] nor apply to Chinese Exclusion cases.[31] But a statute which compelled the owner of property, in proceedings for its forfeiture, to produce upon the trial his books and papers for the inspection of the United States attorney, and provided that, in case of his refusal, the allegations on the part of the government should be taken as confessed,[32] was held to be unconstitutional.[33]

It has been held that papers, which have been unlawfully seized, cannot be put in evidence against the person to whom they belong[34] and that the court should direct their return by the District Attorney;[35] but that this rule does not apply where

26 Act of May 18, 1917, ch. 15, § 1, 40 St. at L. 76, Comp. St. § 2044a.

27 U. S. v. Olson, 253 Fed. 233.

28 People v. Rosenheimer, 209 N. Y. 115.

29 U. S. v. Lombardo, 228 Fed. 980.

30 U. S. v. Rice, S. D. N. Y., October, 1911.

31 *Re* Chin Wah, 182 Fed. 256.

32 Act of June 22, 1874, § 1218, St. at L. 186.

33 Boyd v. U. S., 116 U. S. 616, 29 L. ed. 746, *supra*, § 332; *infra*, § 487.

34 U. S. v. Wong Quong Wong, 94 Fed. 832; criticised in N. Y. L. J. September 22, 1899. *Contra*, opinion in Adams v. New York, 192 U. S. 585, 48 L. ed. 575; Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353. See May v. U. S., C. C. A., 199 Fed. 53.

35 U. S. v. Mills, 185 Fed. 318. But see U. S. v. Rice, S. D. N. Y. October, 1911. See Wise v. Mills, 220 U. S. 549, 55 L. ed. 579; Wise

the search was not seriously resisted;[36] and the admission of such papers in a State court is not a violation of the Fourteenth Amendment.[37]

§ 339b. Statutory immunity and its effect. The Revised Statutes further provide: "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."[1] "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."[2]

It has been held that this does not give the witness the complete security from prosecution which the Constitution guarantees.[3] "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."[4] "No statute which leaves the party of witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section eight hundred and sixty of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional substitute for that prohibition. In view of the constitutional provision, a statutory enactment,

v. Henkel, 220 U. S. 556, 55 L. ed. 581; Wise v. Mills, C. C. A., 189 Fed. 583.

36 Lum Yan v. U. S., C. C. A., 193 Fed. 970.

37 Adams v. New York, 192 U. S. 585, 48 L. ed. 575.

§ 339b. 1 U. S. R. S. § 859.

2 U. S. R. S. § 103, *supra*, § 332.

3 Counselman v. Hitchcock, 142 U. S. 547. But see Emery's case, 107 Mass. 172, 185; Cullen v. Commonwealth, 24 Graton 624.

4 Brown v. Walker, 161 U. S. 591.

to be valid, must afford absolute immunity against future prosecutions for the offence to which the question relates." [5]

The Interstate Commerce law provides: "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause of proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture.[6] But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." [7] This has been held to be constitutional; since the statute protects the witness from prosecution in the State as well as in the Federal courts; and the possibility that, by his disclosure, he may be subjected to the criminal laws of some other sovereignty, is too remote a possibility." [8]

[5] Counselman v. Hitchcock, 142 U. S. 547, 564, per Blatchford, J. "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

[6] Ibid. 142 U. S. 547, 585.

[7] Amendment of February 11, 1893, 27 St. at L. 443; U. S. R. S., § 863, has been repealed 36 St. at L., p. 352. See *supra*, § 77c. U. S. v. Lake Shore & M. S. Ry. Co., 203 Fed. 296; U. S. v. Elton, 222 Fed. 428.

[8] Brown v. Walker, 161 U. S. 591, 40 L. ed. 819; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860. But see Counselman v. Hitchcock, 142 U. S. 547, L. ed. 1110; U. S. v. James, 60 Fed. 257; Foot v. Buchanan, 113 Fed. 156; *Re* Carter, 166 Mo. 604, 57 L.R.A. 654; People ex rel. Hackley v. Kelly, 24 N. Y. 74; *Ex parte* Irvine, 74 Fed. 954; U. S. v. Price, 96 Fed. 960; U. S. v. Kimball, 117 Fed. 156. By the English law exposure to liability to

The power of the Commission to inspect the correspondence of a railroad company has been denied.[9] This power of investigation is not confined to cases in which evils or abuses are definitely charged and specific remedies proposed either by the Commission or complaints before it; nor it seems is the right of inquiry in a particular proceeding to be limited by the terms of the order instituting the investigation.[10]

The Act of February 19, 1903, "to further regulate commerce with foreign nations and among the States," provides: "In proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding."[11] A similar section is contained in the act authorizing suits under the Interstate Commerce Law.[12]

The Act creating the Federal Trade Commission contains similar provisions concerning investigations.[13]

By the act of October 28, 1919, to enforce the Eighteenth Amendment prohibiting the sale of intoxicating liquors: "No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from

punishment under the laws of a foreign country is not protected by the privilege. King of the Two Sicilies v. Willcox, 159 State Trials N.S. VII, 1059, 1070.

9 U. S. v. Louisville & N. Ry. Co., 236 U. S. 318, 336.

10 Smith v. Interstate Commerce Commission, 245 U. S. 33. But see U. S. v. Skinner, 218 Fed. 870.

11 32 St. at L. 847, § 3, 10 Fed. St. Ann. 170, Comp. St. Supp. 599, Pierce Fed. Code, § 6453.

12 24 St. at L. 379, *supra*, § 77g.

13 Act of Sept. 26, 1914, ch. 311, § 9, 38 St. at L. 722, Comp. St. § 8836i.; U. S. v. Armour, 142 Fed. 808; Santa Fe Pac. R. Co. v. Davidson, 149 Fed. 603. *Supra*, § 77h.

attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying."[14]

"Every person who shall directly or indirectly keep or maintain by himself or by associating with others, or who shall in any manner aid, assist, or abet in keeping or maintaining any club house, or other place in which any alcoholic liquor is received or kept for the purpose of gift, barter, or sale, or for distribution or division among the members of any club or association by any means whatsoever, or who shall maintain what is commonly known as the 'locker system' or other device for evading the provisions of this Act, and every person who shall use, barter, sell, or assist or abet in bartering, selling any liquors so received or kept, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject to the penalties prescribed in section one of this Act; and in all cases the members, shareholders, associates or employees in any club or association mentioned in this section shall be competent witnesses to prove any violations of the provisions of this section of this Act, or of any fact tending thereto; and no person shall be excused from testifying as to any offense committed by another against any of the provisions of this Act by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him."[15]

But the immunity under all these statutes has been thus limited to a natural person, who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath. This does not give immunity to persons because they have filed answers, as pleadings, under oath in such proceedings,[16] or have produced documentary evidence as offi-

[14] Act of Oct. 28, 1919, ch. —, tit. II, § 30, Comp. St. § 10138½p.

[15] Act of March 3, 1917, ch. 165, § 7, Comp. St. § 3369h.

[16] U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 229.

cers or employees of corporations,[17] including schedules and abstracts prepared from the books by other employees of the company;[18] nor does it apply to future offenses.[19] It has been held that in order to obtain the immunity, the witness should claim it before the Commission.[20]

It has been said that immunity from prosecution under the Federal statutes is sufficient, although immunity under the different statutes of the different States is not given.[21]

It was formerly held that immunity was given to a witness who testified voluntarily, without the compulsion of a subpœna.[22] The statutes do not prevent an indictment for perjury because of false testimony in such a proceeding.[23] They authorize compulsory testimony concerning a crime for which the witness has been already indicted, although it is a defense to such an indictment.[24]

§ 340. Subpœnas ad testificandum. The attendance of a witness is usually compelled at law and in equity as by the service

17 Heike v. U. S., 217 U. S. 423, 30 Sup. Ct. 439, 54 L. ed. 821; s. c., 227 U. S. 131; affirming C. C. A., 192 Fed. 83; affirming U. S. v. Heike, 175 Fed. 852.

18 Ibid.

19 U. S. v. Swift, 186 Fed. 1002.

20 U. S. v. Heike, 175 Fed. 852; U. S. v. Skinner, 218 Fed. 870, 879, 880, per Grubb, J.: "The purpose of the assertion is only to apprise the examining tribunal that the answer, if given, will be compulsory, and immunity will flow to the witness therefrom. It need not be a formal assertion. It is enough if it apprise the examining tribunal, and the law officer of the government conducting the investigation, that the witness is unwilling to answer because the answer may incriminate him, and enough of the manner in which this may be done to enable them to determine intelligently whether there is a likelihood of such incrimination. It may even be assumed in the absence of express assertion, in some cases from the nature of the questions asked and the manner in which they are answered. The circumstances, however, must be such as to show that the tribunal was clearly informed of the claim of the witness and its basis." *Contra*, U. S. v. Armour, 142 Fed. 808; People of N. Y. v. Scharp, 107 N. Y. 427, 14 N. E. 319, 1 A. M. State 851; State v. Murphy, 128 Wis. 201, 107 N. W. 470.

21 Brown v. Walker, 161 U. S. 591, 606, 608.

22 U. S. v. Armour & Co., 142 Fed. 808. See Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 Fed. 809.

23 Glickstein v. U. S., 222 U. S. 139, 56 L. ed. 128; Cameron v. U. S., C. C. A., 192 Fed. 548.

24 *Re* Kittle, 180 Fed. 946.

of a subpœna *ad testificandum*, and the payment of his fees and mileage.[1]

A subpœna *ad testificandum* is substantially in the same form in equity as in law. When issued from a court of the United States, it must be under the seal of the court, and signed by the clerk; and is usually also signed by the solicitors of the party at whose request it issues. Those issued from the Supreme court must bear *teste* from the day of such issue of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence.[2] Those issuing from a District court must bear *teste* of the judge, or, when that office is vacant, of the clerk thereof.[3] A subpœna must show the action or proceeding in which the testimony of the witness is required.[4]

By the common law, the names of but four witnesses could be included in one subpœna.[5] The Revised Statutes, however, provide that, "to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a case in such a subpœna as convenience in serving the same will permit."[6]

The Equity Rules of 1912, provide that the subpœna, in the usual form, may be issued by the clerk in blank and filed up by the party drawing the same or issued by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified.[7] In actions at common law, it would seem that the common-law practice must prevail. According thereto, if the witness can be served within the jurisdiction of the court where the suit is pending, or within a hundred miles of the place of holding that court, the subpœna may be issued from its clerk's office.[8] If he cannot, and it is desired to take

§ 340. 1 For the amount of his fees and mileage, see § 333.

2 U. S. R. S., §§ 911, 912.

3 U. S. R. S., §§ 911, 912.

4 *Re* Shaw, 172 Fed. 520, holding that a subpœna to testify before a grand jury must disclose the names of the persons against whom the inquiry is instituted or the subject of the investigation.

5 Erwin v. U. S., 37 Fed. 470, 490.

6 U. S. R. S., § 829; Erwin v. U. S., 37 Fed. 470, 490; *Re* Shaw, 172 Fed. 520.

7 Eq. Rule 52.

8 U. S. R. S., § 876. Under the former practice it was held, that a person who did not reside within the district where he was served with a subpœna could not be compelled to attend before an examiner in a suit in equity, unless the proceedings were instituted for taking his deposition *de bene esse* in ac-

his testimony in a civil cause[9] *de bene esse* under the Revised Statutes, application for the issue of the subpœna must be made to the court of the district where the examination is to be made, or to the clerk of such court.[10]

It has been held that, where the State laws authorize a committing magistrate to issue subpœnas, the same power is vested in a United States commissioner; and that a subpœna signed and sealed by him, and countersigned by an attorney for a party, is valid process, although not issued nor countersigned by a judge or clerk of a United States court.[11] General court-martials of the United States army are authorized by statute to issue subpœnas to witnesses, within the judicial districts where they are held.[12]

It has been held that Congress has no power to authorize or compel the courts of the United States to issue subpœnas or punish for contempt witnesses before a Congressional Commission, such as the Pacific Railway Commission,[13] or the Interstate Commerce Commission,[14] or an executive officer.[15] Special statutes have been passed providing for the punishment of recalcitrant witnesses in such cases under the criminal laws.[16]

"Witnesses who are required to attend any term of a District court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."[17]

cordance with the Revised Statutes. Tomlinson v. Moore, 189 Fed. 845. And that a witness who lives outside the district cannot be compelled to attend before a United States Commissioner who sits within one hundred miles of his residence. U. S. v. Stern, 177 Fed. 479. As to naturalization cases, see U. S. v. Ojala, C. C. A., 182 Fed. 51.

9 See *infra*, §§ 354, 355.

10 U. S. R. S., § 863; U. S. v. Tilden, 25 Int. Rev. R. 352; *Ex parte* Humphrey, 2 Blatchf. 228; Henry v. Ricketts, 1 Cranch, C. C. 580; *Ex parte* Peck, 3 Blatchf. 113. See *infra*, § 342.

11 U. S. v. Beavers, 125 Fed. 778. See U. S. R. S., § 1014.

12 31 St. at L. 950.

13 *Re* Pac. Ry. Com., 32 Fed. 241.

14 *Re* Interstate Commerce Commission, 53 Fed. 476.

15 *Re* McLean, 37 Fed. 648. *Cf.* U. S. R. S., § 4906; *Ex parte* Moses, 53 Fed. 316.

16 *Supra*, § 5; *infra*, § 343.

17 U. S. R. S., § 877. It has been said that extreme poverty is an excuse for the failure of the witness

§ 341. Subpœnas duces tecum. A subpœna *duces tecum* is the ordinary process to compel the production of a book, document or paper.[1] A subpœna *duces tecum* may be issued against a party to the action.[2] It may be issued against a corporation.[3] It is not defective because it contains no *ad testificandum* clause or direction that the witness testify.[4]

It is not necessary to have the person producing the papers sworn as a witness. After their production by him, they may be proved by others.[5]

The production of drawings may be thus compelled.[6] The production of other articles, such as patterns,[7] or models cannot.[8] It has been held: that an attorney cannot be compelled, by a subpœna *duces tecum*, to produce a document, upon which he has a lien.[9] That the inspection of a mine may be allowed and

to attend when the Government has not furnished him money for his traveling expenses. U. S. v. Durling, 4 Biss. 509. See Greenleaf on Evidence, (16th ed.) § 311.

§ 341. [1] Johnson Steel S. R. Co. v. N. B. S. Co., 48 Fed. 191; Diamond Match Co. v. Oshkosh M. Works, 63 Fed. 984. An indorsement by the marshal upon such a subpœna stating that he is unable to find the witness therein named, does not show that the subpœna was returned upon the date mentioned in the indorsement, nor that it has become *functa officio*. Heinze v. U. S., C. C. A., 181 Fed. 322. When the production of books before a grand jury is thus directed, "Obedience to the subpœna will be complete when the books called for are presented to the grand jury in an actual session, and are taken away again by the messenger of the corporation as soon as the particular session adjourns;" while the session lasts they must remain with the grand jury. *Re* Am. Sugar Refining Co., 178 Fed. 109, 111.

[2] Am. Lithographic Co. v. Werckmeister, 221 U. S. 603, 55 L. ed. 873.

[3] *Re* Am. Sugar Refining Co., 178 Fed. 109; *Re* Bonn Hat Co., 184 Fed. 506. See § 339, *supra*.

[4] Wilson v. U. S., 221 U. S. 361, 55 L. ed. 771; Wheeler v. U. S., 226 U. S. 478, 57 L. ed. —. See § 339, *supra*.

[5] Wilson v. U. S., 221 U. S. 361, 372, 55 L. ed. 771, 776.

[6] Johnson Steel S. R. Co. v. N. B. S. Co., 48 Fed. 191; Diamond Match Co. v. Oshkosh M. Works, 63 Fed. 984.

[7] *Re* Shephard, 3 Fed. 12. It has been held that, in an action for the infringement of a patent, the court may impound articles that are made in violation of the patent which are found in the defendant's possession or under his control. *Re* Steiner, 195 Fed. 299.

[8] Johnson Steel S. R. Co. v. N. B. S. Co., 48 Fed. 191; Diamond Match Co. v. Oshkosh M. Works, 63 Fed. 984.

[9] Davis v. Davis, 90 Fed. 791.

compelled, in a proceeding to remove a receiver.[10] That a State statute empowering the courts to compel the inspection and survey of a mine is constitutional;[11] and that a court of equity has power, in aid of the defense of an action at law upon a life insurance policy, to order the body of the insured to be exhumed for examination.[12]

Under the former practice it was held, that an order requiring the defendant in a suit for the infringement of a patent to permit the complainant to inspect his machines should not, except in extraordinary cases, be granted upon affidavits before taking testimony.[13]

Under the former practice, it was held that a subpœna *duces tecum* could only be obtained by application to the court.[14] But it has been held that in criminal proceedings it may be issued by the clerk in an ordinary subpœna[15] and there seems to be no reason why the clerk should not issue it as of course in civil proceedings also.[16] Such an application should be by petition setting forth facts, which tend to show that the books or papers required are in the possession of the witness, and that they are *prima facie*, material or relevant to the petitioner's case.[17] It is insufficient merely to allege that the books or papers required are material or relevant to the issues; but the facts, which enable the court to determine whether they are prima facie, material or relevant, have to be set forth.[18] Allegations

10 Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. 778.

11 Montana Co. v. St. Louis Min. & Mfg. Co., 152 U. S. 160, 38 L. ed. 398.

12 Mutual Life Ins. Co. v. Griesa, 156 Fed. 398.

13 Eibel Process Co. v. Remington-Martin Co., 197 Fed. 760.

14 U. S. v. Hunter, 15 Fed. 712; Bischoffsheim v. Brown, 29 Fed. 341; Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753, in which the author was counsel; U. S. v. Terminal R. Ass'n, 154 Fed. 268. In the Second Circuit it has been held: that the same rule applies when the testimony is to be taken for use in another district (Vacuum Cleaner Co. v. Platt, C. C. A., 196 Fed. 398); that it is a proper exercise of discretion for the court to refuse thus to compel the production of a document which is not shown to have any possible relevancy to the issue (Ibid.); and that the remedy for refusing to issue such a subpœna is not by the writ of mandamus, but by appeal. (Ibid.)

15 *Re* Subpœnas *Duces Tecum*, 248 Fed. 137.

16 Ibid.

17 U. S. v. Hunter, 15 Fed. 712; Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753.

18 Dancel v. Goodyear Shoe Ma-

solely upon information and belief, without stating the sources of the information and the grounds of the belief concerning the contents of the documents desired, were ordinarily insufficient.[19] When a large number of books and papers are required, it is the safer practice for the applicant to apply for separate subpœnas *duces tecum*.[20]

Whether the new Equity Rules authorizing subpœnas to be issued by the clerk, commissioner, master or examiner, applies to subpœnas *duces tecum*,[21] has not yet been decided. It has been said that when the testimony is to be taken under a *dedimus potestatem* an order of the judge is required.[22]

In criminal cases a subpœna *duces tecum* may be served outside of the district where it is issued and in any part of the United States.[23]

A subpœna *duces tecum* must be reasonable in its terms. If too broad, it may constitute an unreasonable search and seizure, such as is forbidden by the Fourth Amendment.[24] In a case

chinery Co., 128 Fed. 753; U. S. v. Terminal R. Ass'n, 154 Fed. 268. *Contra*, U. S. v. Terminal R. Ass'n, 148 Fed. 486; U. S. v. Babcock, 3 Dillon, 566, Fed. Cas. No. 14,484.

19 West Pub. Co. v. Edward Thompson Co., 151 Fed. 138.

20 Miller v. Mutual Reserve Fund Life Ann's, 139 Fed. 864.

21 Eq. Rule 52.

22 *Re* Subpœnas *Duces Tecum*, 248 Fed. 137.

23 Ibid.

24 Hale v. Henkel, 201 U. S. 43, 76, 77, 50 L. ed. 652, 666, 667. See Hoppe v. N. B. Ostrander Co., 183 Fed. 786. A subpœna is too broad, which requires the production of all understandings, contracts, or correspondence between one corporation and six other companies, together with all reports made and accounts rendered by such companies to the former corporation, from the date of its organization, when the companies are situated in several States of the Union. Hale v. Henkel, 201 U. S. 43, 76, 77, 50 L. ed. 652, 666, 667. It has been held that a corporation may be required to produce all its minute books "from the time of its incorporation to the present day," a period of about three years, and its copy letter books, for a period of less than four months. U. S. v. American Tobacco Co., 146 Fed. 557. A subpœna commanding an employee of a telegraph company to produce all messages between certain persons, within a reasonably short time, is not too broad. U. S. v. Hunter, 15 Fed. 712; U. S. v. Babcock, 3 Dillon 566, Fed. Cas. No. 14,484. *Re* Stororr, 63 Fed. 564; where the period appears to have been less than a month. *Contra, Ex parte* Jaynes, 70 Cal. 638, 12 Pac. 117. A subpœna directing an officer of a railway company to bring with him "certain tissue impression copy books, containing copies of vouchers made by you or by the office in which you are employed during the

where a blanket subpœna of that character was obtained, the court refused to punish the witness for contempt in disobedience thereto.[25] It has been held that the attendance of an officer of a corporation cannot be compelled by the service, upon another officer, of a subpœna or order addressed to the company;[26] and that where the secretary proves that certain of its books have never been in his possession or control, and that he cannot obtain them, except surreptitiously or by a breach of the peace, he cannot be punished for contempt in failing to produce them in obedience to a subpœna *duces tecum* served upon him, the proper practice being to address the writ to the corporation and make due service upon it.[27] Under ordinary circumstances, a member of a firm may be compelled to produce its books, although they are not in his custody.[28] It has been held that a member of a firm cannot be punished for contempt for failure to produce papers of the firm in possession of his partners in a foreign country.[29]

Where an assistant United States attorney had obtained by service of a subpœna *duces tecum* from a Federal court, directed to a county judge, the production of the records of the county court; it was held that the county court had no power to punish him for contempt in refusing to return those records which had been given to the Federal grand jury, and that he might be discharged by habeas corpus, from a commitment for such an alleged contempt.[30] When a party needs to use, in a State court, papers on file in the clerk's office of a court of the United States, the safer practice is to apply to the Federal court for permission to serve a subpœna *duces tecum* upon its clerk.[31]

years 1904, 1905, and until August 1st, 1906, in payment of each, every and all of the claims made upon and against said railway company for refund of any ever paid,'' together with all letters, papers, memoranda and documents relating to certain claims specified by their numbers, and all correspondence and memoranda relating to a certain claim specified by its number; was held to be not too broad. Santa Fe Pac. R. Co. v. Davidson, 149 Fed. 603.

25 Miller v. Mutual Reserve Fund Life Ass'n, 139 Fed. 864.

26 Central Grain & Stock Exch. v. Board of Trade, C. C. A., 125 Fed. 463, 468.

27 U. S. v. Am. Tobacco Co., 146 Fed. 557.

28 U. S. v. Collins, 145 Fed. 709.

29 Munroe v. U. S., C. C. A., 216 Fed. 107, reversing *Re* Munroe, 210 Fed. 326; see Harvard Law Rev. XXVII, p. 770.

30 *Re* Leaken, 137 Fed. 680.

31 Harkrader v. Wadley, 172 U.

§ 342. Service of a subpœna ad testificandum. A subpœna to appear and testify may be served by the marshal of the court, or by any other person acting as the agent of the party calling the witness.[1] Subpœnas on behalf of the United States in a criminal prosecution may be served in any part of the United States.[2] In the Southern District of New York subpœnas issued by a United States commissioner, on behalf of a defendant, cannot be served outside of the county where he holds the hearing; unless a United States judge, upon an affidavit of the prosecutor or district attorney or of the defendant or of his counsel, stating that he believes that the evidence of the witness is material and his attendance at the trial of examination necessary, endorses on the subpœna an order for the attendance of the witness.[3]

The Revised Statutes provide that "subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."[4] The attendance of a witness in a civil cause, at a court more than one hundred miles from the place where he lives cannot be compelled by the service of a subpœna upon him within the district, when he has been enticed there by false pretenses;[5] or while there to attend either as a party, a witness, an attorney, or a counsel during a suit or other judicial proceeding in a State[6] or Federal court;[7] or, while traveling upon his way to or from Congress, if he is a member thereof;[8] or if there in the course of the performance of any public duty.[9] A variance between the original subpœna

S. 148, 153, 43 L. ed. 399, 400; s. c., as Wadley v. Blount, 65 Fed. 667.

§ 342. 1 Schwabacker v. Reilly, 2 Dill. 127; Cummings v. Akron C. & P. Co., 6 Blatchf. 509; Miller v. Scott, 6 Phila. 484; Power v. Semmes, 1 Cranch, C. C. 247.

2 U. S. R. S., § 876.

3 U. S. v. Beavers, 125 Fed. 778.

4 U. S. R. S., § 876; *Ex parte* Beebee, 2 Wall. Jr. 127; Henry v. Ricketts, 1 Cranch, C. C. 580; U. S. v. Williams, 4 Cranch, C. C. 372.

5 Union S. R. Co. v. Mathiesson, 2 Cliff. 304; Steiger v. Bonn, 4 Fed. 17.

6 Juneau Bank v. M'Spedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568. But see Blight v. Fisher, Pet. C. C. 41.

7 Parker v. Hotchkiss, 1 Wall Jr. 269; Matthews v. Tufts, 87 N. Y. 568. *Contra*, Blight v. Fisher, Pet. C. C. 41.

8 Const. art. I, § 6; Miner v. Markham, 28 Fed. 387.

9 See § 98.

and the copy served, as regards the hour of the time of appearance, does not make the service void, when the witness does not appear at either time.[10] A witness who accepts without protest insufficient fees, cannot object to the sufficiency of the service upon that ground.[11]

"When a commission has been issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at any time and place stated in the subpœna; and if any witness, after being duly served with subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court.[12]

"When either party in such suit applies to any judge of a United States court in such district or Territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied, by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with

10 Leber v. U. S., C. C. A., 170 Fed. 881.

11 Leber v. U. S., C. C. A., 170 Fed. 881.

12 U. S. R. S., § 868.

such subpœna, fails to produce to the commissioner at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience, in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties." [13] "No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna." [14] The

[13] U. S. R. S., § 869.

[14] U. S. R. S., § 870. See *infra*, § 419. U. S. R. S., § 871. "When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or Territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the Supreme Court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified." U. S. R. S., § 872. "When it satisfactorily appears by affidavit to any justice of the Supreme Court of the District of Columbia, or to any commissioner for taking depositions appointed by said court: first, that any person within said District is a material witness for either party in a suit pending in any State or Territorial or foreign court; second, that no commission nor notice to take the testimony of such witness has been issued or given; and, third, that, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof,—such officer shall issue his summons, requiring the witness to

fee of the witness is one dollar and fifty cents a day, and mileage at five cents a mile for going and returning.[15] A witness in a criminal case on the part of the United States is usually required to attend upon service of a subpœna without the prepayment of his fees or mileage, which, however, he can subsequently collect.[16] The courts of the United States have no power to compel the attendance of persons to an examination in a foreign country. Such testimony, therefore, can only be taken against the will of a witness by the aid of, and by means of the remedies administered by, a foreign court.[17]

§ 343. Compelling a witness to testify. When a witness, who has been properly served with a subpœna, refuses to attend, or when upon his examination he refuses to answer a relevant and proper question, against answering which he is not protected by his privilege, by the old rules he was liable "to be proceeded against in three ways: first, by attachment for contempt of the process of the court; secondly, by a special action on the case for damages at common law: and thirdly, by action on the statute 5 Eliz., c. 9, § 12, for the further recompense given by that statute, if it has been previously assessed by the court out of which the process issued."[1]

In the Federal courts, a witness, if contumacious, may be punished for contempt,[2] and is also probably liable to an action for the damages sustained by his refusal. Special statutes pro-

appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit." U. S. R. S., § 873. "Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit." U. S. R. S., § 874. "Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance."

15 U. S. R. S., § 848; *infra*, § 419.

16 U. S. v. Durling, 4 Biss. 409; *infra*, § 419.

17 *Infra*, § 358.

§ 343. 1 Tidds Pr. 738.

2 U. S. R. S., § 725; *infra*, §§ 428-438.

vide for the punishment, under the criminal laws, of witnesses who refuse to appear or testify before Congressional Committees,[3] court-martials,[4] and certain commissions and commissioners.[5] It has been held that a witness, who, under the advice of counsel, refuses to answer before a court-martial, a question which might subject him to a prosecution for libel, cannot be punished.[6] A case, which has been severely criticised, holds that a witness, who has attended before a Congressional Committee without a subpœna, cannot be punished for refusing to answer a question.[7]

Upon an application to punish a witness for refusing to answer a question, the power of the officer before whom he is examined, and the materiality of the question, may both be considered;[8] but he will rarely be relieved from answering because of an objection to the relevancy or materiality of the question.[9] Care will be taken not to compel a witness needlessly to disclose his business secrets[10] and private papers.[11] A court of equity will

3 U. S. R. S., § 116; *Re* Chapman, 166 U. S. 661; Macartney v. U. S., 5 App. D. C. 122; U. S. v. Searles, 25 Wash. L. and Rep. 384.

4 31 St. at L. 950.

5 Such as the Interstate Commerce Commission, 27 St. at L. 423; the Federal Trade Commission, 38 St. at L. 722; the Railroad Labor Board Act of Feb. 20, 1920, § 310. See §§ 5, 77c, 77f, 77h, 339b, *supra*.

6 U. S. v. Praeger, 149 Fed. 474.

7 U. S. v. Searles, 25 Wash. Law Rep. 384.

8 *Ex parte* Peck, 3 Blatchf. 113, *Ex parte* Judson, 3 Blatchf. 89.

9 New England Phonograph Co. v. National Phonograph Co. et al., 148 Fed. 324; Buckeye Powder Co. v. Hazard Powder Co., 205 Fed. 827. See *infra*, § 352.

10 Robinson v. Phila., etc., R. Co., 28 Fed. 340, 342. See *supra*, § 339a. A court might refuse to compel the defendant in an infringement suit to disclose a process which was a business secret. Aniline & Soda Fabrick v. S. Klipstein & Co., 125 Fed. 543; but failure to disclose his process of manufacture, and silence for this reason does not relieve from the burden of proving a negative of a *prima facie* case established by the complainant. Philadelphia Rubber Works Co. v. United States Rubber Reclaiming Works, 225 Fed. 789. It has been held that the defendant cannot be compelled to disclose the names of confidential customers to whom he has furnished articles covered by the patent, at least before an accounting has been ordered. Roberts v. Walley, 14 Fed. 167. But in an action of replevin to recover property, on the ground that it was bought with the intention of breaking a contract between the plaintiff and the buyer by selling it to the defendant; it was held that an officer of the defendants could be required to testify whether they had ever bought any of the same or had any interest therein, and to their custom of scratching off serial numbers on the wrappers and labels before they

not, except possibly in an extraordinary case, require a party to repeat in public certain experiments.[12] Ordinarily, a corporation, even if it is a party to the suit,[13] will not be required to permit a general inspection of its books and papers; but only those can be examined which are shown to be relevant to the issues.[14] The privileges of the witness will be protected.[15] He cannot refuse to produce a paper which is relevant because he is not a party to the suit.[16]

A witness, who attends without service of a subpœna, may be punished for refusing to answer a proper question.[17] But where the oral testimony of a witness had been concluded, and he had refused to produce a paper voluntarily; it was held that he could not be punished for contempt in failing to appear at an adjourned hearing, when he was not tendered his fee for such attendance, nor served with a subpœna *duces tecum*.[18] Where

shipped them, and to produce correspondence relating to the sale; although it was contended that the questions were irrelevant and tended to disclose trade secrets, consisting of the names of the persons through whom the defendants obtained the goods. *Re* Park, 138 Fed. 421; and a complainant in a suit in equity against a railway company may require a witness to disclose the extent of his interest in another corporation, which owns a majority of the stock of the defendant. Teller v. Tonopah & G. R. Co., 151 Fed. 607. A party may be compelled to produce an application for a patent which has not been issued and correspondence with the Patent Office upon the subject, although he claims that the result will be to disclose confidential communications with his attorneys. Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. 55; and s. c., 44 Fed. 294. But see Rule 15 of Patent Office; U. S. R. S., § 4902. See *supra*, §§ 332, 339a, note 1.

11 Henry v. Travelers' Ins. Co., 35 Fed. 15. But see Lloyd v. Pennie, 50 Fed. 4, 11.

12 Simonds R. M. Co. v. Hathorn Mfg. Co., 83 Fed. 490; Glauber v. H. Mueller Mfg. Co., C. C. A., 241 Fed. 487.

13 See Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652. *Supra*, § 341.

14 Southern Ry. Co. v. North Carolina Corp. Com'rs, 104 Fed. 700; *supra*, § 341. *Contra*, Wertheim v. Continental Ry. & Tr. Co., 15 Fed. 716; U. S. v. Babcock, Fed. Cas. No. 14,484. *Cf.* Russell v. McLennan, Fed. Cas. No. 12,158; *Re* Hirsch, 74 Fed. 928; McMullen v. Ritchie, 57 Fed. 104. As to the right of a stockholder to inspect the books of the corporation, see Ranger v. Champion C. P. Co., 51 Fed. 61.

15 Butler v. Fayerweather, C. C. A., 91 Fed. 458.

16 Buckeye Powder Co. v. Hazard Powder Co., 205 Fed. 827.

17 U. S. v. Armour & Co., 142 Fed. 808, 824.

18 *Re* Johnson & Knox Lumber Co., C. C. A., 151 Fed. 207.

a party to an interference proceeding testified on his own behalf, and then permitted adjournments by consent, until it was too late to enforce by subpœna his attendance for cross-examination within the time allowed by the Commissioner of Patents; it was held that his appearance might be ordered by the court.[19]

The application to punish a witness for his refusal to attend must be made to the court which issued the subpœna.[20]

Upon an application to punish a witness for contempt for failure to produce a paper in obedience to a subpœna *duces tecum;* it has been said, that the materiality of the paper will not be determined until it is produced;[21] and, if there is color for the claim that the paper is material, its production will be compelled, and the decision, as to its admission in evidence will be postponed to the final hearing.[22]

The rules concerning the privileges of witnesses, and the materiality and relevance of evidence, are substantially the same in equity and at common law.[23]

Orders punishing for contempt witnesses, who, in order to raise jurisdictional objections, have refused to be sworn or to answer certain questions, have been stayed pending their review by the Circuit Courts of Appeals.[24]

§ 344. Testimony taken in equity which may be used in other courts. Testimony may be taken in a court of equity for use in other courts, as well as for its own use, by bills to perpetuate testimony [1] and bills to take testimony *de bene esse;* [2] and formerly, at least testimony could be taken in a court of equity for use in another court by a bill of discovery.[3]

§ 345. Bills to perpetuate testimony. "In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any "District court, upon applications to it as a court of equity,

19 Lobel v. Cossey, C. C. A., 157 Fed. 664.

20 *Re* Allis, 44 Fed. 216.

21 Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. 294.

22 Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. 55, 59.

23 Stevens v. Cooper, 1 J. Ch. (N. Y.) 425, 7 Am. Dec. 499.

24 *Re* Spofford, 62 Fed. 434; Butler v. Fayerweather, C. C. A., 91 Fed. 458.

§ 344. 1 *Infra,* § 345.

2 *Infra,* § 346.

3 *Infra,* § 347.

may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States."[1] In order to obtain such a direction, the party wishing the testimony taken should file a bill to perpetuate testimony.[2]

A bill to perpetuate testimony must contain all the facts necessary to give the court jurisdiction. It must state with reasonable certainty the subject-matter touching which the plaintiff is desirous of taking testimony,[3] and show that it is a matter which may be cognizable in a court of the United States.[4] It should also show that the plaintiff has some interest in the subject-matter, which may be endangered if the testimony in support of it is lost. A mere expectancy, however strong and well-founded, is not sufficient. It has been said, "Put the case as high as possible; that the party seeking to perpetuate the testimony is the next of kin of a lunatic: that the lunatic is intestate; that he is in the most helpless state, a moral and physical impossibility (though the law would not so regard) that he should ever recover; even if he were *in articulo mortis*, and the bill was filed at that instant; still, the plaintiff could not qualify himself to maintain it, as having any interest in the subject of the suit."[5] If, moreover, the interest be such a one as may be immediately barred by the party against whom the bill is brought, it has been said that the court will withhold its assistance, for it would be a fruitless exercise of power.[6] Such a bill must also show that the defendant has, or claims to have, a title or interest in opposition to that of the plaintiff in the subject-matter of the proposed testimony;[7] as, for example, that the defendant claims an exclusive right to the use of a process which the plaintiff is using, and rests his claim upon letters-patent which the proposed testimony

§ 345. [1] U. S. R. S., § 866. Testimony may thus be taken before a District Court while a case is pending in the Circuit Court of Appeals on appeal from a decree dismissing a bill for insufficiency. Richter v. Union T. Co., 115 U. S. 55.

[2] N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578.

[3] Story's Eq. Pl., §§ 300, 305.

[4] U. S. R. S., § 868; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578. But see Morris v. Morris, 2 Phill. 205, 208.

[5] Dursley v. Fitzhardinge, 6 Ves. 260.

[6] Dursley v. Fitzhardinge, 6 Ves. 261, 263.

[7] Story's Eq. Pl., § 302.

will show to be invalid;[8] and some ground of necessity, for perpetuating the evidence; as that the facts, to which the testimony of the witness proposed to be examined relate, cannot be immediately investigated in a court of law or equity,—or, if they can be immediately investigated, that the right to commence such a suit or action belongs exclusively to the defendants or that the defendant has interposed some impediment, such as an injunction, to an immediate trial of the matter in a court of law; or that, before the investigation can take place, the evidence of a material witness is likely to be lost by his threatened death, illness, or departure from the jurisdiction of the court;[9] but the fact that, in the case recently cited, the Attorney-General might institute a proceeding to annul a patent, did not prevent the granting of the prayer of the bill.[10] The prayer should be for leave to examine the witnesses touching the matter stated to the end that their testimony may be preserved and perpetuated, and for the proper process of subpœna.[11] It has been held that if it adds thereto a prayer for other, or for general relief, it will be demurrable for that reason,[12] although the court may allow an amendment omitting that part of the prayer.[13] An affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost, must be filed with the bill.[14]

8 N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578; Westinghouse Mach. Co. v. El. Storage Battery Co., C. C. A., 25 L.R.A. (N.S.) 673, 170 Fed. 430; reversing 165 Fed. 992; where it was held to be sufficient to allege: that defendant charged that an article manufactured and sold by complainant infringed a patent owned by defendant and threatened suits against complainant and its customers, but refused to bring the same; and that complainant could prove that defendant's patent was void by the testimony of certian designated witnesses and not otherwise, although there was no allegation that the witnesses were about to depart from the jurisdiction or were infirm or old.

9 Angell v. Angell, 1 Sim. & S. 83; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578; Story's Eq. Pl., § 303; Daniell's Ch. Pr. 1572, 1573.

10 N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578.

11 Story's Eq. Pl., § 306.

12 Rose v. Gannel, 3 Atk. 439; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316; Aetna Life Ins. Co. v. Smith, 73 Fed. 318; Dalton v. Thompson, 1 Dickens, 97. But see Equity Rule 21; Cleland v. Casgrain, 92 Mich. 139; s. c., 52 N. W. 460.

13 Vaughan v. Fitzgerald, 1 S. & L. 316.

14 Earl of Suffolk v. Green, 1 Atk. 450; Philips v. Carew, 1 P. Wms.

An omission of any of the foregoing statements in, or requirements of, the bill will make it demurrable; and if any of the necessary allegations are false, or there is another objection not apparent upon the face of the bill, that may be taken by plea or answer.[15] Otherwise, the bill should conform substantially to the requirements of original bills praying relief. Such a bill, it has been held, cannot by amendment be converted into a bill of discovery.[16] It is of itself a bill of discovery only to the extent of enabling the plaintiff to obtain the relief prayed for in it, and he can, therefore, only require an answer from the defendant as to the facts alleged in the bill as entitling him to examine the witnesses.[17] If the defendant answer denying the plaintiff's case, witnesses may be examined as to the point in issue by either party.[18] Otherwise, such a bill should not be brought to a hearing; and if the plaintiff do so, it will be dismissed with costs, but without prejudice to the use of the testimony taken in pursuance of its prayer.[19] It is said that "if the plaintiff neglects to proceed with the suit, the defendant cannot move to dismiss for want of prosecution; but may move that the plaintiff be ordered to take the next step, within a limited time, or to pay him the costs of the suit. If the defendant neglects to take the steps proper to be taken by him within the prescribed time, the court will, it seems, order the examination of the witnesses to proceed."[20] If no valid objection is made, the court will order the testimony to be taken.

Both parties may examine witnesses under the order,[21] and

117; Shirley v. Earl Ferrers, 3 P. Wms. 77.

15 Story's Eq. Pl., § 306a.

16 Ellice v. Roupell, 32 Beav. 299; s. c., 9 Jur. (N.S.) 530.

17 Ellice v. Roupell, 32 Beav. 308; s. c., 9 Jur. (N.S.) 533.

18 Brigstocke v. Roch, 7 Jur. (N. S.) 63. The failure of the defendant to call witnesses to deny the facts to which the complainant's witnesses testified, does not prevent his contradicting such testimony when the depositions then taken are offered in evidence in a subsequent suit or proceeding. *Ex parte* Wing You, C. C. A., 190 Fed. 294.

19 Hall v. Hoddlesdon, 2 P. Wms. 162; Anon., Amb. 237; s. c., 2 Ves. Sen. 497; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316; Morrison v. Arnold, 19 Ves. 670; Ellice v. Roupell, 32 Beav. 308.

20 Daniell's Ch. Pr. (5th Am. ed.) 1573; Wright v. Tatham, 2 Sim. 459; Beavan v. Carpenter, 11 Sim. 22; Coveny v. Athill, 1 Dick. 355; Lancaster v. Lancaster, 6 Sim. 439.

21 Sheward v. Sheward, 2 V. & B. 116; Earl of Abergavenny v. Powell, 1 Meriv. 434; Skrine v. Powell, 15 Sim. 81; s. c., 9 Jour. 1054.

either party must be allowed to cross-examine those whom his opponent examines in chief.[22] After the witnesses have been examined, the cause is at an end,[23] and if the defendant have examined no witnesses in chief he will be entitled to his costs; but by receiving costs he waives any objection he might otherwise be entitled to make on the ground that he has had no sufficient opportunity of cross-examination.[24] The testimony thus taken is filed in the clerk's office, and can be used in a subsequent case at law or in equity in the same court, under an order, which must be obtained by motion upon notice, and supported by proof of the witness's death, or that he cannot be then compelled to attend and testify.[25]

§ 346. Bills to take testimony de bene esse. Bills to take testimony *de bene esse* were formerly filed after a suit or action had been begun, in order to take the testimony of such witnesses as, on account of their age, infirmity, or intention to depart from the jurisdiction of the court, it was feared could not be taken in its regular method of proceeding.[1] Such bills must substantially comply with the rules regulating bills to perpetuate testimony, with which, indeed, they have been often confounded.[2] Now that the same relief can be afforded under the statutes both of most of the individual States and of the United States,[3] it is rarely, if ever, that an occasion for their use arises.

§ 347. Bills of discovery. By the former practice, every bill might seek discovery, but the kind of bill called a bill of discovery is a bill filed for the sole purpose of obtaining a discovery of facts resting in the defendant's knowledge, or of deeds, writings, or other things in his custody or power; and seeking no relief in consequence of the discovery, except possibly a stay of proceedings till the discovery is made.[1] A bill of discovery is usually filed in aid of the jurisdiction of another court.[2]

In England, actions purely for discovery can still be sustained

22 Daniell's Ch. Pr. (5th Am. ed.) 1573, 1574.

23 Morrison v. Arnold, 19 Ves. 670; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316.

24 Watkins v. Atchison, 10 Hare, Ap. xlvi.

25 Daniell's Ch. Pr. (5th Am. ed.) 1574, 1575.

§ 346. 1 Story's Eq. Pl., § 307.

2 Ibid.

3 U. S. R. S., §§ 863-865; Equity Rule 70; *infra*, § 354.

§ 347. 1 Daniell's Ch. Pr. (5th Am. ed.) 1556.

2 Daniell's Ch. Pr. (5th Am. ed.) 1556.

in certain cases; for example, to produce the names of consignors and the particulars of a shipment,[3] in aid of arbitration,[4] in aid of proceedings to recover land in India;[5] but not, it was held, in aid of proceedings in a foreign court.[6]

Before the Equity Rules of 1912, it was held, that a bill of discovery could not be maintained in a court of the United States held within a State under whose statutes a party could be compelled to testify;[7] but by the preponderance of authority, such a bill was maintainable in such a case.[8] The present rule seems to be that such a bill can now be sustained, provided the bill shows that the legal remedies are insufficient.[9] But not otherwise.[10] In determining whether the bill should be sus-

3 Orr v. Diaper, 4 Ch. D. 92.

4 Ainsworth v. Starkee, (W. N. 1876) P. 8.

5 Reiner v. Salisbury, 2 Ch. D. 378.

6 Dreyfus v. Peruvian Co., 41 Ch. D. 151.

7 Rindskopf v. Plato (D. Wis.), 20 Fed. 130; Paton v. Majors (D. La.), 46 Fed. 210; Preston v. Smith (D. Mo.), 26 Fed. 884, 889; Safford v. Ensign Mfg. Co., C. C. A., 120 Fed. 480; U. S. v. Bitter Root Dev. Co., C. C. A., 133 Fed. 274; affi'd 200 U. S. 451; Brown v. McDonald, 130 Fed. 964; Miller v. Moise, 168 Fed. 940. See also Heath v. Erie R. Co., 9 Blatchf. 316; Brown v. Swann, 10 Pet. 497, 9 L. ed. 508; Manchester F. A. Co. v. Stockton C. H. & A. Works, 38 Fed. 378; Southern Pac. R. R. Co. v. U. S., 200 U. S. 341, 351, 50 L. ed. 507, 511; Carpenter v. Winn, 221 U. S. 533, 540, 55 L. ed. 842, 845.

8 Continental Nat. Bank v. Heilman, 66 Fed. 184; Kelly v. Boettcher, 85 Fed. 55, 66; National H. B. B. Co. v. Interchangeable B. B. Co., C. C. A., 83 Fed. 26, 30; Bryant v. Leyland, 6 Fed. 125; Indianapolis Gas Co. v. Indianapolis, 90 Fed. 196; Colgate v. Compagnie Francaise, 23 Fed. 82; McMullen Lumber Co. v. Strother, C. C. A., (Circuit), 136 Fed. 295; Brown v. Magee, 146 Fed. 765; Brown v. Palmer, 157 Fed. 797. See also, Paine v. Warren, 33 Fed. 357. The court sustained a bill of discovery in aid of an action at law upon an insurance policy, to compel the exhumation of the body of the insured and its examination in aid of the defense. Mutual Life Ins. Co. v. Griesa, 156 Fed. 398; aff'd Griesa v. Mutual Life Ins. Co., C. C. A., 169 Fed. 509, where it was said that the question would not be reviewed after the disinterment and autopsy had taken place and that the widow, who owned the cemetery lot where the corpse was buried, was a proper party defendant.

9 Carpenter v. Winn, 221 U. S. 533, 539, 31 Sup. Ct. 683, 55 L. ed. 842; Childs v. Missouri K. & T. Ry. Co., 221 Fed. 219; Scotten v. Rosenblum, 231 Fed. 357, 359; Pressed Steel Car Co. v. Union Pac. R. Co., 240 Fed. 135; Galion Iron Works Co. v. Ohio Corrugated Culvert Co., C. C. A., 244 Fed. 427.

10 Childs v. Missouri K. & T. Ry.

tained the plaintiff's pleading in the action at law may be considered.[11]

A bill of discovery might be maintained in support of a suit in another State or in a foreign country.[12]

It will not be allowed, if it seek a discovery of matters concerning which a party, if called as a witness, would be excused from testifying;[13] nor, it has been said, if the discovery is sought in aid of an action for a mere personal tort.[14] A bill of discovery can only be filed in aid of a judicial proceeding already commenced or immediately contemplated.[15] If filed in aid of proceedings already begun, no person may be made a party to it who is not a party to such proceedings,[16] except possibly the officer of a corporation.[17] If in aid of an action at law, it must be filed before verdict.[18]

A bill of discovery must state the matter touching which discovery is sought, show that both the plaintiff and the defendant have or claim an interest therein, state the facts and circumstances upon which the plaintiff's right to compel discovery from the defendant is founded, and pray that the defendant may make a full discovery of the matters therein stated.[19] A bill of discovery may also pray any equitable assistance of the court

Co., 221 Fed. 219; Pressed Steel Car Co. v. Union Pac. R. Co., 240 Fed. 135; Galion Iron Works Co. v. Ohio Corrugated Culvert Co., C. C. A., 244 Fed. 427. In an action for royalties a bill of discovery was allowed to ascertain the number of articles used by defendant which contained a certain device, since this involved an investigation into several thousand articles, but not as to the price at which they had been offered defendant, which could be easily ascertained at the trial. Pressed Steel Car Co. v. Union Pac. R. Co., 240 Fed. 135.

11 Pressed Steel Car Co. v. Union Pac. R. Co., 240 Fed. 135.

12 Crow v. Del Ris & Vallego, Ch. 1769; Mitchell v. Smith, 1 Paige (N. Y.) 287.

13 Glynn v. Houston, 1 Keen, 329; Langdell's Eq. Pl., § 69; Wigram on Discovery, §§ 130-138; Daniell's Ch. Pr. (2d Am. ed.) 563-569.

14 Glynn v. Houston, 1 Keen, 329. But see Green v. Delaware, L. & W. R. Co., 211 Fed. 774. For discovery of an unlawful combination, see Evans v. Lancaster City St. Ry. Co., 64 Fed. 626.

15 Mayor of London v. Levy, 8 Ves. 398; United N. J. R. & C. Co. v. Hoppock, 1 Stew. Eq. (N. J.) 261; Daniell's Ch. Pr. 1558.

16 Queen of Portugal v. Glyn, 7 Cl. & F. 466; Daniell's Ch. Pr. (5th Am. ed.) 1558.

17 See § 111.

18 Brown v. Swann, 10 Peters, 497, 9 L. ed. 508; Scotten v. Rosenblum, 231 Fed. 357, 359.

19 Daniell's Ch. Pr. (5th Am. ed.) 1557.

which is merely consequential upon the prayer for discovery;[20] but if it should pray any other or general relief, it will thereby become a bill for relief.[21] It has been said that a bill of discovery may be sustained although it waives an answer under oath.[22]

It seems that a bill of discovery need not allege that the facts of which a discovery is sought are within the exclusive knowledge of the defendant,[23] but it will be denied if the complainant has ample knowledge of the facts,[24] or equal means of knowledge with the defendant.[25] Where the discovery is sought upon suspicion, surmise, or vague guesses, it is dismissed as a "fishing bill."[26] The discovery must be of matters essential to a plaintiff's cause of action, or if he be defendant in another suit or action, to his affirmative defense, and the bill must not seek discovery of the evidence of what belongs solely to the defendant's case.[27] Where the evidence sought is cumulative or comparatively unimportant, relief may be denied.[28] Where the bill prays for other relief it should allege that the discovery is essential to such relief.[29] The defendant may oppose a bill of discovery by a motion to dismiss,[30] or in his answer, in the same manner as he might oppose a bill for relief. The English rule as finally established, was that, if a demurrer were interposed to a bill praying both discovery and relief, and the bill were held not to show a proper case for relief, it could not be maintained for discovery merely.[31] This seems to be the rule in the Federal

20 Mitford's Eq. Pl., ch. i, § 2; Loker v. Roll, 3 Ves. 4.

21 Angell v. Westcombe, 6 Sim. 30.

22 Hudson v. Wood, 119 Fed. 764, 776. See Scotten v. Rosenblum, 231 Fed. 357, 360.

23 Metler v. Metler, 4 C. E. Green (19 N. J. Eq.), 457. But see Bell v. Pomeroy, 41 McLean, 57.

24 Galion Iron Works Co. v. Ohio Corrugated Culvert Co., C. C. A., 244 Fed. 427.

25 Kenney v. Rice, 238 Fed. 444; Wolcott v. National Electric Signaling Co., 235 Fed. 224.

26 General Film Co. v. Sampliner, C. C. A., 232 Fed. 95.

27 Carpenter v. Winn, 221 U. S. 533, 540; Churchward International Steel Co. v. Bethlehem Steel Co., 233 Fed. 322; Pressed Steel Car Co. v. Union Pac. R. Co., 241 Fed. 964; Wigram on Discovery, § 372; Langdell's Eq. Pl., § 172; Ingilby v. Shafto, 33 Beav. 31. See *infra*, § 348.

28 Galion Iron Works Co. v. Ohio Corrugated Co., C. C. A., 244 Fed. 427.

29 Leo Feist, Inc. v. American Music Roll Co., C. C. A., 251 Fed. 242.

30 Evans v. Lancaster City St. Ry. Co., 64 Fed. 626; Eq. Rule 29.

31 Fry v. Penn, 2 Bro. C. C. 280;

courts;[32] at least where the discovery is incident to the relief prayed.[33] By the former practice a defense founded upon the statute of limitations or laches could be interposed to a bill of discovery by plea,[34] or, if it appeared upon the face of the bill, by demurrer;[35] but not a defense upon the merits to the suit in aid of which it was filed.[36] A material amendment of a bill of discovery will very rarely be allowed.[37]

A bill of discovery was never brought to a hearing; but, after the defendant had put in a full answer thereto, he was entitled to costs of the suit,[38] less any costs allowed the plaintiff upon exceptions to a previous answer as insufficient.[39]

§ 348. Discovery in equity. Under the former practice, discovery and inspection could only be obtained in the answer of the defendant, made either to a bill seeking relief and discovery of matters thereto incidental, or to a bill filed solely for discovery.

The new Equity Rules, however, provide: "The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave

Loker v. Rolle, 3 Ves. 4; Langdell's Eq. Pl., § 152.

32 Markley v. Mut. Ben. L. Ins. Co., 6 Ins. L. J. 537; Cecil Nat. Bank v. Thurber, C. C. A., 59 Fed. 913; Preston v. Smith, 26 Fed. 884; Safford v. Ensign Mfg. Co., C. C. A., 120 Fed. 480; Grieb v. Equitable Life Assurance Society, 189 Fed. 498; First State Bank v. Spencer, 219 Fed. 503; Childs v. Missouri K. & T. Ry. Co., 221 Fed. 219. But see Livingston v. Story, 9 Pet. 632, 9 L. ed. 255; Wright v. Dame, 1 Met. (Mass.) 237; Higginbotham v. Burnet, 5 J. Ch. (N. Y.) 184; Story's Eq. Pl., § 412.

33 John A. Roebling's Sons Co. of California v. Kinnicutt, 248 Fed. 596.

34 Beams on Pleas, 275; Gait v. Osbaldston, 1 Russ. 158.

35 Wooster v. Siedenbergh, S. D. N. Y., Nov. 6, 1889.

36 Pressed Steel Car Co. v. Union Pac. R. Co., 241 Fed. 964.

37 Marquis Cholmondeley v. Lord Clinton, Meriv. 71.

38 Atty. Gen. v. Burch, 4 Madd. 178.

39 Hughes v. Clerk, 6 Hare, 195. See also Bryant v. Leland, 6 Fed. 125, U. S. C. C., D. Mass.; Easton v. Hodges, 7 Bissell, 324, U. S. C. C., D. Illinois; Paton v. Majors, 46 Fed. 210, U. S. C. C., E. D. La., Billings, J.; Washburn & M. Mfg. Co. v. Freeman Wire Co., 41 Fed. 410, U. S. C. C., E. D. Mo., Thayer, J.; Washburn & M. Mfg. Co. v Cincinnati B. W. F. Co., 42 Fed. 675, U. S. C. C., S. D. Ohio.

of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

"If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

"Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

"Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

"The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

"By a demand served ten days before the trial, either party

may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable."[1] This is derived from Order XXXI of the Supreme Court of England. The English cases under that order and the former cases upon discovery in Chancery will be useful in the interpretation of the new rule.[2] Unfortunately many of the district judges have construed the rule more narrowly.

It has been said that it does not alter the substantive rules governing discovery in equity nor give any right to discovery which did not previously exist;[3] but upon this question the final word has not yet been spoken.

Under the Chancery practice, the party interrogated was obliged to answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief.[4] He had then to answer not only as

§ 348. [1] Eq. Rule 58.

[2] Lord Chancellor Loreburn (Harv. Law Rev., xxvi, p. 106): "Either party to the suit can obtain an order for discovery of documents relevant to the case of the adversary, but a fishing discovery—that is to say, discovery in order to enable the applicant to fish for a cause of action when he has no materials of his own—is disallowed. It must always be a matter for decision upon the circumstances in each case whether it is a fishing application or not. There are numerous decisions illustrating the way in which this rule works. Normally each party must disclose the documents relevant to his opponent's case which are or have been in his custody or control, and make an affidavit that there are no others. He may put in a separate schedule to the affidavit, such of them as he claims to be privileged from inspection. Then his adversary can obtain inspection of such as the judge thinks are not privileged." See General Film Co. v. Sampliner, C. C. A., 232 Fed. 95.

[3] Wolcott v. National Electric Signaling Co., 235 Fed. 224; F. Speidel Co. v. N. Barstow Co., 232 Fed. 617.

[4] Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 3 Story, 590; s. c., 1 W. & M. 244; Victor G. Bloede Co. v. Carter, 148 Fed. 127. It has been said that the defendant must answer not only as to all facts within his knowledge, but to all which he can ascertain from an inspection of books and papers in his possession or under his control. Davis v. Mapes, 2 Paige (N. Y.) 105.

to all facts within his knowledge, but as to all which he could ascertain from an inspection of books and papers in his possession or under his control.[5] He was also required to give a full answer concerning any information that he could obtain upon the subject from persons in his employ.[6] If the employees were no longer in the party's employ, he was not bound to procure information from them in order to answer,[7] and it has been said that a full answer which would involve an unreasonable expense may be excused.[8] If he asserted ignorance as to any matter, he was required to aver that he was ignorant both of his own knowledge and as to information and belief;[9] but if he denied knowledge and information, he was not required to state his belief.[10] He could not deny that he had no knowledge as to a subject, which the bill charged as a personal transaction in which he had taken part.[11]

This last ruling, it has been said, applies to officers of corporations.[12] If new officers have succeeded those in office at the time when the matters charged are said to have occurred, it is their duty, when called upon for discovery, to ascertain the facts by searching the records of the corporation and by inquiry of their predecessors.[13]

Where it was shown that a party charged with infringement made a device substantially similar to that produced by the complainant's patented machine, and the former refused to per-

5 Davis v. Mapes, 2 Paige (N. Y.) 105.

6 In England, if a party "is interrogated about acts which are done in the presence of persons employed by him their knowledge is his knowledge, and he is bound to answer in respect of that." Rasbotham v. Shropshire Union Ry. & Canal Co., 24 Ch. D. 110, 113; Odger's Pleading, 4th ed., p. 271.

7 Phillips v. Routh (L. R.), 7 C. P. 287.

8 Bolckow, Vaughan & Co. v. Fisher, 10 Q. B. D. 161. *Cf.* Miller v. Chicago & A. R. Co., 176 Fed. 379, 381. But see Hall v. L. & N. W. Ry. Co., 35 L. T. 848.

9 Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 1 W. & M. 244.

10 Victor G. Bloede Co. v. Carter, 148 Fed. 127.

11 Burpee v. First Nat. Bank, 5 Biss. 405. It has been held that it is insufficient to deny fraud charged to have been committed by an agent upon the information of the agent and the belief of the principal. Mason v. Jones, 1 Hayw. & H. 329; s. c., Fed. Cas. No. 9,240.

12 Burpee v. First Nat. Bank, 5 Biss. 405; Kittredge v. Claremont Bank, 1 W. & M. 244.

13 Kittredge v. Claremont Bank, 1 W. & M. 244.

mit an inspection thereof or to disclose the contents of an application that he had made for a patent in relation thereto; an order compelling such disclosure or permission to make such an inspection was granted.[14]

Objections to the interrogatories may be made upon the same grounds as, under the former practice, by a demurrer to the discovery. A demurrer to the discovery claimed that, for some reason apparent upon the face of the bill, the defendant should not be obliged to answer so much thereof as his demurrer cover. Professor Langdell says: "A demurrer to discovery indeed is not in its nature a demurrer at all, but a mere statement in writing that the defendant refuses to answer certain allegations in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out."[15] In Chancery a defendant might thus demur because (1) his answer might subject him to a pain, penalty, or forfeiture.[16] This rule still prevails.[17]

[14] Rowell v. William Koehl Co., 194 Fed. 446.

[15] Langdell's Eq. Pl., § 97. The object of interrogating is twofold: first, to obtain admissions to prove the case of the interrogator; secondly, to ascertain the case of the interrogated. Great care is necessary in their preparation, for, if the question is too general or assumes the existence of several facts, an error in one of them may justify a denial. For example: if the interrogator has heard that the plaintiff gave evidence upon an examination before Commissioner Shields, that a certain check was in the handwriting of James Brown, it may be of no use to put the interrogatory, "Did you not state, on oath, upon an examination before Commissioner Shields, that the said check was in the handwriting of Mr. Brown?" To discover precisely what the plaintiff denies, the question should be split substantially thus: "Were you not examined as a witness before Commissioner John A. Shields on October 25th, 1912? Was not a check then and there produced to you? Was not the check then and there produced before you? Was not the said check the one mentioned in the third paragraph of the bill of complaint herein? If you answer 'No' to the last question, describe the check that was then produced. Did you not say that said check was in the handwriting of James Brown? Did you not say so on oath? Did you not say so in the presence of said Commissioner Shields? If you answer 'No' to any of the last three questions, in whose handwriting did you say the said check was?" Under the Chancery practice, it was the custom to close a leading interrogatory with the words, "or how otherwise?" Union Sulphur Co. v. Freeport Texas Co., 234 Fed. 194.

[16] Stewart v. Drasha, 4 M'Lean, 563; Atwill v. Farrett, 2 Blatchf. 39; U. S. v. White, 17 Fed. 561, 565; Snow v. Mast, 63 Fed. 623; Paxton v. Douglas, 19 Ves. 225;

It has been held that it applies to an action at law because of the infringement of a patent in which treble damages are asked.[18]

(2) That it was immaterial to the purposes of the suit.[19]

(3) That it would involve a breach of some confidence which it is the policy of the law to preserve inviolate,[20] as a professional confidence,[21] or one obtained in the course of a public office.[22]

(4) That the matters of which a discovery was sought pertained exclusively to the defendant's case.[23] Matters disclosed in the answer material to the complainant's case may be made the subject of interrogatories.[24]

(5) Because the defendant had, "in conscience, a right equal to that claimed by a person filing a bill against him though not clothed with a perfect legal title,"[25] as, if he were a purchaser in good faith, and for a valuable consideration, without any notice of the plaintiff's claim.[26] Where the complainant was the only person who could insist upon the penalty or forfeiture, and he waives it in his bill, he might compel a discovery.[27] In certain

Story's Eq. Pl., §§ 575-599. Perhaps, also, if it might disgrace him. Franco v. Bolton, 3 Ves. 368; Finch v. Finch, 2 Ves. Jr. 491, 493; Brownsword v. Edwards, 2 Ves. Jr. 243, 245; Northrop v. Hateh, 6 Conn. 361, 363. In England, also, relevant questions which tend to criminate may be asked, although the party interrogated is not bound to answer the same. Alabaster v. Harness, 70 L. T. 375; McCorquodale v. Bell (1876), W. N. 39; Odgers "Principles of Pleading," 4th ed., p. 268.

17 F. Speidel Co. v. N. Barstow Co., 232 Fed. 617. See *supra*, §§ 153, 339a.

18 Ibid.

19 Harvey v. Morris, Rep. temp. Finch, 214; Daniell's Ch. Pr. (2d Am. ed.) 636, 637. But see Pac. R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504.

20 Story's Eq. Pl., § 547; Gormully & Jeffery Mfg. Co. v. Bretz, 64 Fed. 612.

21 Greenough v. Gaskell, 1 Myl. & K. 100; Story's Eq. Pl., § 547, and cases cited.

22 Smith v. East India Co., 1 Phillips, 50; Atty.-Gen. v. London, 12 Beav. 8; Worthington v. Scribner, 109 Mass. 487, 493, 12 Am. Rep. 736.

23 Bolton v. Liverpool, 1 Myl. & K. 88; Daniell's Ch. Pr. (2d Am. ed.) 645-648; Churchward Int. Steel Co. v. Bethlehem Steel Co., 233 Fed. 322; see *supra*, § 347; Wolcott v. National Electric Signaling Co., 235 Fed. 224.

24 Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430.

25 Daniell's Ch. Pr. (2d Am. ed.) 635, 636.

26 Jarrard v. Saunders, 2 Ves. Jr. 454; Glegg v. Legh, 4 Madd. 193; Langdell's Eq. Pl., § 188.

27 Mason v. Lake, 2 Brown, P. C.

cases, a defendant might be obliged to answer to a charge of a fraud which might subject him to criminal prosecution.[28] An English case held that a discovery could be compelled although a defendant might thereby admit his guilt of an offense against the criminal laws of a foreign country.[29]

If the defendant disputes the plaintiff's right to any discovery he should make his objections by motion if they appear upon the face of the bill and interrogatories; otherwise by answer and obtain an enlargement of his time to submit to the interrogatories until the plaintiff's right thereto is determined.[30] If he objects to some but not to all of the interrogatories he must make these objections specifically and bring them up for argument.[31] He is not subject to the old rule that if he answers one he must answer all.[32] He cannot object to answering interrogatories because the bill waives an answer under oath.[33] After answering an interrogatory he cannot object thereto,[34] although he seeks by such objection to raise a question as to the sufficiency of his answer thereto.[35]

An interrogatory must embrace a single question and be so framed that it may be clearly seen what the party interrogated is called upon to answer.[36] An interrogatory is not part of the pleadings.[37]

The criterion of the materiality of an interrogatory is not whether an affirmative answer will prove the bill, but whether it will tend to prove.[38] An interrogatory should not ordinarily be in the language of a claim of the complainant's patent,[39]

495; Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Atwill v. Ferrett, 3 Blatchf. 39.

28 Dummer v. Chippenham, 14 Ves. 245, 251; Story's Eq. Pl., § 578; Daniell's Ch. Pr. (2d Am. ed.) 631, 632.

29 King of Two Sicilies v. Wilcox, 1 Simons (N.S.), 301. See also U. S. v. McRae, L. R. 4 Eq. 327; s. c., L. R. 3 Ch. App. 79.

30 Pressed Steel Car Co. v. Union Pac. R. Co., 241 Fed. 964.

31 Ibid.

32 Ibid.

33 Hudson v. Wood, 119 Fed. 764, 776; Luten v. Camp, 221 Fed. 424. *Cf.* Johnston v. Forsyth Merc. Co., 127 Fed. 845, 848.

34 Window Glass Mach. Co. v. Brookville Glass & Title Co., 229 Fed. 833.

35 Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18.

36 Kinney v. Rice, 238 Fed. 444; Rodman Chem. Co. v. E. F. Houghton Co., 233 Fed. 470.

37 Luten v. Camp, 221 Fed. 424.

38 Uhlmann v. Arnholt & S. B. Co., 41 Fed. 369. See *supra*, § 174.

39 A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300; Rod-

nor require the opinion of a party as to the construction of a patent,[40] unless an answer to a question of fact will incidentally require an expression of opinion.[41] It has been held that the

man Chem. Co. v. E. F. Houghton Co., 233 Fed. 470.

[40] P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634, 636; A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300.

[41] Batdorf v. Sattley Coin Handling Mach. Co., C. C. A., 238 Fed. 925, 926, 927. There the following interrogatories were held proper:

"(100) State where the device is located upon which the plaintiffs will rely in their proof of infringement, and whether or not such device can be inspected on behalf of defendant."

"(101) If the machine referred to in interrogatory 100 cannot be inspected on behalf of defendant, describe and illustrate the device sufficiently for all parts thereof to be understood."

"(97) State, as to each claim of the patents in suit, what date of completion of invention plaintiffs will rely upon at the trial."

The following interrogatories were held to be improper:

"Point out, by reference to the drawings of patent No. 691,435, what part or parts of the structure illustrated in the drawings of said patent respond to—

"73. 'Means for advancing the coins separately,' recited in claim 1, 2, and 8, and 'means for supplying coins separately,' recited in claims 9, 11, and 12."

"(98) State, as to each of the patents in suit, whether or not a device as shown in the drawings of the patent has ever been constructed, and, if so, give the date of completion of the device."

"(99) State, as to each of the patents in suit, whether or not plaintiffs have ever made, or caused to be made, devices of a different construction from that shown in the patents, and, if a device or devices have been made, illustrate and describe such device or devices, and give the date or dates of completion of such device or devices."

In Luten v. Camp, 221 Fed. 424, 429, held: That defendant could be compelled to produce blue prints used in acts which were charged to be an infringement. (To the same effect is Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430.) But that they could not be compelled to compare these blue prints with the plaintiff's plans nor to state what was the precise showing thereof by lines, letters, figures and characters.

In A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300, 302, the following interrogatory was disallowed:

"(77) What is the description and commercial designation of the filler employed in the coating compound of defendant's stencil paper as illustrated (a) by Schedule 1; (b) by Schedule 4; (c) by Schedule A, above referred to; and from whom (give address) did the defendant obtain the same?"

"This group is objectionable because of the use of the word 'illustrated.'" Window Glass Mach. Co. v. Brookville Glass & Tile Co., 229 Fed. 833. *Cf.* Gennert v. Burke &

plaintiff cannot by interrogatory be compelled to point out upon which claim of the patent he relies, since the defendant's proper relief is by motion.[42]

James, Inc., 231 Fed. 998; *Contra*, P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634, 636. But see Batdorf v. Sattley Coin Handling Mach. Co., C. C. A., 238 Fed. 925; A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300, 301, 303: "In Oriental Tissue Co. v. De Jonge & Co., 218 Fed. 170, 134 C. C. A., 50, and in the later case between the same parties (235 Fed. 294), there was a sharp controversy as to the meaning of 'soluble cotton,' and my experience in that case convinced me that, generally speaking, chemical cases cannot be compared in this regard to simple mechanical cases, where, for instance, a 'steel rod' must be a steel rod.

"Defendant has annexed to its answer a sheet of the stencil paper made by it, and that ordinarily would be enough. As it appears, however, from the argument of both counsel that, because the sheet is hygroscopic, it may be subject to changes, defendant should arrange to give plaintiff, immediately when manufactured, a sufficient number of sheets to enable plaintiff's experts to make a prompt analysis. If any practical difficulties in this regard further appear, plaintiff may move again for appropriate relief before or at the trial.

"Another objection to this class of interrogatory is that in effect it may call for a construction of the claims contrary to the practice in this district. District Court rule 7."

In the same case the Court disallowed the following interrogatory:

"(1) Did the defendant, in this district and between June 23, 1914, and January 4, 1916, make or use or sell (if yea, which) stencil paper illustrated by the sheet hereto annexed and marked 'Schedule 1'?"

"The objection is that the interrogatory refers to stencil paper 'illustrated' by the sheet marked 'Schedule 1.' I think this objection is not captious, because the subject-matter of the specifications and claims deals with much specific detail, and therefore in this case the word 'illustrated' may be indefinite. This group of interrogatories, however, is practically disposed of by the suggested arrangement, *supra*, of furnishing plaintiff with fresh samples of the alleged infringing sheets."

[42] In P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634, the court disallowed the following interrogatories: "The second, third, and fourth interrogatories seek to have the complainant describe that element in defendant's device which complainant considers to be the wedge described in the Kramer patent, and that element which complainant considers to be the supporting member described in said claims, and whether the phrase 'other edge of the rail,' occuring in the claims, refers to the edge opposite to that engaged by the flange. The fifth interrogatory requires an answer as to whether complainant has manufactured any devices under the Kramer patent, and how many, and whether it is now making them, and requiring the

Interrogatories must be relevant to the issue.[43] An answer does not admit the materiality of the evidence thus elicited.[44] An interrogatory will not be allowed if its sole object is to establish certain facts, which, if proved, would not be relevant evidence in support of the plaintiff's claims[45] or would be no defense in law to the action;[46] but interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely. In England they may be directed to the evidence by which it is desired to establish such facts at the trial,[47]

production of a sample of such devices, or a cut or drawing. The sixth interrogatory inquires whether the complainant is licensed under, or has any interest in, various of the patents described in the correspondence above referred to. The next interrogatory inquires whether complainant considers defendant's device, to infringe any patents which complainant may own, be licensed under, or have an interest in, other than the three patents mentioned in the notice given by complainant to defendant, and, if so, inquiring the numbers and dates of the patents and names of the patentees. The eighth interrogatory asks whether complainant contemplates instituting other suits for patent infringement against defendant; and the last interrogatory asks whether one of the letters above referred to was written with the knowledge and consent of complainant.''

''The second, third, and fourth interrogatories inquire as to the opinion of the complainant as to the construction of the patent. This is a matter to be supplied by expert testimony in support of the contention of infringement, or the validity of the patent, or both. It is a matter purely evidentiary, and one which within the English rule, and the proper construction of rule 58 cannot be inquired into. The same considerations apply to interrogatories 5, 6, and 7, inquiring whether complainant has manufactured devices under its patent, whether it has any interest in other patents, and whether it considers defendant's device to infringe any other patents. These questions all relate to evidence of circumstances or of facts tending to prove some contention of defendant, supposedly the one set up in the sixth paragraph of the answer, which is to be struck out. The eighth and ninth interrogatories, inquiring whether it had knowledge of one of the letters pleaded in the answer, should be treated in the same way.''

43 Rogers & Co. v. Lambert & Co., 24 Q. B. D. 573.

44 Rodman Chemical Co. v. E. F. Houghton Co., 233 Fed. 470.

45 Kennedy v. Dodson (1895), 1 Ch. 334. In England, a defendant cannot be asked, ''If you did not print the libel, did McCarthy & Company or some other and what firm printed it?'' Pankhurst v. Wighton & Co., 2 Times L. R. 745.

46 Rogers & Co. v. Lambert & Co., 24 Q. B. D. 573.

47 Attorney General v. Gaskill, 20 Ch. D. 519, 528. To obtain names of witnesses for the interrogator, Hall v. Lycordet, W. N. (1883),

and an interrogatory is proper when relevant to any link in the chain of evidence necessary to substantiate the case of the interrogator.[48] It has been said that the interrogation must be confined to the facts upon which the interrogator's case or defense is based,[49] but not as to mere evidence or facts tending to prove the nature of the case or facts tending to prove the facts upon which the case or defense is based.[50]

A party may file interrogatories as to anything which can be fairly said to be material, to enable him either to maintain his own case or to destroy the case of his adversary;[51] but the English rule is that he is not entitled to obtain more than an outline of his opponent's case. He can there compel his adversary to disclose the facts on which the latter intends to rely, but not the evidence by which his adversary proposes to prove those facts.[52] "Even in interrogating as to your own case the questions asked must not be 'fishing'; that is they must refer to some definite and existing state of circumstances, not be put merely in the hopes of discovering something which may help the party interrogating to make out some case. They must be

175; names of persons such as incumbrancers in order to make them parties, Union Bank v. Manby, 13 Ch. D. 239. The security held by prior incumbrancers. West of England Bank v. Nicholls, 6 Ch. D. 613. Profits on a business where it is admitted that trust funds were employed in the same. Elkins v. Clarke, 21 W. R. 447; Schrieber v. Heymann, 63 L. J. Q. B. 749. But see Hemery v. Worwsom, 26 Lolic. J. 26.

48 Jones v. Richards, 15 Q. B. D. 439, holding that, when defendant has denied that he wrote a material document, he may be asked whether other documents produced are not in his handwriting, although the latter documents have no relevancy except for use in comparison of handwriting.

49 Luten v. Camp, 221 Fed. 424, 428.

50 P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 234, 236; Luten v. Camp, 221 Fed. 424, 428. In Du Pont v. Du Pont, 234 Fed. 459, a stockholders' suit against officers and directors, interrogatories concerning the details of a multitude of business transactions involving other companies with no relation to the suit were disallowed where the ultimate material facts could be ascertained from the books. See Wolcott v. National Electric Signaling Co., 235 Fed. 224; J. H. Day Co. v. Mountain City Mills Co., 225 Fed. 622.

51 Hennessy v. Wright, No. 2, 24 Q. B. D. 447n, per Lord Esher, M. R.

52 Odgers "Principles of Pleadings," 4th ed., pp. 265, 266; citing Eade v. Jacobs, 3 Ex. D. 335; Johns v. James, 13 Ch. D. 370.

confined to matters which there is good ground for believing to have occurred."[53] In England, questions "to credit" or interrogatories put solely to test the credibility of a party, are not allowed before trial, although they then may be asked upon cross-examination.[54]

In the Queens Bench Division of England, interrogatories are not allowed as to the contents of written documents, unless it is admitted that the documents have been lost or destroyed.[55] It has been so held by a Federal court.[56]

The right to discovery of matters relevant to the proof of the interrogator's case is not affected by the fact that they will also show the defense or case of the other side.[57] The adversary cannot by interrogation be compelled to disclose the names of his witnesses;[58] nor the names of experts or others from whom the information for his answers is obtained.[59] Interrogatories are not allowed when their object is to contradict a written document;[60] but the interrogated party may be asked what has become of a particular document and the interrogatory continued, "If you state that such document is lost or destroyed, set out the contents of the same to the best of your recollection and belief. If you have a copy, make it an exhibit to your answer.[61]

53 Odgers "Principles of Pleadings," 4th ed., p. 267; citing Gourley v. Plimsoll, L. R. H. C. P. 362; Hennessey v. Wright, No. 2, 24 Q. B. D. 448.

54 Labouchere v. Shaw, 41 J. P. 788, per Cockburn, C. J.; Allhusen v. Labouchere, 3 Q. B. D. 654.

55 Odgers "Principles of Pleadings," 4th edition, p. 267; citing Stearn v. Tabor, 31 L. T. 444; Fitzgibbon v. Greer Parish R. 9 C. L. 294.

56 Luten v. Camp, 221 Fed. 424, 429. In Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430, where a license was claimed by defendant, plaintiff was allowed to inquire as to the date of the acts which were charged as an infringement, whether the license was in writing, its date and the correspondence relating thereto; but not the date of the notice to the inventor of the beginning of the construction, the completion and the use of the infringing article, since that was merely evidentiary on the issue of the existence of the license.

57 Kinney v. Rice, 238 Fed. 444; Blast Furnace Appliances Co. v. Worth Bros. Co., 231 Fed. 420.

58 Kinney v. Rice, 238 Fed. 444; F. Speidel Co. v. N. Barstow Co., 232 Fed. 617; Wolcott v. National Electric Signaling Co., 235 Fed. 224.

59 A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300.

60 Moor v. Roberts, 3 C. B. N. S. 671.

61 Odgers "Principles of Plead-

It has been said that conditions may be imposed upon the requirement of an answer to an interrogatory.[62] In one case the court imposed the condition that publication of the answers be not made until after both parties had answered the interrogatories respectively put to them.[63]

An answer to an interrogatory is insufficient when it is so mixed with matter irrelevant thereto as to prevent the interrogator from using the same apart therefrom.[64] A person not a party to a suit cannot be compelled to answer an interrogatory attached to the bill.[65]

§ 349. Inspection in equity. According to the old English practice, the adverse party had no right, in the absence of special circumstances, to compel before the hearing the production of any exhibit, however it had been proved, except, perhaps, when the deposition proving it had set it out *verbatim;* nor even to inspect it, it being considered that a party should not before the hearing see the strength of the cause, or any deed, to pick holes in it.[1] The Equity Rules now provide: that the court or judge may upon reasonable notice make all such orders as may be appropriate to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary.[2]

ings,'' 4th ed., p. 267, 268; citing Wolverhampton New Water Works Co. v. Hawksford, 5 C. B. N. S. 703; Dalrymple v. Leslie, 8 Q. B. 5.

62 Batdorf v. Sattley Coin Handling Machine Co., C. C. A., 238 Fed. 925.

63 Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925, 927. ''If defendant interrogates plaintiffs regarding facts or documents tending to disclose the dates of the making and completion of the invention of the patent suit, and plaintiffs interrogate defendant regarding facts or documents tending to disclose the dates of any prior knowledge, prior use, or prior invention defense, it would seem proper procedure for this court, upon *ex parte* request, to require both the plaintiffs and defendant to file the answers to such interrogatories in sealed envelopes with the clerk of this court on a day specified by the court, the sealed envelopes containing the answers to the interrogatories to be opened by the clerk the day following the date set by the court for the filing thereof. And it is here so ordered and made a condition of the granting of defendant's prayer regarding interrogatory 97.''

64 Lyell v. Kennedy, 27 Ch. D. 1, 28.

65 First State Bank v. Spencer, 219 Fed. 505.

§ 349. 1 Davers v. Davers, 2 P. Wms. 410.

2 Eq. Rule 58, quoted *supra*, § 348.

A party is not entitled to a general inspection of books and papers in his adversary's possession. In the case of an inspection of books, the usual practice is to have all except the pages containing the material matter sealed up, and to have the inspection take place under the supervision of a master or commissioner,[3] or the clerk,[4] with the right in the latter case to a summary application to the judge for a review of the clerk's decision after both sides had been afforded a hearing.[5] Previously to the Equity Rules of 1912, the section of the Revised Statutes[6] quoted in the following section has been followed in equity.[7]

In England, it has been said that there are seven grounds upon which production of documents may be lawfully refused: First, documents of title need not be produced when they relate solely to a party's own title to real property, corporeal or incorporeal, and contain nothing which tends to establish the title of his opponent.[8] Where, however, the documents are material to his opponent's title, they must be produced, although the party against whom the order is made is a purchaser for value without

3 Robbins v. Denis, 1 Blatchf. 238, 243.

4 Jacques v. Collins, 2 Blatchf. 23.

5 Ibid.

6 U. S. R. S., § 724.

7 Coit v. N. C. Gold Am. Co., 9 Fed. 577. *Cf.* U. S. R. S., § 724; Kirkpatrick v. Pope Mfg. Co., 61 Fed. 46. But see Guyot v. Hilton, 32 Fed. 743; Colgate v. Compagnie Francaise, 23 Fed. 82; Ryder v. Bateman, 93 Fed. 31. Under the former practice it was held: that upon the inspection of books or documents, the order might provide that the originals be filed with the clerk or that copies thereof be served upon the parties seeking them (Sampson v. Johnson, 2 Cranch C. C. 107; Bank of U. S. v. Kurtz, 2 Cranch C. C. 342); that a special master might be appointed to supervise the inspection (Motley, Green & Co. v. Detroit Steel & Spring Co., 174 Fed. 734); or that the clerk might supervise the inspection, with the right of both parties to a summary application to the judge, at chambers, for a review of his decision after a hearing (Jacques v. Collins, 2 Blatchf. 23); that, in the case of books, only the entries which were relevant (Jacques v. Collins, 2 Blatchf. 23; Motley, Green & Co. v. Detroit Steel & Spring Co., 174 Fed. 734); and that photographic copies of letters might be made under proper restrictions (Newcomb v. Burbank, 159 Fed. 568). Inspection of entries containing the name of a party's customers will rarely be allowed, unless they are clearly relevant. Motley, Green & Co. v. Detroit Steel & Spring Co., 174 Fed. 734; Roberts v. Walley, 14 Fed. 167.

8 Egremont Burial Board v. Egremont Iron Ore Co., 14 Ch. D. 158.

notice.[9] Second, communications between solicitor and client.[10] Third, documents prepared solely for the purpose of assisting the opponent or his legal advisers in any actual or anticipated litigation.[11] Fourth, incriminating documents.[12] But, in England, the objection to such must be made under oath, in clear and express terms, not upon information and belief.[13] Fifth, documents that tend to prove a forfeiture.[14] Sixth, documents which are the property of a third person and held by the interrogated as agent or trustee.[15] But this privilege does not extend to private letters written in confidence by a stranger who forbids their production.[16] Seventh, State documents, the production of which is contrary to public policy.[17]

§ 350. Inspection at common law. The Revised Statutes provide: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit, and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." [1]

9 Ind. Coope & Co. v. Emmerson, 12 App. Cas. 300.

10 Lowden v. Blakey, 23 Q. B. D. 332; Minet v. Morgan, L. R. H. Ch. 361; Calecraft v. Guest (1898), 1 Q. B. 759; Goldstone v. Williams, Deacon & Co. (1899), 1 Ch. 47.

11 Walsham v. Stainton, 2 H. & M. 1; 12 W. R. 199; Nicholl v. Jones, 2 H. & M. 588; 13 W. R. 461; M'Corquodale v. Bell, 1 C. P. D. 471; 45 L. J. C. P. 329; Southwark and Vauxhall Water Co. v. Quick, 3 Q. B. D. 315; 47 L. J. Q. B. 258; Friend v. London, Chatham and Dover Ry. Co., 2 Ex. D. 437; 46 L. J. Ex. 696.

12 Spokes v. Grosvenor Hotel Co., 2 Q. B. D. 130.

13 Roe v. New York Press, 75 L. T. J. 31.

14 Earl of Mexborough v. Whitwood (1897), 2 Q. B. 111. *Contra*, Seaward v. Dennington, 44 W. R. 696.

15 Proctor v. Smiles, 2 Times L. R. 474; Ward v. Marshall, 3 Times L. R. 578; Odgers "Principles of Pleading," 4th ed., p. 258.

16 Hopkinson v. Lord Burghley, L. R. 2 Ch. 447; Odgers "Principles of Pleading," 4th ed., p. 258. See M'Corquodale v. Bell, 1 C. P. D. 471.

17 Beatson v. Skene, 5 H. & N. 838. See § 332, *supra*.

§ 350. 1 U. S. R. S., § 724, 3 Fed. St. Ann. 2, Pierce Fed. Code, § 7360.

The Supreme Court of the United States, overruling a number of cases in the lower courts to the contrary,[2] has held that this statute does not authorize compulsion of the production of books and papers before trial,[3] the court saying that a bill of discovery is the proper remedy if the parties desire inspection in order to prepare for trial.[4]

It has been held that such an order will not be granted when the production of the papers can be compelled by a subpœna *duces tecum* which has been served.[5] Where a deposition is properly taken under the Revised Statutes before trial, the production of books, papers and other documents can then undoubtedly be compelled by a *subpœna duces tecum*.[6] In a recent case an order was affirmed which upon a petition clearly specifying what was wished and making a sufficient showing of their materiality compelled the production of books and papers upon the trial.[7]

It was previously held that the pendency of a bill of discovery was not a bar to such a motion in an action at common law,[8] and that the motion must be made before the trial.[9] The statute has been enforced in an action to recover treble damages under the Anti-Trust Act.[10] In an action to recover a penalty, whether

2 Exchange Nat. Bank v. Wichita Cattle Co., 61 Fed. 190; Central Nat. Bank v. Tayloe, 2 Cranch, C. C. 427; Jacques v. Collins, 2 Blatchf. 23; Gregory v. Chicago, M. & St. P. R. Co., 10 Fed. 529; Lucker v. Phœnix Assur. Co., 67 Fed. 18; Victor G. Bloede Co. v. Joseph Bancroft & Sons, 98 Fed. 175; Cameron Lumber Co. v. Droney, 132 Fed. 304. *Contra*, Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201; Iasigi v. Brown, 1 Curt. 401; Triplett v. Bank, 3 Cranch, C. C. 646; Cassatt v. Mitchell Coal & Coke Co., C. C. A., 150 Fed. 32; reversed for want of jurisdiction of the writ of error, Webster Coal & Coke Co. v. Cassatt, 207 U. S. 181. See Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1,088; Dunham v. Riley, 4 Wash. C. C. 126, Fed. Cas. No. 4,155.

3 Carpenter v. Winn, 221 U. S. 533, 55 L. ed. 842; reversing C. C. A., 165 Fed. 636.

4 Ibid., 221 U. S. 533, 540, 55 L. ed. 842, 845. See *supra*, § 347.

5 Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. 294, 300.

6 Am. Lithographic Co. v. Werckmeister, C. C. A., Nov. 16, 1908, 165 Fed. 426. See *supra*, § 341.

7 United Mine Workers of America v. Cornado Coal Co., C. C. A., 258 Fed. 829, 834.

8 Iasigi v. Brown, 1 Curt. 401, Fed. Cas. No. 6,993.

9 Geyger v. Geyger, 2 Dall. 332, 1 L. ed. 403; Bank of U. S. v. Kurtz, 2 Cranch, C. C. 342.

10 Am. Banana Co. v. U. S., 153 Fed. 943.

brought by a private individual or by the United States, and in a proceeding to enforce a forfeiture of property, the defendant or owner of the property seized cannot be compelled to produce its books or papers or other articles of personal property for the inspection of the opposite party, and should such an inspection be compelled, the judgment may be reversed upon that ground alone.[11] It has been said that, as regards inspection at common law, the State practice may now be followed.[12]

§ 350a. Testimony taken in another suit. Depositions, or testimony otherwise taken, in a former suit between the same parties, if relevant and material may be admitted in evidence[1] unless it clearly appears that there was no adequate cross examination upon an issue not raised in the former suit.[2] The deposition of a witness who has since died taken in a suit between strangers if tending to prove ancient possession of land, is competent evidence[3] but the deposition of a public officer who has since died concerning the destruction of public records when taken in an action between strangers is inadmissible since the destruction might be shown by the man in office at the time of the trial.[4] In some cases affidavits,[5] depositions,[6] and evidence of oral testimony[7] offered by a party in another suit have been admitted in evidence against him although there was no privity

11 Johnson v. Donaldson, 18 Blatchf. 287; Boyd v. U. S., 116 U. S. 616, 29 L. ed. 746. See U. S. v. Denicke, 35 Fed. 407, 410.

12 Victor G. Bloede Co. v. Joseph Bancroft & Sons Co., 98 Fed. 175; Filscole v. Lancaster, 70 Fed. 337; Gray v. Schneider, 119 Fed. 474. *Contra,* Lucker v. Phœnix Assur. Co., 67 Fed. 18; Schatz v. Winton Motor Carriage Co., 197 Fed. 777; General Film Co. v. Sampliner, C. C. A., 232 Fed. 95. See *infra,* § 359.

§ 350a. 1 Young v. J. Samuels & Bro., 232 Fed. 784.

2 See Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83.

3 Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83.

4 Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83.

5 Simon v. Etgen, 213 N. Y. 589, 598; Pritchard v. Bagshawe, 11 C. B. 459, 462.

6 But see Wigmore on Evidence, § 1075, and cases cited.

7 Becker v. Philadelphia, 217 Pa. 344, 347, 66 Atl. 564; Bageard v. Consol. Tea Co., 64 N. J. Law, 316; Livingston v. Colpiss, 4 N. W. Terr. 441, 442. *Contra,* Wilkins v. Stidgen, 22 Cal. 231, 236; Patly v. Salem F. Co., 53 Oregon 350, 96 Pac. 1106.

between the parties.[8] A party's own affidavit,[9] deposition [10] or oral testimony [11] or admission [12] in a former suit irrespective of privity is always competent evidence against him as an admission. Otherwise depositions or testimony taken upon a trial to which the person against whom it was offered was not a party are incompetent.[13]

§ 351. Testimony taken before a cause is at issue. Testimony for use in a court of law or equity of the United States may be taken either before or after it is at issue. Testimony taken before a cause is at issue may be taken either before or after it has begun. "Any court of the United States may, in its discretion, admit in evidence in any clause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending according to the laws thereof." [1] Evidence taken by means of a bill to perpetuate testimony may also be admitted in a subsequent suit in equity.[2] The Equity Rules authorize depositions to be taken, by leave of the court, "when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit." [3] Such testimony is then taken in the same manner as testimony taken after issue has been joined.

8 Hallett v. Walker, 1 Ala. 585, 588; Gardner v. Moult, 10 A. & E. 464; Cole v. Hadley, 11 A. & E. 807; Boileau v. Rutlin, 2 Ex. Eq. 265, 280; Richards v. Morgan, 10 Jurist, N. S. 559, 4 B. & S. 641; Evans v. Merthyr Tydfil, 1 Ch. 241, 250. *Cf.* Simon v. Etgen, 213 N. Y. 589, 598. See Wigmore on Evidence, § 1075, and cases cited.

9 Simon v. Etgen, 213 N. Y. 589, 598; State v. Jones, 29 S. C. 201; Wigmore on Evidence, § 1040.

10 People v. Devine, 44 Cal. 458; People v. Bushton, 80 Cal. 160, 161, 22 Pac. 127; Southern Kansas R. R. Co. v. Painter, 53 Kansas 413, 418, 36 Pac. 731.

11 State v. Jones, 29 S. C. 201, 228, 7 S. E. 296; Lewis v. State, 91 Georgia 158, 170, 16 S. E. 986; Wigmore on Evidence, § 1040.

12 *Supra*, §§ 330, 331.

13 Anderson v. Holtberg, C. C. A., 247 Fed. 273; Virginia & West Virginia Coal Co. v. Charles, C. C. A., 251 Fed. 83. See *supra*, § 332.

§ 351. 1 U. S. R. S., § 867; Brown v. Worster, 113 Fed. 20. For a case where the testimony of a man injured by an accident was taken for use in a contemplated action on behalf of his family to recover for his death, see Ohio Copper Min. Co. v. Hutchings, C. C. A., 172 Fed. 201.

2 N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578.

3 Eq. Rule 47, quoted *infra*, § 352. See Eq. Rule 70 of 1842. The action of an examiner in adjourning the hearing after a witness is tendered for cross-examination is final, and if the party who offered the

§ 352. Testimony taken within the jurisdiction of the court after a cause is at issue. Testimony taken after a cause is at issue is taken differently when taken within, than when taken without, the jurisdiction of the court. The Equity Rules of 1912 make a radical innovation in the pre-existing practice.

"In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require."[1]

"The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order.

witness refuses to produce him for cross-examination his testimony in chief will be suppressed. Shapleigh v. Chester El. L. & P. Co., 47 Fed. 848. The court may, after a deposition has been concluded, allow further cross-examination. La Normandie, C. C. A., 58 Fed. 427; s. c., 40 Fed. 590. For a case where a deposition was admitted when the witness had died before his cross-examination, which had been adjourned at the request of the cross-examiner, see Celluloid Mfg. Co. v. Arlington Mfg. Co., 47 Fed. 4. For a case where a deposition was taken by consent in the absence of the examiner, and a dispute arose, see Ballard v. McCluskey, 52 Fed. 677. It has been held that when the parties stipulate that testimony may be taken before any officer or magistrate qualified to administer oaths without special appointment by the court as an examiner, the deposition thus taken must be filed on record, as required by Equity Rule 67, in cases where an examiner is regularly appointed; and the party in whose behalf the testimony was taken has no right to suppress it. T. L. Mott Iron Works v. Standard Mfg. Co., C. C. A., 48 Fed. 345.

§ 352. [1] Eq. Rule 46.

All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."[2] This rule does not limit the power of the court by order to permit the taking of depositions at any time[3] even after the close of the hearing.[4] The time may be extended by consent.[5]

It has been doubted whether the order can be made *nunc pro tunc* after the depositions have been taken.[6] Depositions taken after the time has expired will be suppressed.[7] The probability that the trial will occupy several days was held not to be a sufficient ground for authorizing the taking of depositions before an examiner.[8] Whether this time limit applies to depositions *de bene esse* taken under the Revised Statutes[9] has been the subject of conflicting decisions.[10]

The court when granting leave to take a deposition may limit the scope of the inquiry to a particular matter.[11]

Permission may be granted before a case is upon the trial calendar.[13]

"In a case involving the validity or scope of a patent or trademark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed

2 Eq. Rule 47.

3 U. S. Gypsum Co. v. Mackey Wall Plaster Co., C. C. A., 252 Fed. 357.

4 U. S. Gypsum Co. v. Mackey Wall Plaster Co., 252 Fed. 397. See American Caramel Co. v. White, C. C. A., 234 Fed. 328.

5 Fortney v. Carter, C. C. A., 203 Fed. 454.

6 Victor Talking Mach. Co. v. Sonora Phonograph Corp., 221 Fed. 677.

7 Victor Talking Mach. Co. v. Sonora Phonograph Corp., 221 Fed. 677.

8 North v. Herrick, 203 Fed. 591.

9 *Infra*, § 354.

10 It has been held that it does not in Iowa Washing Mach. Co. v. Montgomery Ward & Co., 227 Fed. 1004 (S. D. N. Y.). *Contra*, Block v. Arrowsmith Mfg. Co., 243 Fed. 775 (D. N. J.); Audiffren Refrigerating M. Co. v. General El. Co., 245 Fed. 783 (D. N. J.).

11 Norma Min. Co. v. Mackay, C. C. A., 241 Fed. 640.

13 United Lace & Braid Mfg. Co. v. Barthels Mfg. Co., 217 Fed. 175.

to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause." [14]

"All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an

[14] Eq. Rule 48. In view of the positive language of the Revised Statutes, there may be some question whether the Court can compel the testimony of expert witnesses who live more than one hundred miles from the place of trial to be thus taken. See U. S. R. S., § 863. *Infra*, § 354. By the Equity Rules of S. D. N. Y. "5. In the trial of a patent cause whether in open Court or by deposition, or partly in each way, only one expert witness shall be allowed to each side, unless leave shall previously be obtained from the Court on motion made and cause shown." "In cases where under Supreme Court Rule 48 the direct testimony of experts in Patent causes is taken by affidavit, the witnesses shall not give their opinion as to the meaning of any patent claim or specification, but their testimony shall be strictly confined to an explanation of the operation of relevant arts, processes, machines, manufactures or compositions of matter, and of the meaning of terms of art or science and of diagrams or formulæ. If the affidavit or deposition of any expert witness contain matter forbidden by this Rule, or irrelevant or immaterial matter, it shall not be answered by the opposite party, nor shall it be the basis of any cross-examination at the hearing, and the Court at any stage of the case may strike from any such affidavit or deposition all such matter." Eq. Rule 6. "Each District court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of cases. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district."

Where there is doubt as to the propriety or relevancy of any matter, the court will reserve until the hearing, its decision upon the motion to strike it out. Victor Talking Mach. Co. v. Sonora Phonograph Corp., 221 Fed. 676.

examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination." [15]

"When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript." [16]

"Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just." [17]

"Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance

15 Eq. Rule 49. See *Re* Felts, 205 Fed. 983.

16 Eq. Rule 50.

17 Eq. Rule 51. See *infra*, §§ 409, 410, 411. A motion to strike out evidence at the complainant's courts cannot be made at the appellate court. Horton Mfg. Co. v. White Lily Mfg. Co., C. C. A., 213 Fed. 471.

in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court. In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories." [18]

"Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case." [19]

"After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order." [20]

"Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court." [21]

"After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be kept except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give." [22]

[18] Eq. Rule 52.

[19] Eq. Rule 53.

[20] Eq. Rule 54.

[21] Eq. Rule 55. For a case where the Court directed that the publication of answers to interrogatories should be delayed, see Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925, 927, quoted *supra*, § 348.

[22] Eq. Rule 56.

Originally, the only manner of examining witnesses within the jurisdiction of a court of chancery was by means of written interrogatories and cross-interrogatories, which were prepared by the solicitors and counsel of the respective parties, or by the court, and then submitted to an examiner or one or more commissioners appointed by the court, who examined the witnesses privately by means of them. The testimony thus obtained was kept secret until all the testimony in the cause had been taken. The time when it could first be inspected was called the time of publication. This method of taking testimony was, like many other parts of equity practice, borrowed from the canon law; with this difference, however, that whereas by the canon law each party before the examination of witnesses was obliged to furnish his adversary and the court with articles containing a specific statement of the facts which he expected to prove by them; in equity, on the other hand, except in a few rare instances, facts, not evidence, are required to be pleaded. So, originally, each party was before publication very much in the dark as to the facts which his antagonist intended to attempt to establish. "It is not surprising, therefore, that the mode of taking testimony in equity fell into disrepute, and finally broke down."[23]

[23] Langdell's Eq. Pl., § 56. See also Langdell's Eq. Pl., §§ 14-19, 57, 58; Eillert v. Craps, 44 Fed. 792; Wood v. Mann, 2 Sumn. 316. The argument in favor of this practice is stated by Chancellor Kent in Remsen v. Remsen, 2 J. Ch. (N. Y.) 495, 499, 500: "Whether examinations shall be secret, and to what extent they shall be carried, suggests much more important considerations. If examinations are protracted, from day to day, for any length of time, there is very great danger of abuse from public examinations, by which parties are enabled to detect the weak parts of the adversary's case, or of their own, and to hunt up or fabricate testimony to meet the pressure or exigency of the inquiry. It is to guard against this abuse, that examinations in chief are not permitted, after publication, and that courts of law will not grant new trials merely to enable a party to accumulate testimony on any given point, or to oppose that which was taken on the opposite side. It is also upon the same grounds that a witness, who has been examined in chief before the hearing, cannot be re-examined before the master, without an order, and, then, not to any matter to which he had before been examined (Dickens, 508); and that a witness, once examined before the master, cannot be re-examined, without an order. (2 Ves. 370. 2 Maddock's Ch. 392, 393.) In trials at common law, the cause is heard, and the verdict

Under the Equity Rules of 1842, as subsequently amended,[24] testimony within the jurisdiction was usually taken orally before an examiner. It was the duty of the examiner to note all of the objections and of the exceptions to questions and answers and to take the testimony subject to them when deciding on their validity.[25] It was held that the court should not interfere to prevent irrelevant questions.[26] The only way to object for irrelevancy was for the witness to refuse to answer and then to raise the objection upon a motion to compel him to answer [27] or upon contempt proceedings.[28] Where the witness or the evidence was privileged,[29] or it clearly and affirmatively appeared that the evidence sought could not possibly be competent, material or relevant, which very rarely happened, such a motion would be denied;[30] but a witness ordinarily was compelled to answer all questions which might possibly be relevant or material, provided that he was not privileged.[31] This rule applied to depositions taken upon a commission of *dedimus potestatem*, issued under section eight hundred and sixty-six of the Revised Statutes of the United States, after a general notice by the plaintiff that he desired the evidence to be taken orally;[32] unless, for special reasons, the court ordered it to be taken upon written interrogatories.[33] This system produced great abuses. Records were swollen with irrelevant matter consisting not only of testimony but of discussions between counsel. Before a case could be

taken at one sitting, and all opportunity for getting up suppletory proof is precluded.''

24 Former Eq. Rule 67.

25 Appleton v. Ecaubert, 45 Fed. 281. See *Re* Felts, 205 Fed. 983.

26 Blease v. Garlington, 92 U. S. 1, 4-8, 23 L. ed. 521, 522-524.

27 Independent Baking Powder Co. v. Boorman, 137 Fed. 995. See Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211, where the form of the application was a petition for mandamus.

28 Butler v. Fayerweather, C. C. A., 91 Fed. 458.

29 Butler v. Fayerweather, C. C. A., 91 Fed. 458; Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211.

30 Independent Baking Powder Co. v. Boorman, 137 Fed. 995; Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211; *supra*, § 343. This is the present rule. *Re* Felts, 205 Fed. 983; *infra*, § 353.

31 Perry v. Rubber Tire Wheel Co., 138 Fed. 836; Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211. *Re* Felts, 205 Fed. 983.

32 Bischoffscheim v. Baltzer, 10 Fed. 1; Encyclopædia Britannica Co. v. Werner Co., 138 Fed. 461; *infra*, § 356.

33 Bischoffscheim v. Baltzer, 10 Fed. 1.

heard, the courts required that this all be printed, and fees be paid the clerks of the courts for filing the same. The consequence was that a rich and unscrupulous defendant could make litigation so expensive and delay a case so long that poor men feared to assert their rights on the equity side of the courts of the United States. The evil was especially prominent in litigation concerning patents. The new rules have, it is hoped, abolished it forever.

It has been held that the taking of depositions before an examiner in an equity suit is not a judicial trial, nor part of a trial, but merely a proceeding preliminary to a trial, and that neither the public, nor the representatives of the press, have the right to be present against the objection of either party.[34] A recent statute directs that testimony in such proceedings in suits by the United States under the Anti-Monopoly Law shall be public.[35]

§ 353. Testimony taken after a cause is at issue and beyond the jurisdiction of the court. It often happens that a witness, whose testimony is needed by either party to a suit in equity, is beyond the jurisdiction of the court. In such a case, his testimony can be taken in six ways,—by deposition, according to the acts of Congress;[1] by a commission under a *dedimus potestatem;*[2] by letters rogatory;[3] in the method prescribed by the laws of the State where the court is held;[4] and by a special master or examiner,[5] or a master[6] appointed by the court where the suit is pending to take testimony in another district, or even in a foreign country.[7] In such cases, applications to compel witnesses to answer questions or to punish them for contempt, must be made to the court of the district where the testimony is

34 U. S. v. United Shoe Machinery Co. of New Jersey, 198 Fed. 870.

35 Act of March 3d, 1913.

§ 353. 1 *Infra*, §§ 354, 355.

2 *Infra*, §§ 356, 357.

3 *Infra*, § 358.

4 27 St. at L. 17; § 359, *infra*.

5 White v. Toledo R. Co., C. C. A., 79 Fed. 133; North Carolina R. Co. v. Drew, 3 Woods 691; *Re* Steward, 29 Fed. 813; Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 Fed. 191; *Re* Allis, 44 Fed. 217; *Re* Spofford, 62 Fed. 443; *Re* Robert Gair Co., C. C. A., 196 Fed. 492, 493; U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 232. But see Arnold v. Chesebrough, 35 Fed. 16, and Celluloid Mfg. Co. v. Russell, 35 Fed. 17.

6 Consolidated Fastener Co. v. Columbian B. & T. Co., 85 Fed. 54.

7 Bate Refrigerating Co. v. Gillette, 28 Fed. 673.

taken;[8] and if application to the court for subpœnas is necessary, the court of such district must issue them.[9] Where a party lives without the district, the court has the power to postpone the trial to enable his deposition to be taken, unless he is present in court and within reach of a subpœna.[10]

§ 354. Depositions de bene esse under the acts of Congress. The acts of Congress which authorize depositions to be taken *de bene esse*, apply to cases at common law and in equity.[1] They are as follows: "The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a Circuit Court, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a County Court or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his deposition: and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice therein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as

[8] U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 232; *infra*, § 429.

[9] U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 232. But see Eq. Rule 52.

[10] Frost v. Barber, 173 Fed. 847.

§ 354. [1] Stegner v. Blake, 36 Fed. 183; U. S. R. S., § 863.

any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court."[2] It has been held that the deposition may be taken before the judge who is to try the case, at the residence of the witness outside of the judge's district.[3]

"Every person deposing as provided in the preceding section, shall be cautioned and sworn to tell the whole truth, and carefully examined. His testimony shall be reduced to writing, or typewriting, by the officer taking the deposition, or by some other person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent."[3a]

It seems insufficient to swear the witness to tell the whole truth concerning such interrogatories as may be put to him. He should be sworn or should affirm to tell the whole truth as far as he knows concerning the matter in controversy between the parties.[4] It seems that if the witness is properly sworn, it is necessary that he be also cautioned to testify the whole truth;[5] and that the oath may be administered after the deposition has been reduced to writing, as well as before.[6] If the witness has con-

[2] U. S. R. S., § 863.

It has been held that the deposition may be taken before a judge of probate if his court is a court of record, Merrill v. Dawson, Hempst. 563; s. c., *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736; or any county judge, Voce v. Lawrence, 4 McLean 203. It has been held that the deposition cannot be taken before a township justice, Schutte v. Thompson, 15 Wall. 152, 21 L. ed. 123; or a judge of a county commissioner's court, Garey v. Union Bank, 3 Cranch, C. C. 91; or a judge of a city court, Freeman v. Holmead, 5 Cranch, C. C. 162.

[3] Jennings v. Smith, 244 Fed. 837. For a case where the plaintiff was allowed to take depositions in another State, see United Lace & Braid Mfg. Co. v. Barthels Mfg. Co., 217 Fed. 175.

[3a] U. S. R. S., § 864, as amended May 13, 1900.

[4] Shutte v. Thompson, 15 Wall. 152; Pendleton v. Forbes, 1 Cranch 507; Garrett v. Woodward, 2 Cranch 190; Rainer v. Haynes, Hempst. 689; Wilson S. M. A. v. Jackson, 1 Hughes, 295; U. S. v. Smith, 4 Day 121.

[5] Moore v. Nelson, 3 McLean 384; Brown v. Piatt, 2 Cranch 253. *Contra*, Luther v. The Merritt Hunt, 1 Newb. Adm. 4.

[6] Toker v. Thompson, 3 McLean 92.

scientious scruples about taking an oath, he may affirm.[7] The certificate of the magistrate that the witness has such conscientious scruples is sufficient evidence thereof.[8]

"Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it was taken; or it shall, together with a certificate of the reasons as aforesaid of taking it, and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment he is unable to travel and appear at court, such deposition shall not be used in the cause."[9]

These sections do not apply to the taking of depositions in foreign countries.[10]

In suits in equity it is the safer practice for the plaintiff to take his deposition within sixty days from the time the cause is at issue; the defendant within thirty days from the expiration of this time and rebutting depositions by either party within twenty days thereafter.[11] A deposition cannot be taken under these statutory provisions after an appeal to the Supreme Court or the Circuit Court of Appeals has been perfected: for the case is then no longer "depending" in a Circuit Court.[12] This practice has no application to cases pending in the Supreme Court.[13]

7 U. S. R. S., § 1.

8 Elliot v. Hayman, 2 Cranch 678.

9 U. S. R. S., § 865.

10 Cortes Co. v Tannhauser, 18 Fed. 667; Stein v. Bowman, 13 Pet. 209, 10 L. ed. 129; The Alexandra, 104 Fed. 904; Compania Azucarera Cubana v. Ingraham, Maxwell & Beals, 180 Fed. 516; Birge-Forbes Co. v. Heye, C. C. A., 248 Fed. 636. But see Bischoffsheim v. Baltzer, 10 Fed. 1.

11 Eq. Rule 47. Whether this rule applies to depositions *de bene esse* under the revised statutes is a disputed question. It has been held that it does not in Iowa Washing Mach. Co. v. Montgomery Ward & Co., 227 Fed. 1004 (S. D. N. Y.). *Contra*, Block v. Arrowsmith Mfg. Co., 243 Fed. 775 (D. J.); Audiffren Refrigerating M. Co. v. General El. Co., 245 Fed. 783 (D. N. J.).

12 Richter v. Jerome, 25 Fed. 679, 681; Slaughter-House Cases, 10 Wall. 273, 19 L. ed. 915.

13 The Argo, 2 Wheat. 287, 4 L. ed. 241; Richter v. Jerome, 25 Fed. 679, 681.

Either party to an action at law, or a suit in equity, may be thus examined under oath when the other statutory conditions exist.[14] It has been held that a witness or a party, not ancient or infirm, cannot be examined under this statute *de bene esse* before issue joined, although he resides more than one hundred miles from the place of trial.[15] The magistrate should write down and return to the court any species of evidence offered before him, and cannot exclude evidence on the ground that it is not pertinent. It belongs to the court, on the return of the deposition, to determine whether the evidence is pertinent or not.[16]

The relevancy of a question and the right to have the deposition taken will be tested, if the witness refuses to answer, and an application is made to punish him for contempt.[17]

In an examination before a master, examiner, or commissioner, if the question is improper or irrelevant, the answer may be disregarded by the court, or the counsel may advise the witness not to answer until the question has been submitted to the court for determination.[18]

14 Lowrey v. Kusworm, 66 Fed. 539; *supra*, § 339.

15 Stevens v. Mo., K. & T. Ry. Co., 104 Fed. 934; Flower v. MacGinniss, C. C. A., 112 Fed. 377; Hartman v. Feenaughty, 139 Fed. 887. *Contra*, Lowrey v. Kusworm, 66 Fed. 539.

16 *Ex parte* Judson, 3 Blatchf. 89; Adee v. J. L. Mott Iron Works, 46 Fed. 39. See Thomson-Houston El. Co. v. Jeffrey Mfg. Co., 83 Fed. 614; *Re* Feltz, 205 Fed. 983.

17 *Ex parte* Peck, 3 Blatchf. 113; *Ex parte* Judson, 3 Blatchf. 89. Where the witness or the evidence is privileged, Butler v. Fayerweather, C. C. A., 91 Fed. 458; Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211; or it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material or relevant, and that it would be an abuse of the process of the court to compel its production, as for example, when it relates to matters alleged in part of a pleading, which has been previously stricken out by the court, Independent Baking Powder Co. v. Boorman, 137 Fed. 995, such a motion is denied, Independent Baking Powder Co. v. Boorman, 137 Fed. 995; Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211; *supra*, § 343; but a witness may be compelled to answer all questions, which may possibly be relevant or material, provided that he is not privileged; Perry v. Rubber Tire Wheel Co., 138 Fed. 836; Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211. If there is any doubt on the question of its relevancy, the motion to compel an answer will be granted. Independent Baking Powder Co. v. Boorman, 137 Fed. 995; Perry v. Rubber Tire Wheel Co., 138 Fed. 836; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co., 139 Fed. 843; Buckeye Powder Co. v. Hazard Powder Co., 205 Fed. 827.

18 *Re* Felts, 205 Fed. 983. Where the master certified to the court a

The statutory provisions, being in derogation of the common law, are strictly construed.[19] Consequently, before depositions thus taken can be read in evidence, the party that offers them must prove that compliance was made with all the requirements of the statutes, or else that these requirements were waived by the opposite party.[20] There is no presumption that a deposition was properly taken.[21] The certificate of the magistrate is *prima facie* evidence of such a compliance.[22] His certificate that the witness lives more than one hundred miles from the place of trial is *prima facie* evidence of that fact,[23] and when that appears by such certificate, or by testimony in the deposition, it will be presumed, without further proof, that the witness is, at the time of trial, more than one hundred miles away.[24] When the distance is great the court may take judicial notice of the fact.[25] A witness lives, within the meaning of the statute, at a place "where he can be found and is sojourning, residing or abiding for any lawful purpose."[26] It has been held that he lives at a place where he has gone for his health to remain for an uncertain time.[27] Where a witness who lives more than one hundred miles from the trial but is not otherwise disqualified is present at the place of trial and available to the party who took his deposition, his deposition cannot be read;[28] unless the depo-

question which a witness refused to answer, and the proponent failed to press the motion to compel an answer it was held that he thereby waived his right to the same. Dr. Peter H. Fahrney & Sons Co. v. Ruminer, C. C. A., 153 Fed. 735.

19 Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174.

20 Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Harris v. Wall, 7 How. 693, 12 L. ed. 875.

21 Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Banks v. Miller, 1 Cranch, C. C. 543.

22 Harris v. Wall, 7 How. 693, 12 L. ed. 875; Thorpe v. Simmons, 2 Cranch, C. C. 195.

23 Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. ed. 243; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375. 13 L. ed. 736; Tooker v. Thompson, 3 McLean, 92.

24 Texas & P. Ry. Co. v. Reagan, C. C. A., 118 Fed. 815.

25 Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723.

26 Ibid.

27 Ibid. The fact that a witness is a seaman on a gunboat stationed in harbor, but liable to be ordered to some other place, is, it seems, not sufficient to authorize the taking of his testimony *de bene esse* in this manner. The Samuel, 1 Wheat. 9, 4 L. ed. 23.

28 Vagaszki v. Consolidated Coal Co., C. C. A., 225 Fed. 913 (in which the writer was counsel).

sition was taken under a stipulation that it might be read in evidence.[29]

If the witness does not live more than one hundred miles from the place of trial the party who has taken his deposition must prove that his disability to attend still continues, and that due diligence was used in seeking to procure his attendance, before the deposition can be read in evidence.[30] The previous issue of a subpœna is not essential if proof of the inability of the witness is otherwise given.[31] If it appears that at the time when the deposition was taken the witness lived more than one hundred miles from the place of trial, the opposite party, upon whom the burden then rests, may prove that at the time of trial he lives within one hundred miles.[32] Actual residence and not domicile is the test.[33] Whether a witness resides more than one hundred miles from the place of trial is to be determined by the actual distance by usual routes.[34]

It has been held that parol evidence is inadmissible to show a sufficient reason, where the magistrate's certificate gives one that is insufficient.[35]

[29] The Colusa, C. C. A., 248 Fed. 21.

[30] Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 612, 8 L. ed. 243, 246; The Samuel, 1 Wheat. 9, 4 L. ed. 23; Weed v. Kellogg, 6 McLean, 44; Jones v. Greenolds, 1 Cranch, C. C. 339; Penn v. Ingraham, 2 Wash. C. C. 487; Baumert v. Day, 3 Wash. C. C. 343; Pettibone v. Derringer, 4 Wash. C. C. 215; Read v. Bertrand, 4 Wash. C. C. 558; Brown v. Galloway, Pet. C. C. 291.

[31] Park v. Willis, 1 Cranch, C. C. 357; Leatherberry v. Radcliffe, 5 Cranch, C. C. 550.

[32] Penn v. Ingraham, 2 Wash. C. C. 487; Brown v. Galloway, Pet. C. C. 291; Pettibone v. Derringer, 4 Wash. 215; Russell v. Ashley, Hempst. 546, 549; Weed v. Kellogg, 6 McLean, 44; Whitford v. Clark Co., 119 U. S. 522, 30 L. ed. 500; Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. ed. 243.

[33] Frost v. Barber, 173 Fed. 848.

[34] *Ex parte* Beebee, 2 Wall. Jr. 127.

[35] Wheaton v. Love, 1 Cranch, C. C. 451. But see Dunkle v. Worcester, 5 Biss. 102. It is the proper practice for the magistrate to state in his certificate that he was not of counsel for either party nor interested in the event of the cause, Gartside Coal Co. v. Maxwell, 20 Fed. 187; Donohue v. Roberts, 19 Fed. 863. But see Miller v. Young, 2 Cranch, C. C. 53; Peyton v. Veitch, 2 Cranch, C. C. 123; Stewart v. Townsend, 41 Fed. 121. It has been held that the magistrate's certificate need not state the witness was "sworn to testify the whole truth" if it states that the witness was sworn. Bussard v. Catalino, 2

No order or rule of the court is necessary in order to take depositions in this manner.[36] Although one deposition has been already taken, yet a second deposition of the same witness may be taken without an order of the court,[37] even it seems when the first deposition was taken under the State practice.[38]

§ 354a. Notice of taking deposition. Any one, even a party to the suit, may serve the notice.[1]

If the United States be a party, it seems that service of the notice should be made upon the nearest district attorney.[2] It has been held that if an attorney has been employed in a case and is still employed therein, notice should be given to him, although he has never formally appeared on the record.[3] The service of the notice, at least when made upon the party, must be personal, unless otherwise expressly authorized as provided for in the statute.[4] The notice must be served a reasonable time before the taking of the deposition.[5]

What is a reasonable time depends upon circumstances. It seems that it is not proper to serve a notice for the taking of a deposition during a term at which the cause could be tried,[6] or so short a time before as not to allow an attorney, if he attend, to reach the court before the commencement of that term.[7] Under the circumstances of one case it was held that an hour's notice was reasonable.[8] Under those of another, that four days' notice

Cranch, C. C. 421. But see Rainer v. Haynes, Hempst. 689; Garrett v. Woodward, 2 Cranch, C. C. 190. Nor, perhaps, that the witness is not a resident of the district where the case is pending. Sage v. Tauszky, 6 Cent. L. J. 7.

36 Pettibone v. Derringer, 4 Wash. 215; Buckingham v. Burgess, 3 McLean, 5 Cranch, C. C. 639.

37 Nash, tenant of Connett v. Williams, 20 Wall. 226, 22 L. ed. 254; Audiffren Refrigerating M. Co. v. General El. Co., 245 Fed. 783. See U. S. v. Tilden, Fed. Cas. No. 16,522.

38 Cook v. Flagg, 233 Fed. 713.

§ 354a. 1 Henning v. Boyle, 112 Fed. 397; Young v. Davidson, 5 Cranch, C. C. 515.

2 The Argo, 2 Gall. 314.

3 Allen v. Blunt, 2 M. & W. 121.

4 Carrington v. Stimson, 1 Curt. 437. *Contra,* Merrill v. Dawson, Hempst, 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

5 Jamieson v. Willis, 1 Cranch, C. C. 566; Renner v. Howland, 2 Cranch, C. C. 441; Barreli v. Simonton, 3 Cranch, C. C. 681; Am. Ex. Nat. Bank v. First Nat. Bank, C. C. A., 82 Fed. 961.

6 Allen v. Blunt, 2 W. & M. 121; Bell v. Nimmon, 4 McLean, 539. *Contra,* Union Pac. Ry. Co. v. Reese, C. C. A., 56 Fed. 288.

7 Bell v. Simmons, 4 McLean 539.

8 Leiper v. Bickley, 1 Cranch, C.

was not.[9] Where the magistrate's certificate showed that the time of taking the deposition was several weeks after that stated in the notice and there had been no adjournments, the deposition was suppressed.[10] If the notice state that the taking of depositions will be adjourned from day to day, it seems that depositions taken upon an adjourned day will be received.[11] A notice that a party will on the same day take depositions of witnesses in different cities is unreasonable, and such depositions will be suppressed; even, it has been held, if the opposite party appeared at each by counsel and cross-examined, provided that before the direct examination the objection was specifically stated, and although such party had served similar notices of the taking of depositions at other times and places on his own behalf.[12]

It is the rule in the Southern District of New York that where the witness is to be examined at a place remote from the forum the notice must state his name.[13] If the witnesses' Christian names are unknown, the inclusion of their surnames in the notice will be sufficient.[14] Where the parties and their attorneys lived in the place where the deposition was taken, a notice that the deposition would be taken "before William G. Peckham, Esq., Notary Public, or some other officer authorized by law to take depositions," etc., was held sufficient when the deposition was taken before another notary.[15]

The notice must show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives the party serving it a right to have the deposition taken; so that the party upon whom it is served may be able to judge whether it is necessary for him to attend.[16] It has been held that a wit-

C. 29; Bowie v. Talbot, 1 Cranch, C. C. 247; Atkinson v. Glenn, 4 Cranch, C. C. 134. But see Renner v. Howland, 2 Cranch, C. C. 441; Irving v. Sutton, 1 Cranch, C. C. 567.

9 Jones v. Illinois Cent. R. Co., 260 Fed. 488.

10 Pullman Co. v. Jordan, C. C. A., 218 Fed. 573.

11 Knode v. Williamson, 17 Wall. 586, 21 L. ed. 670; Sage v. Tauszky, 6 Cent. L. J. 7. But see Kirkpatrick v. B. & O. R. Co., 24 Pittsb. L. J. 51.

12 Uhle v. Burnham, 44 Fed. 729.

13 *Re* Automobile Cooperative Association, 222 Fed. 345.

14 Claxton v. Adams, 1 MacAr. (D. C.) 496. See Carrington v. Stimson, 1 Curt. 437.

15 Gormley v. Bunyan, 138 U. S. 623, 632, 34 L. ed. 1086, 1089.

16 Aldrich v. Nye, U. S. C. C., S.

ness is justified in refusing to be sworn because of such an omission; but should the objection be waived by all the attorneys it may be doubted whether this decision would be followed. Technical errors in the notice such as a misdescription of the district in which the case was pending [17] or even, it was held, a misnomer of the opposite party when the notice was served upon the proper attorneys; [18] when the latter were not misled thereby, do not justify a suppression of the deposition. It has been held that the court has no jurisdiction to vacate the notice; [19] nor to extend it.[20]

Under the former practice, it was customary to file in the clerk's office, the notice, or a copy thereof, with an affidavit showing proof of service thereof and proof of the pendency of the suit, and the clerk then issued a subpœna.[21] Whether this is required by the new Equity Rules has not yet been decided.[22] No notice of filing a deposition need be given to a party who knows it has been taken.[23] A State statute requiring depositions to be filed a certain number of days before trial was not followed by the Federal court.[24]

§ 354b. Proceedings upon the deposition. It has been held that a witness may be compelled to attend for the purpose of having his deposition taken *de bene esse*, either by a subpœna *duces tecum*, or the writ of *habeas corpus ad testificandum*, but that a commissioner cannot issue a writ of *habeas corpus* to take a person from a jail for the purpose of giving his deposition before such a commissioner.[1] A subpœna *duces tecum* may be

D. N. Y., Lacombe, J., Oct. 31, 1891; Harris v. Hall, 7 How. 693, 12 L. ed. 875. *Contra*, Debutts v. McCulloch, 1 Cranch, C. C. 28; Sage v. Tauszky, 6 Cent. L. J. 7.

17 Grant Bros. v. U. S. 232 U. S. 647, 662.

18 Pullman Co. v. Jordan, C. C. A., 218 Fed. 573.

19 Kline Bros. & Co. v. Liverpool & London & Globe Ins. Co., 184 Fed. 969. *Contra*, Audiffren Refrigerating Mach. Co. v. General El. Co., 245 Fed. 783.

20 Ibid.

21 Davis v. Davis, 90 Fed. 791; *Ex parte* Judson, 3 Blatchf. 89.

22 See Eq. Rules 52, 54.

23 Nelson v. Woodruff, 1 Black, 156; Leatherberry v. Radcliffe, 5 Cranch 550. The D. J. Sawyer, C. C. A., 236 Fed. 913. For practice when a deposition is destroyed, see Stebbins v. Duncan, 108 U. S. 32.

24 Walker v. Collins, 59 Fed. 70.

§ 354b. 1 *Ex parte* Peck, 3 Blatchf. 113; U. S. v. Tilden, 10 Ben. 566.

issued by the court to compel the production of books and papers in connection with such deposition.[2]

Under the former practice, a subpœna *duces tecum* could only be issued by an order of the court.[3] Whether the new Equity Rules permit such a subpœna now to be issued by the officer taking the deposition has not yet been decided.[4] A party cannot be compelled by a subpœna to produce papers or books, &c., which would not be material or competent as evidence, merely for the purpose of refreshing his memory,[5] but the production of books and papers which are material may be thus compelled;[6] even though they relate to his private business and he is not interested in the suit,[7] not, however, it has been held, by the client from an attorney, who has a lien thereupon.[8]

The rules concerning the exclusion of evidence claimed to be incompetent, irrelevant, or immaterial, are the same as those in depositions taken within the original jurisdiction.[9] A witness will be compelled to answer any question that may possibly be material, subject to his right to be protected in his constitutional privilege.[10] It has been held that after a party has examined a witness in chief under the statutory provisions and demanded an adjournment, he has no right to withdraw the proceedings, and that any party in interest may compel such witness to appear and submit to cross-examination.[11] Either party may obtain an order compelling the return of a deposition thus taken.[12] After a deposition has been taken, the court may allow its return for cross-examination, where the counsel for the party thereto entitled has not attended because of a reasonable excuse,[13] or it may allow a further cross-examination on newly-discovered

2 U. S. v. Tilden, Fed. Cas. No. 16,522; Davis v. Davis, 90 Fed. 791.

3 Daneel v. Goodyear Shoe Machinery Co., 128 Fed. 753; *supra*, § 341.

4 See Eq. Rule 52.

5 *Ex parte* Peck, 3 Blatchf. 113; U. S. v. Tilden, 10 Ben. 566.

6 Davis v. Davis, 90 Fed. 791.

7 Buckeye Powder Co. v. Hazard Powder Co., 205 Fed. 827.

8 Davis v. Davis, 90 Fed. 791.

9 *Supra*, §§ 339, 343.

10 Perry v. Rubber Tire Wheel Co., 138 Fed. 836; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co., 139 Fed. 843; *supra*.

11 *Ex parte* Barnes, 1 Sprague, 133; *Re* Rindskopf, 24 Fed. 542.

12 First Nat. Bank v. Forest, 41 Fed. 246.

13 Pennsylvania Sugar Refining Co. v. Am. Sugar Refining Co., 171 Fed. 579.

facts.[14] The court has the power to compel the opening of such a deposition before the trial upon the motion of either party against the objection of the other.[15]

It is the safer practice to have the witness sign his deposition.[16] A witness is not justified in refusing to sign his deposition because he claims that his answers are incorrect by reason of his misunderstanding of the questions.[17] His remedy is to insert before his signature and jurat a statement that upon reading the transcript he now discovers that certain of his answers, which should be separately specified, are incorrect together with the reason for the inaccuracy.[18]

An objection to the admissibility of such a deposition, upon the ground that it is not shown that the witness is beyond the reach of a subpœna at the time of the trial, must be made when it is offered in evidence, and will not be considered when interposed for the first time in the court of review.[19] An objection to an entire deposition is untenable if any part thereof is admitted in evidence.[20] It has been held that a deposition should not be suppressed because the witness refused to answer competent questions, but that the proper remedy is an order compelling the witness to answer the same.[21] Where such witness is a defendant, his answer cannot be stricken out because of such refusal.[22] Either party may offer part of the deposition, provided that it is not a fragment which cannot be understood without reference to what is omitted.[23] In such a case he adopts it as his own evidence[24] and the other party may offer what was omitted.[25] Where the taker of the deposition fails to offer it in evidence, the opposing party may offer all or a part thereof and the taker may then put in evidence the rest.[26] Where the witness is present upon the trial, and is tendered in open court by one party to

14 The Normandie, 40 Fed. 590.

15 U. S. v. Tilden, 10 Ben. 170.

16 Thorpe v. Simmons, 2 Cranch 195.

17 *Re* Samuels, C. C. A., 213 Fed. 446.

18 Ibid.

19 Columbus Ry. Co. v. Patterson, C. C. A., 143 Fed. 245.

20 Ritterbusch v. Atchison, T. & S. F. Ry. Co., 198 Fed. 46.

21 H. Scherer & Co. v. Everest, C. C. A., 168 Fed. 822.

22 Barnes v. Trees, 194 Fed. 230.

23 Crotty v. Chicago Great Western Ry. Co., C. C. A., 169 Fed. 593.

24 American Lumber & Mfg. Co. v. Berthold & Jennings Lumber Co., C. C. A., 233 Fed. 971.

25 Ibid.

26 H. Scherer & Co. v. Everest, C. C. A., 168 Fed. 822.

the other, the latter cannot read his deposition, except to impeach testimony then given by the witness orally.[27]

§ 355. Form of deposition under acts of Congress. The deposition should state, either in its body or in its caption, the name of the court where the cause is pending,[1] the title of the cause,[2] and the place where the deposition is taken.[3] If the deponent reduces the deposition to writing, the magistrate must certify that it was reduced to writing by the deponent in his presence.[4] Consent may waive objection to the person who takes

27 Texas & P. Ry. Co. v. Wilder, C. C. A., 92 Fed. 953; Texas & P. Ry. Co. v. Watson, C. C. A., 112 Fed. 402.

§ 355. 1 Van Ness v. Heineke, 2 Cranch, C. C. 259.

2 Peyton v. Veitch, 2 Cranch, C. C. 123; Smith v. Coleman, 2 Cranch, C. C. 237; Centre v. Keene, 2 Cranch, C. C. 198; Waskern v. Diamond, Hempst. 701; Allen v. Blunt, 2 W. & M. 121. But see Voce v. Lawrence, 4 McLean, 203; Buckingham v. Burgess, 3 McLean, 368; Pannill v. Eliason, 3 Cranch, C. C. 358; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

3 Pendleton v. Forbes, 1 Cranch, C. C. 507; Tooker v. Thompson, 3 McLean, 92. A slight error in the caption, such as mistake in spelling the name of a party, Van Ness v. Heineke, 2 Cranch, C. C. 259; or the omission from the title of the cause of the name of one of several plaintiffs or defendants, is not a ground of suppressing the deposition. Pannill v. Eliason, 3 Cranch, C. C. 358; Egbert v. Citizens' Ins. Co., 7 Fed. 47; Merritt v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375. See also Voce v. Lawrence, 4 McLean, 203. The heading of the notice: "United States of America, State of Illinois, County of Cook, ss. In the Circuit Court of the United States," was held not sufficiently irregular to avoid the deposition. Gormley v. Bunyan, 138 U. S. 623, 634, 34 L. ed. 1086, 1090. The omission of the name of the county from the caption is not a fatal defect. Van Ness v. Heineke, 2 Cranch, C. C. 259.

4 Edmonson v. Barrel, 2 Cranch, C. C. 228; Rainer v. Haynes, Hempst. 689; Pettibone v. Derringer, 4 Wash. 215. Before the amendment of May 13, 1900, it was held that the certificate should show that the magistrate reduced the testimony in writing himself, or that it was done by the witness in his presence. Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; U. S. v. Smith, 4 Day (Conn.) 121; Bell v. Morrison, 1 Pet. 351, 355, 7 L. ed. 174, 176; Bussard v. Catalino, 2 Cranch, C. C. 421; Donohue v. Roberts, 19 Fed. 863. *Contra*, Vasse v. Smith, 2 Cranch, C. C. 31; Van Ness v. Heineke, 2 Cranch, C. C. 259; Centre v. Keen, 2 Cranch, C. C. 198; Elliott v. Piersol, 1 Pet. 328, 335, 7 L. ed. 164, 168; Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29. But see Vasse v. Smith, 2 Cranch, C. C. 31; U. S. v. Smith, 4 Day (Conn.), 121; Marstin v. McRae, Hempst. 688; Rainer v. Haynes, Hempst. 689.

down the deposition.[5] Consent may waive an omission by the witness to sign the testimony, which was taken down in shorthand.[6]

It has been said that a witness, upon a second examination, may read over and subscribe as his second deposition, a copy of one formerly made by him in the case.[7] The objection that the magistrate does not certify that the deposition was signed by the witness in his presence, is not fatal.[8] A mistake in the name of witness in the notarial certificate will not make the deposition inadmissible, when the name is correctly stated in the caption.[9] The certificate should state whether the parties were or were not present or represented,[10] and show the reasons for which the deposition was taken.[11]

The notice need not be attached to the deposition.[12]

Except under extraordinary circumstances, copies instead of

In one case, a deposition was rejected because the magistrate certified that "the form," an evident slip of the pen for "the same," which were the words of the statute then in force, "was reduced to writing." Voce v. Lawrence, 4 McLean 203; Burton v. Simmons, 2 Cranch, C. C. 195.

5 Stewart v. Townsend, 41 Fed. 121.

6 Columbus Ry. Co. v. Patterson, C. C. A., 143 Fed. 245.

7 Samuel Bros. & Co. v. Hostetter, C. C. A., 118 Fed. 257, 258, 259.

8 Van Ness v. Heineke, 2 Cranch, C. C. 259; Centre v. Keen, 2 Cranch, C. C. 198. If the deposition bears the witness' signature and appears to have been reduced to writing by the magistrate, it is sufficient, although the certificate does not say that it was signed by the witness. Bussard v. Catalino, 2 Cranch, C. C. 421. But see Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; Donahue v. Roberts, 19 Fed. 863.

9 Columbus Ry. Co. v. Patterson, C. C. A., 143 Fed. 245.

10 Curtis v. Railway Co., 6 McLean 401.

11 Shutte v. Thompson, 15 Wall. 152, 21 L. ed. 123; Sage v. Tauszky, 6 Cent. L. J. 7; Harris v. Wall, 7 How. 693, 12 L. ed. 875; Woodward v. Hall, 2 Cranch, C. C. 235; Wheaton v. Love, 1 Cranch, C. C. 451; Jones v. Knowles, 1 Cranch, C. C. 523.

It has been held that a certificate sufficiently shows the reason for making depositions, if the caption of the deposition states when the depositions were taken, without giving the distance from the place of taking to the place of trial; where the distance is in fact, and is well known by all parties to be, more than one hundred miles from the place of trial. Egbert v. Citizens' Ins. Co. of Mo., 7 Fed. 47.

12 Stewart v. Townsend, 41 Fed. 121.

the originals of exhibits or so much thereof as is required by either party, must be annexed to the deposition.[13]

During the Great War while the United States was still at peace with Germany, depositions transmitted from Germany to the State Department and thence mailed to the court were admitted.[14] If the deposition is sent by mail, the magistrate should certify that it was retained by him until sealed up and directed to the court.[15] The certificate need not state that the deposition has been sealed, provided that it appears by the envelope that the deposition was sealed.[16] If the magistrate have an official seal under which he usually certifies his acts, it seems that this certificate should be under that seal.[17] It seems that it will be presumed that he occupies the official position which he assumes in his certificate;[18] certainly so if he be a notary public and certifies under his notarial seal;[19] and this may always be proved by oral testimony like any other material fact.[20]

The deposition may be directed to either the judge or the clerk of the court.[21] It cannot be read in evidence if intentionally opened anywhere but in court,[22] except when opened by con-

13 Dancel v. Goodyear Shoe Machinery Co., U. S. C. C., D. Mass., 1905, in which the writer was counsel. For a case where a tabulation was annexed instead of the books themselves, see Columbia Knickerbocker Trust Co. v. Abbott, C. C. A., 247 Fed. 833. See Illinois Car & Eq. Co. v. Linstroth Wagon Co., C. C. A., 112 Fed. 737; U. S. R. S., § 869.

14 Birge-Forbes Co. v. Heye, C. C. A., 248 Fed. 636.

15 Shankwiker v. Reading, 4 McLean 240; Jones v. Neale, 1 Hughes, 268. But see Stewart v. Townsend, 41 Fed. 121.

16 Egbert v. Citizens' Ins. Co. of Mo., 7 Fed. 47, 50. If the deposition is sealed up with the seal of a corporation, across which are written the name or the names of the person or persons who took the deposition, it is sufficient. *Re* Thomas, 35 Fed. 337.

17 Paul v. Lowry, 2 Cranch, C. C. 628. But see Price v. Morris, 5 McLean 4.

18 Ruggles v. Bucknor, 1 Paine, 358; Price v. Morris, 5 McLean 4; Vasse v. Smith, 2 Cranch, C. C. 31; Whitney v. Huntt, 5 Cranch, C. C. 120. But see Tooker v. Thompson, 3 McLean 92.

19 Dinsmore v. Maroney, 4 Blatchf. 416.

20 Paul v. Lowry, 2 Cranch, C. C. 628; Dunlop v. Munroe, 1 Cranch, C. C. 536.

21 Thorp v. Orr, 2 Cranch, C. C. 335; Whitney v. Huntt, 5 Cranch, C. C. 120.

22 Beale v. Thompson, 8 Cranch, 70; The Roscius, 1 Brown, Adm. 442; *Re* Thomas, 35 Fed. 337. The accidental opening in the mail of an envelope containing a deposition taken by a commission under Rule 67 does not authorize the suppres-

sent, which it will be well to have appear by writing duly signed and filed with or indorsed on the deposition.[23] Where the certificate fails to state certain material facts, by leave of the court the deposition may be withdrawn from the clerk's office, the certificate amended, and the deposition then refiled.[24]

If an attorney appear and cross-examine a witness without objection, he thereby waives any lack of notice, or irregularity in the notice,[25] or in the form and manner of the proceedings,[26] or, it seems an incompetency in the witness then known to him,[27] or any other formal defect. His presence, however, if he declines to take any part in the proceedings, does not.[28] It is the safer and the usual practice for the counsel present to note on the record all objections to the form of questions; and to the admission of an exhibit; and a failure to note such an objection might be held to be a waiver by a party who was present or represented at the examination.[29] The matter objected to should be specifically pointed out, and the grounds of the objection stated.[30]

Irregularities are waived by consent to open depositions "without prejudice to any objections to the inclosed deposition other than relating to publication and opening, which is hereby waived."[31] An objection to the failure of a witness to produce a paper to which he referred, or which was called for, can only be made by a motion to suppress the deposition.[32] In general, all defects in form[33] or to the competeney or relevancy of evi-

sion of the deposition. Eillert v. Craps, 44 Fed. 164.

23 The Roscius, 1 Brown Adm. 442.

24 Gartside Coal Co. v. Maxwell, 20 Fed. 187; Donahue v. Roberts, 19 Fed. 683; Leatherberry v. Radcliffe, 5 Cranch, C. C. 550.

25 Dinsmore v. Maroney, 4 Blatchf. 416.

26 Shutte v. Thompson, 15 Wall. 152, 21 L. ed. 123; *Re* Thomas, 35 Fed. 822.

27 U. S. v. One Case, 1 Paine 400.

28 Harris v. Wall, 7 How. 693, 12 L. ed. 875.

29 *Cf.* Equity Rule 49; S. C. Rule 13. Illinois Car & Eq. Co. v. Linstroth Wagon Co., C. C. A., 112 Fed. 737; Persons v. Beling, 116 Fed. 877.

30 Persons v. Beling, 116 Fed. 877.

31 Stewart v. Townsend, 41 Fed. 121.

32 Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; Winans v. N. Y. & E. R. Co., 21 How. 88, 16 L. ed. 68. As to the transmission and identification of exhibits, see Giles v. Paxson, 36 Fed. 882; Bird v. Halsy, 87 Fed. 671; U. S. v. Fifty Boxes, 92 Fed. 601.

33 Claxton v. Adams, 1 MacA. (D. C.) 496; Bank of Danville v. Travers, 4 Biss. 507; Brooks v. Jenkins, 3 McLean 432; Uhle v. Burnham, 44

dence[34] can only be raised by a motion to suppress the deposition, which is seasonably made before the case is called for trial,[35] and the court may, and usually will, when such a motion is granted, allow an adjournment of the hearing in order that the testimony may be taken again, provided that the objection can then be obviated.[36]

The denial of such a motion is no ground for the reversal of a judgment at common law, unless upon the trial an objection is duly made to the admission of the evidence and an exception taken.[37]

It has been held to be proper for one of the counsel for the party introducing the deposition to stand at the bar and read the questions and another to sit in the witness chair and read the answers.[38]

§ 356. Commissions issued under a dedimus potestatem. The Revised Statutes provide that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." "And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five shall not apply to any depositions to be taken under the authority of this section."[1] This statute applies to criminal prosecutions,[2] informations for forfeitures,[3] actions at law,[4] and cases in equity.[5]

Fed. 729, 730; Howard v. Stillwell, B. M. Co., 139 U. S. 199, 35 L. ed. 147; Bibb v. Allen, 149 U. S. 481, 488, 37 L. ed. 819, 822; Samuel Bros. & Co. v. Hostetter, C. C. A., 118 Fed. 257. See Dickerson v. Matheson, 50 Fed. 73, 75.

34 Ward v. Cochran, C. C. A., 71 Fed. 127.

35 Bibb v. Allen, 149 U. S. 481, 488, 37 L. ed. 819, 822.

36 Luther v. The Merritt Hunt, 1 Newb. Adm. 4; Doe d. Moore v. Nelson, 3 McLean, 383.

37 Union Pac. Ry. Co. v. Reese, C. C. A., 56 Fed. 288. *Cf.* Zych v. Am. Car & Foundry Co., 127 Fed. 723.

38 Vagaszki v. Consolidation Coal Co., C. C. A., 225 Fed. 913, in which the writer was counsel.

§ 356. 1 U. S. R. S., § 866; Jones v. Oregon C. R. Co., 3 Sawyer, 523; North American Transportation & Tr. Co. v. Howells, C. C. A., 121 Fed. 694.

2 U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. 601.

3 U. S. v. Cameron, 15 Fed. 794; U. S. v. Wilder, 14 Fed. 393.

4 Peters v. Provost, 1 Paine, 64.

5 Bischoffsheim v. Baltzer, 10 Fed. 1.

The words "common usage," when applied to a suit in equity, signify the ordinary practice of courts of equity.[6] It has been held that the usage referred to is the common usage at the time of the revision of the Statutes of the United States in 1874;[7] that it does not direct the Federal courts to adopt all subsequent laws of the States wherein they sit;[8] and where, prior to 1874, the Federal courts within a district had adopted a practice of their own, such practice may be continued;[9] that accordingly in the Southern District of New York, those courts, even when sitting at common law, are not bound by the sections of the State Code of Civil Procedure regulating the execution of commissions to take testimony in foreign countries, but may take them in accordance with the old practice in the district upon written direct and cross-interrogatories; and when the answers of the witnesses are in a foreign language, they may be translated by the commissioner or under his direction, and only the answer, as thus interpreted, be returned;[10] but that in districts where there is no settled practice the State practice should be followed.[11]

In a case of doubtful authority, the condition that a safe conduct be furnished to the plaintiff was inserted in an order for a commission to examine witnesses on the part of the defendant in a foreign country,[12] but a commission to prove documents was allowed without such a condition.[13]

Depositions may be taken under this section of the Revised Statutes, even though the witness live within one hundred miles of the court where the cause is pending;[14] or in a country with which the United States are at war.[15]

Such a commission is not granted as of course, but only upon good cause shown.[16] The application will ordinarily be denied

6 U. S. v. Parrott, 1 McAll. 447.

7 U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. 601.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.; Buddicum v. Kirk, 3 Cranch, 293, 2 L. ed. 444; Jones v. Railroad Co., 3 Sawyer, 523; s. c., Fed. Cas. No. 7,486.

12 Hollander v. Baiz, 40 Fed. 659. For a case where a commission was issued to examine an expert in a foreign country, see Holliday v. Schultzeberge, 57 Fed. 660.

13 Hollander v. Baiz, 43 Fed. 35.

14 Wellford v. Miller, 1 Cranch, C. C. 485; Russell v. M'Lellan, 3 W. & M. 157.

15 Peters v. Provost, 1 Paine, 64.

16 U. S. v. Parrott, 1 McAll. 447; Magone v. Colorado Smelting & Min. Co., 135 Fed. 846. An application for a dedimus potestatem to

when the testimony can be taken *de bene esse*, under Section 863 of the Revised Statutes.[17] The application must be made in open court, and not to a judge at chambers;[18] and must be accompanied by an affidavit showing that the testimony which the party desires to take is material.[19] It seems that the commission need not specify the exact place where the depositions are to be taken; but if it do, the commissioners should conform to it in that respect.[20] Whether a party will or will not be required before the commission is issued to name the witnesses to be examined under it, depends upon the discretion of the court, to be exercised under the circumstances of each case.[21] It has been held in equity that either party has the right to have the testimony taken orally;[22] unless, for special reasons, the court orders it to be taken upon

take testimony before trial alleged: that the action was to recover damages for the negligent death of plaintiff's father, and that plaintiffs were non-residents and minors; that the negligence alleged consisted in defendant's failure to instruct deceased regarding the dangers of his employment, he being ignorant and illiterate; that the only persons who could give information as to decedent's death, and the rules and regulations under which decedent's business was conducted at the time, were persons in defendant's employ, and that the truth of the allegations of plaintiff's complaint must necessarily be established by the testimony of defendant's servants; that defendant had refused to permit plaintiff's representatives to enter its works and examine the place of the accident, and that at the inquest over deceased's remains five eyewitnesses testified, two of whom, since the accident, had left the State; that plaintiffs were unable to ascertain their whereabouts or that of another of such eyewitnesses and that plaintiffs verily believe there is danger of losing the testimony of other important witnesses through death, disease, or accident. Held that such allegations were sufficient to entitle plaintiffs to the relief demanded under U. S. R. S., § 866 (U. S. Comp. St. 1901, p. 663), authorizing the taking of depositions of witnesses in order to prevent a failure or delay of justice. Zych v. Am. Foundry Co., 127 Fed. 723.

17 Henning v. Boyle, 112 Fed. 397.

18 Peters v. Provost, 1 Paine, 64.

19 Sutton v. Mandeville, 1 Cranch, C. C. 115; U. S. v. Parrott, 1 McAll. 447.

20 Rhoades v. Selin, 4 Wash. 715.

21 Parker v. Nixon, Baldw. 291. An order authorizing the examination of witnesses not named in the commission was granted by Mayer, J., in U. S. D. C., S. D. N. Y., February 15, 1913.

22 Bischoffsheim v. Baltzer, 10 Fed. 1; Edison El. Co. v. Westinghouse, Church, Kerr & Co., 138 Fed. 460; Encyclopaedia Britanica Co. v. Werner Co., 138 Fed. 461; Maryland Tr. Co. v. Kirby Lumber Co., 149 Fed. 443.

written interrogatories;[23] that the defendants may be permitted to cross-examine orally, although the complainants have filed interrogatories;[24] but, in that case, the complainants will be given leave to withdraw their interrogatories and to examine their witness orally.[25] In the Southern District of New York, a *dedimus potestatem* to examine witnesses in admiralty may provide for oral examination or for written interrogatories or for the application of the former method to witnesses in a party's employ and of the latter, to witnesses presumably disinterested.[26]

When testimony was taken in a remote jurisdiction—Texas, the suit pending in the Southern District of New York—it was held that the counsel for the other side might interpose their objections to the testimony and prepare their cross-interrogatories, after the direct testimony had been returned; or that, if they then elected to cross-examine orally, the witness must, on reasonable notice, be produced for such cross-examination.[27] Before the issue of the commission, the proposed interrogatories should be filed[28] and served upon the opposite party or his attorney;[29] and the latter given a reasonable time, usually fixed by the court, within which to object to them and to file cross-interrogatories.[30] If he omit to do so, the commission may be issued without further notice.[31] The interrogatories are drawn up substantially as those for the examination of witnesses within the jurisdiction of the court.[32] Objections to interrogatories or cross-interrogatories should be in the form of exceptions to them, and must be filed before the commission issues; or

23 Bischoffscheim v. Baltzer, 10 Fed. 1; Compania Azucarera Cubana v. Ingraham, Maxwell & Beals, 180 Fed. 516.

24 Edison El. Co. v. Westinghouse, Church, Kerr & Co., 138 Fed. 460; Encyclopaedia Britanica Co. v. Werner Co., 138 Fed. 461.

25 Edison El. Co. v. Westinghouse, Church, Kerr & Co., 138 Fed. 460.

26 The Titanic, 206 Fed. 500.

27 Maryland Tr. Co. v. Kirby Lumber Co., 149 Fed. 443.

28 Cunningham v. Otis, 1 Gall. 166.

29 Rhoades v. Selin, 4 Wash. 715; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

30 Frevall v. Bache, 5 Cranch, C. C. 463; The Norway, 1 Ben. 493. Leave to cross-examine orally will rarely be given. Coates v. Merrick T. C., 41 Fed. 73.

31 Cocker v. F. H. & B. Co., 1 Story, 169.

32 Rhoades v. Selin, 4 Wash. 715.

otherwise will be held waived.[33] If the parties cannot agree as to their form or substance, a reference may be ordered to a master, whose report will be reviewed by the court.[34] If there be any doubt as to the relevancy or propriety of an interrogatory, the ultimate decision thereon will be reserved until the hearing, and it will be allowed to stand and be answered. If there be no doubt as to its irrelevancy or impropriety, it will be stricken out before the commission issues.[35]

A commission must also name or designate the commissioner or commissioners.[36] A woman may be a commissioner, even though she be the wife of the witness to be examined.[37] The court may grant an order that exhibits annexed to a deposition already taken may be removed from the file and attached to a commission, provided that copies of them are left in their place.[38]

§ 357. Proceedings under a dedimus potestatem. If the application does not state when and where the commission is to be executed, the party at whose instance, or the commissioner to whom it is issued, should notify the adverse party or his solicitor before the depositions are taken.[1] The notice should name the year as well as the day.[2] When, however, a party, after notice of an opportunity to do so, has neglected to file cross-interrogatories, no further notice to him is necessary.[3] The notice should be served personally, or else left at the house of the person upon whom it is made with a member of his family of sufficient intelligence.[4] The person with whom it is left, however, need not be

33 Cocker v. F. H. & B. Co., 1 Story, 169.

34 Cocker v. F. H. & B. Co., 1 Story, 169; Bondereau v. Montgomery, 4 Wash. 186.

35 Cocker v. F. H. & B. Co., 1 Story, 169.

36 Vanstophorst v. Maryland, 2 Dall. 401, 1 L. ed. 433. A slight error in spelling the commissioner's name will not vitiate proceedings under the commission provided it clearly appears that the adverse party was not misled thereby. Bibb v. Allen, 149 U. S. 481, 488, 37 L. ed. 819, 822; Keene v. Meade, 3 Peters, 1, 6, 7 L. ed. 581, 583.

37 The Norway, 2 Ben. 121.

38 Daly v. Maguire, 6 Blatchf. 137.

§ 357. 1 Rhoades v. Selin, 4 Wash. 715; Knode v. Williamson, 17 Wall. 586; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736; Dunlop v. Monroe, 1 Cranch, C. C. 536. See *infra*, § 353a.

2 Knode v. Williamson, 17 Wall. 586, 13 L. ed. 736.

3 Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

4 Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

informed of its purport.[5] Service by mail, unless actually received in time, is insufficient.[6] An hour's notice of the time of taking a deposition in the place where the attorney to whom it is given dwells, has been held sufficient.[7]

The regulation of the proceedings under a commission is a matter in the discretion of the court issuing it.[8] A commissioner is appointed by and represents the court; and is no more the representative of the party nominating him, than is an arbitrator.[9] The authority given to a commissioner is special, and must be strictly construed.[10] A commission issued to more than one commissioner must be executed and returned by all of them,[11] unless it is otherwise so provided in it;[12] and if any one else, except a judge in a foreign country whose laws do not permit a private individual to take testimony alone,[13] join in its execution or return, the testimony taken under it will also be suppressed.[14]

A commission must be executed at the time and place named in it, or in the notice.[15]

When the deposition was taken by written interrogatories it has been held that the witnesses under such a commission should be examined alone; and the parties are not allowed to be present either in person or by attorney, unless the court otherwise directs.[16] The interrogatories may be shown the witness before he

5 M'Call v. Towers, 1 Cranch, C. C. 41.

6 Walker v. Parker, 5 Cranch, C. C. 639.

7 Nicholls v. White, 1 Cranch, C. C. 59.

8 Cunningham v. Otis, 1 Gall. 166.

9 Jones v. Oregon C. R. Co., 3 Saw. 523; Gilpins v. Consequa, Pet. C. C. 85; Guppy v. Brown, 4 Dall. 410, 1 L. ed. 887.

10 Guppy v. Brown, 4 Dall. 410, 1 L. ed. 887; Armstrong v. Brown, 1 Wash. 43; Boudereau v. Montgomery, 4 Wash. 186.

11 Guppy v. Brown, 4 Dall. 410, 1 L. ed. 887; Armstrong v. Brown, 1 Wash. 43; Munns v. Dupont, 3 Wash. C. C. 31.

12 The Griffin, 4 Blatchf. 203; Lonsdale v. Brown, 3 Wash. 404.

13 Winthrop v. Union Ins. Co., 2 Wash. 7.

14 Willings v. Consequa, Pet. C. C. 301; Barnet v. Day, 3 Wash. 243.

15 Rhoades v. Selin, 4 Wash. 715; Boudereau v. Montgomery, 4 Wash. 186; Knode v. Williamson, 17 Wall. 586, 21 L. ed. 670; Buddicum v. Kirk, 3 Cranch, 293, 2 L. ed. 444. As to waiver, see Gartside Coal Co. v. Maxwell, 20 Fed. 187.

16 Cunningham v. Otis, 1 Gall. 166. But see Knode v. Williamson, 17 Wall. 586, 21 L. ed. 670; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

is called upon to give his testimony.[17] He must be examined as to such interrogatory and cross-interrogatory; and if he improperly omits to answer any one of them; or if any one of them, an answer to which would be legal evidence, is not put to him, his whole deposition may be suppressed at the instance of the party who might be thereby injured.[18] If, however, the depositions have been issued *ex parte*, the adverse party having omitted to file cross-interrogatories after an opportunity to do so has been given him, it has been said that as many, or as few, of these interrogatories as the party who filed them thinks proper may be put, provided that the general interrogatory is not omitted.[19] If the cross-interrogatories are put, it makes no difference how soon after the direct interrogatories have been answered the witness is called upon to answer them.[20] No additional interrogatories, however, can be filed with or put by, or before, the commissioner.[21]

Under extraordinary circumstances the examination of a witness not named in the commission might be permitted.[22]

The deposition may be taken down in writing either by the magistrate or by the deponent in the presence of the magistrate:[23] but not by the counsel for either of the parties.[24] If exhibits are referred to by the witness, they should be annexed to the deposition or identified by marks or reference.[25] A paper referred to by a witness, but which is neither in his own power nor in that of the party making the objection, need not, however,

17 North Carolina R. Co. v. Drew, 3 Woods, 691.

18 Ketland v. Bissett, 1 Wash. 144; Nelson v. U. S., Pet. C. C. 235; Winthrop v. Union Ins. Co., 2 Wash. 7; Bell v. Davidson, 3 Wash. C. C. 328; Richardson v. Golden, 3 Wash. C. C. 109; Dodge v. Israel, 4 Wash. 323; Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184. But see Gass v. Stinson, 3 Sumn. 98.

19 Merrill v. Dawson, Hempst. 563, s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

20 Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184.

21 Cunningham v. Otis, 1 Gall. 166; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

22 The Infanta, Abbott's Adm. 263. See § 356, *supra*.

23 Stockwell v. U. S., 3 Cliff. 284; Keene v. Meade, 3 Pet. 1, 7 L. ed. 581; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51.

24 U. S. v. Pings, 4 Fed. 714. But see Nicholls v. White, 1 Cranch, C. C. 59; Atkinson v. Glenn, 4 Cranch, C. C. 134.

25 Dodge v. Israel, 4 Wash. 323.

be included in the deposition or thus identified.[26] The better practice ordinarily seems to be to annex copies of the exhibits to the deposition.[27] It has been held that the deposition need not be signed by the witness.[28] A deposition prepared and signed some time before the oath is administered is improper and will be suppressed.[29] The depositions should be attached to the commission, and, with them, a certificate by all the commissioners that they have complied with the statutory requirements above described. The commission should then be sent or delivered to the clerk's office of the court unopened, and must there remain so till publication is allowed by order or consent.[30] The fact that it was forwarded through the embassy mail-bag first to Washington, and thence to the clerk, does not invalidate the proceedings.[31] The return, or certificate, of the commissioners should state that they were sworn, unless that ceremony has been waived, or they are officers qualified to administer an oath.[32] The return should also state the time and place of taking the depositions;[33] that each witness was sworn or affirmed, but not that he was cautioned; nor need it state the form of the oath.[34] The return need not state in whose handwriting the depositions were taken down;[35] nor, if the witness was an alien, whether or not he was examined by means of an interpreter;[36] nor that it was subscribed by a sworn interpreter, when it states that the interpreter was sworn and every page is subscribed by a signature purport-

26 Winans v. New York & Erie R. Co., 21 How. 88, 16 L. ed. 68.

27 U. S. R. S., § 869; quoted *supra*, § 342.

28 Ketland v. Bissett, 1 Wash. 144.

29 Dodge v. Israel, 4 Wash. 323; North Carolina R. Co. v. Drew, 3 Woods, 691.

30 Boudereau v. Montgomery, 4 Wash. 186; Frevall v. Bach, 5 Cranch, C. C. 463; U. S. v. Price, 2 Wash. 356.

31 U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. 601. See Birge-Forbes Co. v. Heye, C. C. A., 248 Fed. 636; *supra*, § 355.

32 Frevall v. Bach, 5 Cranch, C. C. 463; Hoyt v. Hammekin, 14 How. 346, 14 L. ed. 449. But see Gilpins v. Consequa, Pet., C. C. 85; s. c., 4 Wash. 184.

33 Rhoades v. Selin, 4 Wash. 715; Boudereau v. Montgomery, 4 Wash. 186.

34 Jones v. Oregon C. R. Co., 3 Saw. 523; Keene v. Meade, 3 Pet. 1, 7 L. ed. 581; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51.

35 Keene v. Meade, 3 Pet. 1, 7 L. ed. 581; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51; Jones v. Oregon C. R. Co., 3 Saw. 523.

36 Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184.

ing to be that of the interpreter;[37] nor, it has been held, need the answers, when an interpreter was used, be transmitted in the foreign language of the witness as well as in the translation.[38] The certificate will be presumptive evidence of the facts therein stated in relation to the execution of the commission.[39]

Subpœnas for the witnesses are issued by the clerk of a court of the United States in the district where the commission is executed.[40] Subpœnas *duces tecum* can only be issued by the order of a judge of such a court.[41] Otherwise, proceedings under these commissions should conform substantially to those under commissions to examine witnesses within the jurisdiction of the court.[42] Any objection to the form or manner of the proceedings can only be raised by a motion to suppress the deposition,[43] which should be seasonably made before the case is called for trial;[44] provided that sufficient time within which to make such a motion remains between the return of the commission and the hearing.[45] Should a foreign plaintiff refuse to testify before a commission when required so to do, the court may deny him relief in the suit.[46]

§ 358. Letters rogatory. When the witnesses whose testimony is desired are in a country whose laws do not permit of the execution of a commission issued from a foreign court, their testimony can only be taken by means of letters rogatory. "This

37 U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. 601, 603, 604.

38 Ibid.

39 Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736; Bouderean v. Montgomery, 4 Wash. 186; Winter v. Simonton, 3 Cranch, C. C. 104.

40 U. S. R. S., § 868, quoted *supra*, § 342.

41 U. S. R. S., § 868, quoted *supra*, § 342. See Daneel v. Goodyear Shoe Machinery Co., 128 Fed. 753.

42 Jones v. Oregon C. R. Co., 3 Saw. 523; U. S. v. Parrott, 1 McAll, 447. See § 352.

43 Blackburn v. Crawfords, 3 Wall. 175; Winans v. New York & Erie R. Co., 21 How. 88, 16 L. ed. 68; Doane v. Glenn, 21 Wall. 33, 22 L. ed. 476; York Co. v. Central R. Co., 3 Wall. 107, 18 L. ed. 170; Walker v. Parker, 5 Cranch, C. C. 639.

44 Bibb v. Allen, 149 U. S. 481, 488, 37 L. ed. 819, 822. See Dickerson v. Matheson, 50 Fed. 73, 75; *supra*, § 355.

45 Sergeant v. Biddle, 4 Wheat. 508, 4 L. ed. 627; Mechanics' Bank v. Seton, 1 Pet. 299; 7 L. ed. 152; Buddieum v. Kirk, 3 Cranch, 293, 2 L. ed. 444; Alsop v. Com. Ins. Co., 1 Sumn. 451.

46 Heath v. Erie R. Co., 9 Blatchf. 316.

method of obtaining testimony from witnesses in a foreign country has always been familiar in the Courts of Admiralty; but it is also deemed to be within the inherent powers of all courts of justice. For, by the Law of Nations, courts of Justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the Court before which the action is pending, may send to the Court within whose jurisdiction the witness resides, a writ, either patent or close, usually called a letter rogatory, or a commission *sub mutuae vicissitudinis obtentu, ac in juris subsidium,* from those words contained in it. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause the depositions to be taken, in due course of law, for the furtherance of justice; with an offer, on the part of the tribunal making the request, to do the like for the other in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties, on each side, to which the answers of the witnesses are desired. The commission is executed by the judge who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated," or duly authenticated copies of the same, "are returned with the commission to the Court from which it issued.

The Court of Chancery has always freely exercised this power, by a commission, either directed to foreign magistrates, by their official designation, or more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt by consent, where any doubt exists as to its inherent authority."[1] A special application for an order for letters rogatory may be made to the court, and will be granted in the first instance without issuing a commission, upon satisfactory proof that the au-

§ 358. [1] Greenleaf's Ev., § 320. See for a good form, Nelson v. U. S., 1 Pet. C. C. 236, note. See also Cunningham v. Otis, 1 Gall. 166; Hall's Adm. Pr., part 2, tit. 19, vol. 1, *cum add.*, and tit. 27, *cum add.*, pp. 37, 38, 55, 60; Clerke's Praxis, tit. 27; 1 Roll. Abr. 530, pl. 15; Oughton's Ordo Judiciorum, vol. 1, pp. 150, 152, tit. 95, 96; Wharton's Int. Law Dig., vol. III, § 413.

thorities abroad will not allow the testimony to be taken in any other manner.[2]

"When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have any interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission so executed and certified by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same."[3] The statutes further provide for the taking of testimony under a commission or in pursuance of letters rogatory issued from a court in a foreign country, with which the United States are at peace, to take the testimony of a witness residing within the United States, in any suit for the recovery of money or property depending in such foreign court in which the government of such foreign country is a party or has an interest, as follows:—

"The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of

[2] Hoffman's Ch. Pr. 482; Daniell's Ch. Pr. (3d Am. ed. by Judge Perkins), vol. II, p. 953; Gason v. Wordsworth, 2 Ves. Sen. 336; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Gross v. Palmer, 105 Fed. 833.

[3] U. S. R. S., § 875.

any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, Then when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons."[4] It has been held that criminal proceedings,[5] and "proceedings relating to the investigation as to the smuggling of some cases of cotton,"[6] do not come within this statute.

"No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign State."[7]

"If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued in accordance with section forty hundred and seventy-one, or, if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the District Court of the United States."[8]

"Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the District Courts of the United States."[9]

4 U. S. R. S., § 4071.

5 Matter of the Spanish Consul, 1 Ben. 225.

6 *Re* Letters Rogatory, 36 Fed. 306.

7 U. S. R. S., § 4072.

8 U. S. R. S., § 4073.

9 U. S. R. S., § 4074.

"When letters rogatory are addressed from any court of a foreign country to any Circuit Court of the United States, a commissioner of such Circuit Court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts."[10] The court refused to comply with a judicial request in a letter rogatory requesting service of process from a court of a foreign country upon a resident of the United States.[11]

§ 359. Testimony taken in the manner prescribed by the State law. The act of March 9, 1892, provides "that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held."[1]

Before this statute it was held that no form of examination or deposition unknown to the common law and not authorized by a Federal statute, even though—as the examination of a party before trial,[2] or the filing of interrogatories with a complaint[3]—authorized by a statute of the State where the court is held,[4] would be followed by a Federal court in either an action at common law or a suit in equity;[5] and that an order of a State court directing such an examination was avoided by the removal of the case.[6] In the Second Circuit it was held that an order could be granted for the examination of a party to an action at common law, in accordance with the State statute, to enable the opposite party to frame his pleading.[7] In the Eighth Circuit it

10 U. S. R. S., § 875, as amended by 19 St. at L. 241 (U. S. R. S., 1 Supp. 266).

11 Letters Rogatory Out of First Civil Court of City of Mexico, 261 Fed. 652.

§ 359. 1 27 St. at L. 7; Henning v. Boyle, 112 Fed. 397; see Cook v. Flagg, 233 Fed. 713.

2 *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117. But see Bryant v. Leyland, 6 Fed. 125; Lowrey v. Kusworm, 66 Fed. 539.

3 Tabor v. Indianopolis Journal Newspaper Co., 66 Fed. 423.

4 U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. 601.

5 *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117.

6 *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117.

7 Anderson v. Mackay, 46 Fed.

was held that the defendant could not be compelled to answer interrogatories attached to the plaintiff's common-law petition in accordance with the State practice.[8] It has been said that the statute merely provides an additional method of taking testimony, and does not confer any additional rights.[9] The statute relates only to the manner of taking depositions, and it does not authorize them to be taken in any cases not specified in the Revised Statutes of the United States.[10] It does not authorize an examination of a party before trial for the use of his testimony at the trial under the State practice either orally,[11] or upon written interrogatories,[12] or before issue joined.[13] It does not prevent the taking of depositions for use upon motions, when that practice is authorized by a rule of the Federal court.[14] Under this statute, a *dedimus potestatem* to take testimony in Cuba, by oral examination, was granted in accordance with the statutes of Connecticut.[15] When the State practice requires an application to the court, it may be denied if the practice in taking a deposition under the Revised Statutes of the United States [16] would be simpler and granted when the State practice would save expense.[17]

In the absence of a statute, State or Federal, a court of the United States has no power to order a plaintiff in an action for

105. But see Marvin v. C. Aultman & Co., 46 Fed. 338.

8 Pierce v. Union Pac. Ry. Co., 47 Fed. 709.

9 Nat. Cash Reg. Co. v. Leland, C. C. A., 94 Fed. 502; s. c., 77 Fed. 242.

10 Hanks Dental Ass'n v. International Tooth-Crown Co., 194 U. S. 303, 308, 48 L. ed. 989, 991.

11 Hanks Dental Ass'n v. International Tooth-Crown Co., 194 U. S. 303, 308, 48 L. ed. 989, 991; Nat. Cash-Register Co. v. Leland, C. C. A., 94 Fed. 502; s. c., 77 Fed. 242. *Cf.* Calivada Colonization Co. v. Hayes, 119 Fed. 202.

12 Hanks Dental Ass'n v. International Tooth-Crown Co., 194 U. S. 303, 48 L. ed. 989; Smith v. International Mercantile Co., 154 Fed. 786.

13 Shellebarger v. Oliver, 64 Fed. 306; Texas & Pac. Ry. Co. v. Wilder C. C. A., 92 Fed. 953; Despeaux v. Pennsylvania R. Co., 81 Fed. 897. But see Anderson v. McKay, 46 Fed. 105 *supra.*

14 Importers' & Traders' Nat. Bank v. Lyons, 134 Fed. 510.

15 Compania Azucarora Cubana v. Ingraham, Maxwell & Beals, 180 Fed. 516.

16 Henning v. Boyle, 112 Fed. 397. (Application for a commission to take a deposition orally.)

17 Cook v. Flagg, 233 Fed. 713. (Application for a commission to take testimony upon written interrogatories.)

personal injuries to submit to a physical examination in advance of the trial,[18] but a State statute authorizing such an examination is constitutional and will be followed.[19] It has been held that the State practice as to the inspection of documents will not be followed.[20]

[18] Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734; Braee v. Central R. Co. of N. J., 216 Fed. 718.

[19] Camden & S. Ry. Co. v. Stetson, 177 U. S. 172, 44 L. ed. 721. *Cf.* Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 38 L. ed. 398; Lyon v. Manhattan Ry. Co., 142 N. Y. 298, 25 L.R.A. 402; McGovern v. Hope, 63 N. J. Law, 76, 42 Atl. 830.

[20] Lucker v. Phœnix Assur. Co., 67 Fed. 18; Schatz v. Winton Motor Carriage Co., 197 Fed. 777. *Contra*, Victor G. Bloede Co. v. Joseph Baneroft & Sons Co., 98 Fed. 175; Filscole v. Lancaster, 70 Fed. 337; Gray v. Schneider, 119 Fed. 474.

CHAPTER XXII.

DISMISSAL OF BILLS BEFORE A HEARING.

§ 360. Dismissal of bills before a hearing. In general. Bills may be dismissed before a hearing upon a motion of the plaintiff, when he wishes to abandon the suit; upon the motion of the defendant for want of prosecution, for failure to perfect or revive the suit, for want of jurisdiction over the person of the defendant, for want of jurisdiction of the Federal court, and for failure to show a ground for relief in equity or at common law.

§ 361. Dismissal of bills by the plaintiff. The plaintiff may dismiss his bill without costs at any time before the defendant's appearance.[1] He may obtain the order for the dismissal as of course upon motion or petition, usually by the latter;[2] but if the dismissal is a violation of an agreement between him and the defendant, the order granting it may be subsequently vacated.[3] After appearance and before a decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared;[4] but not, if they or any of them would be injured thereby.[5]

§ 361. [1] Quoted with approval by Newman, J., *Re* Wellhouse, 113 Fed. 962; Thompson v. Thompson, 7 Beav. 350.

[2] Daniell's Ch. Pr. (5th Am. ed.) 790, 791.

[3] Betts v. Barton, 3 Jur. (N. S.) 154.

[4] Chicago & A. R. Co. v. Union R. M. Co., 109 U. S. 702, 27 L. ed. 1081; Conn. & P. R. Co. v. Hendee, 27 Fed. 678; Penn Phonograph Co. v. Columbia Phonograph Co., C. C. A., 132 Fed. 808; Morton Tr. Co. v. Keith, 150 Fed. 606; Thomson-Houston El. Co. v. Holland, 160 Fed. 768; Tower v. Stimpson, 175 Fed. 130.

[5] This whole sentence was quoted with approval by Newman, J., *Re* Wellhouse, 113 Fed. 962, and the text was quoted with approval by Hanford, J., in Hershberger v. Blewett, 55 Fed. 170; Cooper v. Lewis, 2 Phil. 178; Ainslie v. Sims, 17 Beav. 174; Booth v. Leycester, 1 Keen, 247; Bank of S. C. v. Rose, 1 Rich. Eq. (S. C.) 292; Stevens v. The Railroads, 4 Fed. 97. See W. U. Tel. Co. v. Am. Bell Tel. Co., 50 Fed. 662.

Ordinarily the only terms imposed are the payment of costs,[6] but under extraordinary circumstances leave may be granted upon other terms,[7] as for example, that the complainant stipulate to allow defendant's evidence to be used in any subsequent suit.[8] The payment of costs is always required unless the complainant has sued as a pauper.[9] Under extraordinary circumstances when extensive depositions have been taken, the complainant was obliged to pay not only the taxable costs but incidental expenses including counsel fees.[10] The prospect of future litigation regarding the same subject matter is not, according to the practice which usually prevails in equity a reason for depriving the plaintiff of the right to dismiss.[11]

Leave to dismiss may be refused where the defendant claims affirmative relief by cross-bill,[12] or by counter-claim, or other-

6 Ibid. Young v. J. Samuels & Bro., 232 Fed. 784.

7 Am. Z. Co. v. Celluloid Mfg. Co., 32 Fed. 809; Am. Steel & Wire Co. v. Mayer & Englund Co., 123 Fed. 204.

8 Ibid.

9 Carlisle v. Smith, 224 Fed. 221.

10 A. G. Staude Mfg. Co. v. Labombarde, 229 Fed. 1005.

11 Orr v. Cocoa-Cola Co., C. C. A., 247 Fed. 452; Cowham v. McNider, 261 Fed. 714. Rule VIII of the United States District Court, S. D. N. Y., provides: "If justice requires the court after issue joined may refuse to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice is the vexation and expense of a possible second suit upon the same cause of action." Under this rule where a complainant has obtained a favorable adjudication on its patent in one district which entitled it as of course to a preliminary injunction in a suit pending in another district the court should refuse permission to dismiss without prejudice the bill in the second suit. Individual Drinking Cup Co. v. Union News Co., C. C. A., 250 Fed. 625. But see Orr v. Coca-Cola Co., C. C. A., 9th Ct., 247, 441, 452.

12 Electrical Acc. Co. v. Brush El. Co., 44 Fed. 602; C. & A. R. Co. v. Rolling M. Co., 109 U. S. 702, 27 L. ed. 1081; City of Detroit v. Detroit City Ry. Co., 55 Fed. 569. Where a cross-bill prayed discovery only and not affirmative relief, it did not prevent the dismissal. Houghton v. Whitin Mach. Works, 160 Fed. 227. The same rule was applied when the cross-bill sought affirmative relief against a co-defendant and not against the complainants. Gilmore v. Bort, 134 Fed. 658. Leave to dismiss an original bill was granted without prejudice to relief under the cross-bill. Harding v. Corn Products Refining Co., C. C. A., 168 Fed. 658. Pendency of a motion by defendant for leave to file an amended answer praying affirmative relief did not

wise.[13] For example, where the bill was filed to enforce a false claim to property or an instrument, which the evidence showed had been obtained by fraud; in which case the defendant without filing a cross-bill would be entitled if successful to a decree declaring the plaintiff's claim unfounded, and enjoining him from again settling it up;[14] or where the bill was filed to set aside a patent on the ground of interference, when the defendant may obtain affirmative relief by answer.[15] The court will take notice of fractions of a day in determining whether a cross-bill was filed before the filing of a motion to dismiss the original bill.[16] Leave has been refused when the defendant by the dismissal would have lost the benefit of an adjudication made in the previous proceedings in the suit,[17] or of a verdict [18] or finding by a master or referee [19] made in the previous proceedings in the suit, or of a failure of the complaint to take testimony, after a replication, within the time required by the former rules which were then in force.[20] The reversal of the judgment of ejectment for plaintiff on the ground that he had brought two previous actions and was not entitled to bring a third did not prevent the court from permitting him to dismiss his bill.[21] In a patent case, the court refused to permit the plaintiff to dismiss his bill without prejudice, after the proofs had been taken and a preliminary injunction obtained.[22]

cause a denial of the motion for voluntary dismissal. Cowham v. McNider, 261 Fed. 714.

13 Stevens v. The Railroads, 4 Fed. 97; Hat Sweat Mfg. Co. v. Waring, 46 Fed. 87; Pyrene Mfg. Co. v. Castle, 240 Fed. 841 (where the counterclaim was less than the jurisdictional amount).

14 Stevens v. The Railroads, 4 Fed. 97; Hat S. Mfg. Co. v. Waring, 46 Fed. 87; *supra*, § 197.

15 Electrical Acc. Co. v. Brush El. Co., 44 Fed. 602; *supra*, § 197.

16 Tower v. Stimpson, 175 Fed. 130.

17 Hershberger v. Blewett, 55 Fed. 170, 172; Daniell's Ch. Pr. (5th ed.) 793; Am. Bell Tel. Co. v. W. U. Tel. Co., C. C. A., 69 Fed. 666. But see W. U. Tel. Co. v. Am. Bell T. Co., 50 Fed. 662.

18 Ebner v. Zimmerly, C. C. A., 118 Fed. 818.

19 Am. Bell Tel. Co. v. W. U. Tel. Co., C. C. A., 69 Fed. 666, (where no report had been signed but the draft of the master's findings had been submitted to counsel;) Smith v. Carlisle, C. C. A., 228 Fed. 666, reversing 224 Fed. 231.

20 Schmeiser Mfg. Co. v. Blanchard, 192 Fed. 362.

21 Southern Cotton Oil Co. v. Shelton, C. C. A., 223 Fed. 770.

22 Georgia Pine Turpentine Co. v. Bilfinger, 129 Fed. 131.

An executor or other person, who has filed a bill in a representative capacity in good faith with reasonable grounds for so doing, may be excused payment of costs.[23]

The motion for such an order should be upon notice.[24] The same practice is followed when a plaintiff sues in behalf of himself and others, provided that no one has previously joined with him as co-plaintiff,[25] unless, perhaps, others have contributed to the expenses of the suit and wish it continued.[26]

It has been said that an individual plaintiff in an action on the bond of a government contractor should not be permitted to discontinue so as to prevent relief to other creditors when it was not shown that there was no intervenor ready to proceed.[27]

Complainant does not lose this right because his motion was made after the removal of his suit from a State to a Federal court and another stockholder has since then instituted, in the former jurisdiction, a suit which is not removable.[28] After other members of his class have joined as co-plaintiffs in the suit, the plaintiff cannot dismiss the bill without their consent.[29] A stockholder of a corporation, who has intervened in a creditors' suit, cannot, however, make such an objection.[30]

The majority of the stockholders in a corporation cannot usually have a suit discontinued against the wishes of its directors.[31]

After a decree or decretal order, whether parol or interlocutory, the plaintiff may not discontinue without the consent of all parties who have acquired rights by the decree, including creditors who have filed their claims pursuant to a direction in the same,[32] and bondholders represented by the plaintiff as

23 Arnoux v. Steinbrenner, 1 Paige (N. Y.) 82.

24 Am. Z. Co. v. Celluloid Mfg. Co., 32 Fed. 809; Gregory v. Pike, C. C. A., 67 Fed. 837; Hirshfield v. Fitzgerald, 157 N. Y. 166.

25 Hanford v. Storie, 2 Sim. & S. 196; Armstrong v. Storer, 9 Beav. 277.

26 *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355; Miller v. Liggett & M. T. Co., 7 Fed. 91.

27 Merchants' Nat. Bank v. U. S., C. C. A., 214 Fed. 200, 206.

28 Harding v. Corn Products Refining Co., C. C. A., 168 Fed. 658.

29 Belmont N. Co. v. Columbia I. & S. Co., 46 Fed. 336.

30 Shaffer v. McCulloch, C. C. A., 192 Fed. 801.

31 Railway Co. v. Alling, 99 U. S. 463, 25 L. ed. 438.

32 Guilbert v. Hawles, 1 Ch. Cas. 40; Carrington v. Holly, 1 Dick. 280; Hershberger v. Blewett, 55 Fed. 170; Gregory v. Pike, C. C. A., 67 Fed. 837; Garner v. Second Nat. Bank, 67 Fed. 833.

trustee.[33]

The usual course pursued by one in whose name without his consent a bill has been filed, is to move, on notice to the solicitor who appeared for him and to any other parties who have appeared, to have it taken off the file.[34] Upon this being done, he may recover from the solicitor who filed the bill, his costs,[35] as well as any costs he may have been compelled to pay a defendant.[36] Where the plaintiff had made an agreement of settlement without the consent of his attorneys, who opposed the same, it was held that the suit could not be dismissed until the matter had been set up by a cross-bill.[37] It has been held that an agreement to dismiss a suit is waived by answering on the merits an amended bill thereafter filed.[38]

Plaintiff cannot, it seems, dismiss a part only of his bill. The proper course is for him to amend by omitting it.[39]

When there is more than one plaintiff, one of them may by special leave of the court have the bill dismissed with costs so far as concerns himself, provided that no injury will thereby result to any other party.[40] If there are several defendants, a plaintiff may obtain an order dismissing his bill as to some of them, provided that no injury will be thereby done the rest.[41]

A dismissal at the plaintiff's request before a hearing is usually without prejudice,[42] unless evidence has been taken and the cause set down for a hearing, when it should be granted only by a decree dismissing the bill upon the merits.[43] The entry of

33 Johnson v. Miller, 96 Fed. 271.

34 Central Tr. Co. v. U. S. Flour Milling Co., 113 Fed. 587.

35 Palmer v. Walesby, L. R. 3 Ch. App. 732; Titterwan v. Osborne, 1 Dick. 350; Hood v. Phillips, 6 Beav. 176.

36 Palmer v. Walesby, L. R. 3 Ch. App. 732; Wright v. Castle, 3 Meriv. 12.

37 Snyder v. DeForest Wireless Telegraph Co. (D. Maine), 154 Fed. 142. *Contra*, Snyder v. DeForest Wireless Telegraph Co., E. D. Mo. 1907. In both cases the author was counsel.

38 McFadden v. Heisen, C. C. A., 150 Fed. 568.

39 Camden & Amboy R. Co. v. Stewart, 4 C. E. Green (N. J.) 69. But see Lyster v. Stickney, 12 Fed. 609; Barber v. Reo Motor Car Sales Co., 245 Fed. 939.

40 Holkirk v. Holkirk, 4 Madd. 50; Winthrop v. Murray, 7 Hare, 150.

41 Baily v. Lambert, 5 Hare 178.

42 Daniell's Ch. Pr. (5th Am. ed.) 793. But see Stevens v. The Railroads, 4 Fed. 97.

43 Rumbry v. Stainton, 24 Ala. 712; Rochester v. Lee, 1 Macn. &

an order of discontinuance upon consent of both parties amounts in effect to a dismissal of the bill.[44] The dismissal of a bill or of part of a bill does not authorize the removal of the paper from the clerk's office unless the order so directs; and such a direction will rarely be given.[45] Otherwise, the paper remains a part of the record, and may be used as evidence of any admission therein contained.[46]

An order dismissing a bill may be set aside.[47] An order denying a motion to dismiss a bill as to a party is appealable.[48]

§ 362. Dismissal of bills for want of prosecution or for failure to perfect or revive the suit. If the plaintiff unreasonably neglects to proceed in a suit it may be dismissed for want of prosecution. This was done: when he failed to take proofs within the times prescribed by the rules after the issues were joined;[1] where after an auditor had been appointed plaintiff failed to proceed for fifteen years;[2] and where plaintiff failed to take out a subpoena for two years after the bill was filed.[3]

The Equity Rules provide, that if a case is continued by consent beyond the term, it shall be dropped from the trial calendar, subject to reinstatement within one year upon the application to the court by either party. "If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."[4] The refusal of the plaintiff and of the State court to recognize a removal is no defense to such motion to dismiss for want of prosecution in the Federal court,[5] although the court might, in its discretion, consider this, if made in good faith, as a ground for allowing further time. A failure to take out subpoenas for two years after a bill was filed, has been held to justify a dismissal of the bill.[6]

G. 467. See Stevens v. The Railroads, 4 Fed. 97.

44 Pictet A. I. Co. v. N. Y. I. M. Co., 12 Fed. 816.

45 Lyster v Stickney, 12 Fed. 609, 610.

46 Ibid.

47 Gregory v. Pike, C. C. A., 67 Fed. 837.

48 Brush El. Co. v. California El. L. Co., C. C. A., 51 Fed. 557; s. c., 52 Fed. 945.

§ 362. 1 Vrooman v. Burdick, C. C. A., 222 Fed. 900.

2 Bernays v. Frederic Leyland & Co., 228 Fed. 913.

3 Houston v. City and County of San Francisco, 47 Fed. 337; Bancroft v. Sawin, 143 Mass. 144.

4 Eq. Rule 57, quoted in full, § 369, *infra*.

5 McMullen v. Northern Pac. R. Co., 57 Fed. 16.

6 Houston v. City and County of

A bill may be dismissed for the failure of the complainant, within a reasonable time, to serve indispensable defendants, whom he has named in its introduction or title,[7] but it is the usual practice to make the order conditional upon his not bringing them in within a number of days therein specified.[8]

Where a master had filed a report in favor of the complainant it was held that the bill should not be dismissed for want of prosecution until after the court had passed upon the defendant's exceptions.[9]

The right to dismiss for want of prosecution is waived by a subsequent proceeding in the case by the other side such as a consent to an order of reference[10] or a consent to adjourn the case after a docket entry of dismissal had been made.[11] The pendency of other litigation involving a doubtful question of law involved is a sufficient excuse for the delay.[12] So in one case was the misunderstanding of the practice by the plaintiff whose counsel had died.[13]

By the former practice, when a suit had abated or become otherwise defective before a decree, the party or parties against whom it could be continued might, upon notice served upon the person or persons entitled to revive or supply the defect in the same, move for and obtain an order, directing that these revive or supply the defect, within a certain limited time to be fixed by the court, or that else the bill be dismissed.[14] If the suit abated by the death of one of several co-plaintiffs, the order might be obtained against the survivors; and it seems that the objection that there was no personal representative of the deceased plaintiff did not prevent the court from granting such an order.[15] It was irregular in such cases to move to dismiss

San Francisco, 47 Fed. 337; Bancroft v. Sawin, 143 Mass. 144.

7 Herndon v. Ridgway, 17 How. 424, 15 L. ed. 100.

8 Rogers v. Penobscot Min. Co., C. C. A., 154 Fed. 606; Buck v. Felder, 208 Fed. 474.

9 Henry v. Harris, C. C. A., 201 Fed. 872.

10 Lackner v. McKechney, C. C. A., 252 Fed. 403.

11 U. S. v. Sixty-five Cases of Glove Leather, 254 Fed. 211.

12 Kryptok Co. v. Haussman & Co., 216 Fed. 267.

13 Craven v. Clark, 247 Fed. 622.

14 Adamson v. Hall, 1 T. & R. 258; Bolton v. Bolton, 2 S. & S. 371. See *supra*, §§ 216-221.

15 Hinde v. Morton, 2 H. & M. 368.

a bill for want of prosecution; and an order to that effect, if obtained, would be discharged for irregularity.[16]

A bill might be dismissed at a defendant's motion for the plaintiff's failure to serve with process another defendant named in the bill who was a necessary party to the suit.[17] Upon the death of a defendant, whom the pleadings showed to be an indispensable party, when it was impossible to bring in his executors, the suit would be dismissed.[18]

The equity rules now provide that in the event of the death of either party if the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.[19] Under this rule a motion to dismiss for want of prosecution can be made.[20]

§ 363. Dismissal for want of jurisdiction. The Judicial Code provides: "If, in any suit commenced in a District Court or removed from a State court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."[1] The court should do this of its own motion, as soon as it dis-

16 Robinson v. Norton, 10 Beav. 484; Boddy v. Kent, 1 Meriv. 361; Sellers v. Dawson, 2 Dick. 738; Dillard's Adm'r v. Central Va. Iron Co., 125 Fed. 157, quoting text with approval.

17 Picquet v. Swan, 5 Mason, 561; Jessup v. Illinois Central R. Co., 56 Fed. 735.

18 Lawrence v. Southern Pac. Co., 177 Fed. 547.

19 Eq. Rule 45.

20 Spring v. Webb, 227 Fed. 481.

§ 363. 1 Jud. Code, § 37, 36 St. at L. 1087, re-enacting in substance Act of March 3, 1875, ch. 137, § 5 (18 St. at L. 472).

covers its want of jurisdiction or the improper or collusive joinder.[2] The Supreme Court has said that such an act is salutary, and that it is the duty of the courts to exercise their power under it in all proper cases.[3] Neither party has the right, however, without pleading a denial within the time allowed for that purpose, to introduce evidence to contradict averments of the jurisdictional facts;[4] but if the defect appears upon the plaintiff's pleading or the evidence, the objection may be taken at any time[5] even after a trial upon the merits.[6]

And if from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.[7] In such a case the party that sought the jurisdiction of the Federal court should have an opportunity to be heard on the motion, and to meet it by appropriate evidence.[8] Objection can be raised by motion,[9] which, where it is charged

2 Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; Consolidated Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756; McEldowney v. Card, 193 Fed. 475; Sclarenco v. Chicago Bonding Co., 236 Fed. 592; Bucyrus Co. v. MacArthur, 219 Fed. 266; Cerri v. Akron People's Tel. Co., 219 Fed. 285; Houck v. Bank of Brinkley, C. C. A., 242 Fed. 881; Columbus Ry. Power & Light Co. v. City of Columbus, 253 Fed. 499, 509; N. Y. Life Ins. Co. v. Johnson, C. C. A., 255 Fed. 958.

3 Williams v. Nottawa, 104 U. S. 209, 212, 26 L. ed. 719, 720.

4 Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725; Davies v. Lathrop, 13 Fed. 565; Cuthbert v. Galloway, 35 Fed. 466; Deputron v. Young, 134 U. S. 241, 33 L. ed. 923. A refusal by the court upon the trial to allow the defendant to file a plea on the question of the plaintiff's citizenship was held not to be reviewable upon a writ of error. Mexican C. Ry. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699.

5 Phoenix-Buttes Gold Min. Co. v. Winstead, 226 Fed. 855; Hastings v. Hoog, 234 Fed. 103.

6 Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986.

7 Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690; Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary, 73. When jurisdiction does not depend upon diversity of citizenship the court cannot of its own action inquire into the incorporation of the complainant when the defendant has waived that point. Kardo Co. v. Adams, C. C. A., 231 Fed. 950.

8 Hartog v. Memory, 116 U. S. 588, 590-592, 29 L. ed. 725, 726, 727; Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729.

9 Ladew v. Tennessee Copper Co.,

that there was collusion in the making and alignment of the parties, must specify the parties as to whom the collusion is charged.[10]

A question of fact thereupon arising may be submitted to a jury.[11] But it has been held that neither party has a constitutional right to a jury trial.[12]

Except under extraordinary circumstances, the question should not be tried upon affidavits,[13] but affidavits may be used to supplement the statements in the pleadings upon such a motion.[14]

A judge cannot thus dismiss or remand a case upon his personal conviction, although it amounts to a moral certainty; the collusion or lack of jurisdiction must be legally proved, and appear upon the record.[15] Expressions in the opinion of the

179 Fed. 245; Lewis Blind Stitch Co. v. Abetter Felling Mach. Co., 181 Fed. 974; Am. Sheet & Tin Plate Co. v. Winzeler, 227 Fed. 321.

10 Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79.

11 Gilbert v. David, 235 U. S. 561. But see Kever v. Phila. & Reading Coal & Iron Co., 234 Fed. 814, 816.

12 Ibid.

13 Kilgore v. Norman, 119 Fed. 1006. See Put-in-Bay Water Works, &c., Co. v. Ryan, 181 U. S. 409, 415, 45 L. ed. 927, 930; s. c., Industrial, &c., Co. v. El. Supply Co., C. C. A., 58 Fed. 732, 744; s. c., C. C. A., 84 Fed. 740.

14 Federal Wall Paper Co. v. Kempner, 244 Fed. 240.

15 Barry v. Edmunds, 116 U. S. 550, 559, 29 L. ed. 729, 732; Deputron v. Young, 134 U. S. 241, 252, 33 L. ed. 923, 929. Where a plaintiff had acquired the causes of action which he sought to enforce, solely for the purpose of collection in the Federal courts under an agreement to pay back a certain proportion of the net proceeds to his assignors, who could not have sued therein, it was held that the suit should be dismissed. Farmington v. Pillsbury, 114 U. S. 138, 29 L. ed. 114; Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; Bernards Tp. v. Stebbins, 109 U. S. 341, 27 L. ed. 956; New Providence v. Halsey, 117 U. S. 336, 29 L. ed. 904; Little v. Giles, 118 U. S. 596, 30 L. ed. 269; Woodside v. Beckham, 216 U. S. 117, 54 L. ed. 408; Norton v. European & N. A. Ry. Co., 32 Fed. 865; Board of Com'rs of Lake County v. Schradsky, C. C. A., 97 Fed. 1, 38 C. C. A. 17; Edwards v. Bates County, 117 Fed. 526; Turnbull v. Ross, C. C. A., 141 Fed. 649. But see Lipsmeier v. Vehslage, 29 Fed. 175; Cole v. Phila. & E. Ry. Co., 140 Fed. 944; William H. Perry Co. v. Klosters Aktie Bolag, C. C. A., 152 Fed. 967. Jurisdiction does not depend upon motive; and when there has been an actual transfer, the jurisdiction is not defeated, although it appears that the property was given to complainant to enable him to sue in the Federal court. *Re* Cleland, 218 U. S. 120, 54 L. ed. 962; O'Neil v. Wolcott Min. Co., C. C. A., 174 Fed. 527. Where land worth at least $1,800 was conveyed by a citizen of the State to an alien

Circuit Court of Appeals that the court below had no jurisdiction, do not necessarily make it appear to the satisfaction of the District Court that such was the case, nor compel a dismissal when the mandate does not so direct.[16]

If the case is dismissed for this reason, the Supreme Court of the United States may review the decision upon the facts, as well as upon the law.[17] If the jurisdiction appears upon the record, and the District Court refuses to dismiss or remand the case under this clause of the statute, the Supreme Court will ordinarily refuse to review its decision,[18] but it may do so,[19] although not, it has been said, by mandamus.[20]

A determination that the defendants did not act jointly, when joint conduct by them is charged in good faith in the complaint,

laborer without means, who agreed to pay $600 for the same, paid only $10 in cash, and gave a mortgage for the balance, it was held that the facts did not show a simulated transfer nor justify a dismissal of the bill. Woodside v. Ciceroni, C. C. A., 93 Fed. 1. Where persons largely interested in a Pennsylvania corporation, in order to procure the appointment of a receiver by a court of the United States, caused certain bonds and stock of little value to be assigned to a citizen of New Jersey, a stenographer in the office of one of the attorneys for the corporation, for no other consideration than the signature of the bill; it was held that the case should be dismissed as collusive and fraudulent, although the assignment was absolute. Kreider v. Cole, C. C. A., 149 Fed. 647. It was held that a suit should be dismissed for collusion when the trustee of a mortgage sued to protect a right asserted by the mortgagor, who was in possession and not in default. Williams v. City Bank & Tr. Co., C. C. A., 186 Fed. 419. See §§ 41, 119, *supra*. For the reversal of a judgment of dismissal because the evidence did not prove that the value of the matter in dispute was below the jurisdictional amount, see Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682. *Cf.* Blackburn v. Portland Gold Mine Co., 175 U. S. 571, 44 L. ed. 276; Howe v. Howe & Owen Ball Bearing Co., C. C. A., 154 Fed. 820. Before the Act of 1875, it was held that a defendant, between whom and the complainant the requisite difference of citizenship existed, could not raise an objection on account of the citizenship of another defendant. Harrison v. Uramm, 1 Story, 64; Pond v. Vt. Valley R. Co., 12 Blatchf. 280.

16 Put-in-Bay Water Works, etc., Co. v. Ryan, 181 U. S. 409, 431, 45 L. ed. 927, 937; Hartford Fire Ins. Co. v. Erie R. Co., 172 Fed. 899.

17 Smithers v. Smith, 204 U. S. 632, 51 L. ed. 651; Gilbert v. David, 235 U. S. 561.

18 Put-in-Bay Water Works, etc. Co. v. Ryan, 181 U. S. 409, 431, 45 L. ed. 927, 937.

19 Little v. Giles, 118 U. S. 596, 30 L. ed. 269.

20 *Re* Cleland, 218 U. S. 120, 54 L. ed. 962.

is a decision of the merits, not of the jurisdictional facts, and does not justify such a dismissal.[21] Where an alias summons had been quashed, and the Federal Court had no power to issue process that would subject the defendant to its jurisdiction; the case was remanded.[22]

It has been said: "The court will not concern itself with the fact, if it exists, that the parties to the cause have agreed to submit their alleged controversy to this court; if there is nothing in substance to support the theory of collusion, other than that, the fact is of no consequence. Provided a real controversy between the parties exists, and the same elements of jurisdiction obtain as if the action were forced upon the defendant by the plaintiff, the court will not inquire into the reason why the parties to the cause entered into an agreement, if they did, to bring their action in this court in any form."[23]

It has been held that there is a controversy in the case, and that the suit is not collusive, when instituted to procure the appointment of a receiver and an administration of its assets by two creditors without judgments or securities, at the request of the defendant.[24]

The conveyance of all the property of a partnership to a corporation, organized for the purpose by the partners, and the division between them of its capital stock, a small part only of which consisted of lands in controversy in an action subsequently brought by the corporation in a Federal court: was held not to be such a transfer as to defeat the court of jurisdiction.[25]

Where substantially all the property of the corporation was involved in the litigation, it was held that the transaction was a fraud upon the court, and jurisdiction was not sustained.[26]

In a patent suit the triviality of the infringement combined with the fact that defendant had desisted from the acts complained of as soon as its attention was called to it and a stipula-

21 Smithers v. Smith, 204 U. S. 632, 633, 51 L. ed. 656.

22 Stowe v. Santa Fe Pac. R. Co., 117 Fed. 368.

23 Stevens v. Ohio State Tel. Co., 240 Fed. 759, 765.

24 *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403. See Bowdoin College v. Merritt, 63 Fed. 213.

25 Slaughter v. Mallet Land & Cattle Co., C. C. A., 141 Fed. 282. See *supra*, § 45

26 Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 140 L. ed. 444.

tion as to the facts were held to be insufficient to establish that the case was collusive.[27]

The appointment of an alien administrator of a citizen of the United States with no acquaintance with the decedent or his family and no interest in the estate was held to be evidence of such collusion as to justify a dismissal.[28]

When a case was brought in good faith but the controversy was subsequently settled and the suit is continued in order to obtain an adjudication, it should be dismissed for collusion.[29]

If there is no collusion and an original defect in the jurisdiction has been cured,[30] or the jurisdiction appears upon the record,[31] before the objection is raised; the suit may be retained. It has been said that, where the want of jurisdiction does not appear on the record, the court may exercise its discretion on determining whether it will permit the issues of fact to be tried at a late stage of the case.[32] It has been held that where the difference of citizenship is averred in the plaintiff's pleading, and denied by defendant, the burden of proof is upon the defendant.[33]

If the record does not know affirmatively that the court has jurisdiction, the case may be dismissed at any time by motion before issue joined,[34] or thereafter at the close of plaintiff's

27 Globe Knitting Works v. Segal, 239 Fed. 322.

28 Cerri v. Akron-People's Tel. Co., 219 Fed. 285.

29 Southern Pac. Co. v. Eshelman, 227 Fed. 928. See *infra*, § 705.

30 Pacific R. Co. v. Ketchum, 101 U. S. 289, 299, 25 L. ed. 932, 936.

31 Mahoning Valley Ry. Co. v. O'Hara, C. C. A., 196 Fed. 945.

32 Briggs v. Traders' Co., 145 Fed. 254. But see Pennsylvania Co. v. Bay, 138 Fed. 203.

33 Adams v. Shirk, 117 Fed. 801; Kilgore v. Norman, 119 Fed. 1006; Federal Wall Paper Co. v. Kempner, 244 Fed. 240. See Fentress Coal & Coke Co. v. Elmore, C. C. A., 240 Fed. 328. The defendant is not bound to convince the court of its lack of jurisdiction to a legal certainty. Simpson v. Phillipsdale Paper Mill Co., 223 Fed. 661.

34 Bicycle S. Co. v. Gordon, 57 Fed. 529; La Vega v. Lapsley, 1 Woods 428; Municipal Inv. Co. v. Gardiner, 62 Fed. 954. But see Fuller v. Metropolitan L. Ins. Co., 31 Fed. 696. "Such an objection ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest." Deputron v. Young, 134 U. S. 241, 251, 33 L. ed. 923, 928. The fact that if the suit is dismissed the cause of action will be barred by the Statute of Limitations is no ground for denying the motion. Gilbert v. David, 235 U. S. 561. It has been held that upon a motion to dismiss, leave

proofs;[35] after as well as before judgment; and the objection may be taken for the first time in the appellate court.[36] An appellate court will rarely direct the dismissal of a case for collusion; but will ordinarily direct a trial of that question by the court below.[37] When, after all the pleadings are filed in a suit which is brought in or removal to a Federal court on the claim that it is a case arising under the Constitution and laws of the United States, it appears that the averments upon which the jurisdiction is claimed are immaterial, it is the duty of the court to dismiss or remand the cause.[38] Where there was a misjoinder of causes of action cognizable only at law with others cognizable only in equity and if separated, the aggregate of neither part equalled the jurisdictional amount, the court of its own motion dismissed the bill.[39] To justify a dismissal under this statute, the court must be satisfied that the object was to create a case cognizable in the Federal Court.[40]

Where a collusive transfer of the cause of action was evidently made for another purpose, it was held that the jurisdiction should be retained.[41] Admissions by the defendant after a suit is brought cannot be reducing the matter in dispute divest the

to amend may be given where it does not affirmatively appear that the court has no jurisdiction. Home Ins. Co. of N. Y. v. Nobles, 63 Fed. 641.

35 Streat v. American Rubber Co., 115 Fed. 634.

36 Grace v. Am. C. Ins. Co., 109 U. S. 278, 27 L. ed. 93; Bors v. Preston, 111 U. S. 252, 28 L. ed. 419; Mansfield, C. & L. M. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462.

37 Ashley v. Supervisors of Presque Isle County, C. C. A., 60 Fed. 55.

38 Robinson v. Anderson, 121 U. S. 522, 30 L. ed. 1021; McCaim v. Des Moines, 174 U. S. 168, 43 L. ed. 946; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764; Minnesota v. No. Securities Co., 194 U. S. 48, 65, 48 L. ed. 870; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 288, 46 L. ed. 910, 914; *supra*, § 24. But see Peoples' Sav. Bank v. Layman, 134 Fed. 635; where, there being two questions involved, one Federal and the other not, it was held that the decision of the Federal question adversely to the complainant did not deprive the court of jurisdiction to decide in its favor upon the other ground.

39 Bucyrus Co. v. M'Arthur 219 Fed. 266; Shrauger & Johnson v. Phillip Bernard Co., 247 Fed. 547, 549.

40 Lanier v. Nash, 121 U. S. 404, 410, 30 L. ed. 949; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878.

41 Lanier v. Nash, 121 U. S. 404, 30 L. ed. 947.

court of jurisdiction.[42] If the question of jurisdiction is doubtful, the decision thereupon may be reserved until the final hearing.[43] The dismissal should be without prejudice.[44]

§ 364. Motions to dismiss because the complaint shows no cause of action. Demurrers have been abolished.[1] Objections which formerly were raised by demurrer "shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court."[2] "If the defendant move to dismiss the bill or any part thereof, the motion may be set down for him by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered."[3] This new method of procedure is borrowed from the English chancery orders.[4] The former decisions upon demurrers, as well as the English cases upon motions to dismiss, will, to a large extent, be followed, except in so far as they relate to technical questions. Under the equity rule that, if at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side

42 Fuller v. Met. L. Ins. Co., 37 Fed. 163. See Chicago C. Co. v. Fogg, 53 Fed. 72, and *supra*, § 22.

43 York County Sav. Bank v. Albot, 131 Fed. 980.

44 Thompson v. Railroad Co., 6 Wall. 134, 18 L. ed. 765; Kendig v. Dean, 97 U. S. 423, 24 L. ed. 1061; Van Noddon v. Morton, 99 U. S. 378, 25 L. ed. 453; Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719. A New York court said that, in such a case, the case resembled one in which an arbitrator duly chosen had refused to act and pass upon the claims of the parties. Dunlevie v. Spangenbery, 66 Misc. (N. Y.) 364.

§ 364. 1 Eq. Rule 29.

2 Eq. Rule 29. Under the former practice, the prevailing opinion was that a motion to dismiss a bill for want of equity could not be made before the hearing. La Vega v. Lapsley, 1 Woods 428; Betts v. Lewis, 19 How. 72, 15 L. ed. 576; Fuller v. Met. L. Ins. Co., 31 Fed. 696. But see Person v. Fidelity Cas. Co., 84 Fed. 759. *Cf.* Willis v. Willis, 42 W. Va. 522; s. c., 26 S. E. R. 515; Carlsbad v. Tibbetts, 51 Fed. 852; State v. Hemingway, 69 Miss. 491; Reilly v. Reilly, 139 Ill. 180; Russell v. Lamb, 82 Iowa, 558; Am. Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn., 181 Fed. 375; Hardinge Conical Mill Co. v. Abbe Engineering Co., 182 Fed. 848; Fay v. Hill, C. C. A., 249 Fed. 415.

3 Eq. Rule 29, Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294. See *supra*, §§ 171, 172.

4 See Odgers on Pleading *passim*.

and be there proceeded with, with only such alterations in the pleadings as shall be essential,[5] and the statute [6] authorizing the amendment of pleadings so as to obviate the objection that the suit was brought in equity when it should have been at law; a motion to dismiss the bill because the complainant has an adequate remedy at law should not be granted.[7] It has been said that a bill cannot be dismissed on motion unless for misjoinder, nonjoinder or insufficiency of facts to constitute a cause of action.[8] The rule contemplates that the motion be made before answer but the court may entertain it at any time.[9]

Upon such a motion no facts can be considered except those which appear on the face of the bill including the exhibits to which the bill refers,[10] neither allegations in the defendant's answer,[11] nor affidavits submitted by him;[12] nor, denials by another defendant;[13] nor even records of the court which show another suit pending for the same relief,[14] or that a person not joined is an indispensable party;[15] although if such a defect appear upon the face of the bill, the motion will be granted,[16] except admissions made by the complainant in answer to interrogatories in the suit,[17] and records produced at the request of complainant [18] which it has been held will have the same effect as if set forth in his pleading. When the motion is to dismiss

5 Equity Rule 22. Brown v. Kossove, C. C. A., 255 Fed. 806.

6 Act March 3, 1915, ch. 90, 38 St. at L. 951.

7 Collins v. Bradley Co., 227 Fed. 199.

8 Tilden v. Barber, 227 Fed. 1010.

9 Krouse v. Brevard Tannin Co., C. C. A., 249 Fed. 538.

10 Crown Feature Film Co. v. Bettis Amusement Co., 206 Fed. 362; Bogert v. Southern Pac. Co., 211 Fed. 776; Adler Goldman Commission Co. v. Williams, 211 Fed. 530; Scattergood v. American Pipe & Construction Co., 247 Fed. 712; Old Dominion Trust Co. v. First Nat. Bank of Oxford, 252 Fed. 712.

11 Adler Goldman Commission Co. v. Williams, 211 Fed. 530; Bogert v. Southern Pac. Co., 211 Fed. 776; Krouse v. Brevard Tannin Co., C. C. A., 249 Fed. 538.

12 Crown Feature Film Co. v. Bettis Amusement Co., 206 Fed. 362.

13 Boyd v. New York & H. R. Co., 220 Fed. 174.

14 Adler Goldman Commission Co. v. Williams, 211 Fed. 531.

15 Bogert v. Southern Pac. Co., 211 Fed. 776.

16 Hyams v. Old Dominion Co., 204 Fed. 681.

17 Bronk v. Charles H. Scott Co., C. C. A., 211 Fed. 338. But see Buffalo Specialty Co. v. Van Cleef, C. C. A., 227 Fed. 391.

18 Whitaker v. Whitaker Iron Co., 238 Fed. 983; A. G. Wineman & Sons v. Reeves, C. C. A., 245 Fed. 254.

the whole bill and any part of the bill is good, the whole motion may be denied.[19] It has been said that a legal proposition which affects less than the whole case made by a bill should not be decided in advance of the final hearing, unless such decision will add to, or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting other points in the litigation.[20]

The fact that a judge has granted leave to file a bill is persuasive but not controlling upon a motion to dismiss. It has been held that an order dismissing a bill with leave to amend when not appealed from is res adjudicata of the insufficiency of the original bill in subsequent proceedings.[21]

Upon such a motion after answer, the admissions or other affirmative allegations in the answer may be used by the complainant to cover a weakness in his bill.[22] In a suit for the infringement of a trade-mark or a trade-name or for unfair competition, there will be no presumption that the articles sold and manufactured by the plaintiff are patented, in the absence of an allegation in his bill to that effect.[23]

Where the question is doubtful and it is probable that the facts elicited upon the trial will make it more easy of decision, the motion may be denied.[24] Where in a bill of equity there was a misjoinder of several complainants each stating a separate cause of action at common law, the suit was not dismissed, but each complainant was permitted to file a separate pleading at law.[25] But where the plaintiff sued to enforce the statutory liability of six stockholders it was said that the court did not err in dismissing the suit instead of transferring it to the com-

19 General Inv. Co. v. Lake Shore & M. S. Ry. Co., C. C. A., 250 Fed. 160, 172.

20 Boyd v. N. Y. & H. R. Co., 220 Fed. 174.

21 Presidio Min. Co. v. Overton, C. C. A., 261 Fed. 933.

22 Boyd v. N. Y. & H. R. Co., 220 Fed. 174.

23 Russell v. Shippen Bros. Lumber Co., 224 Fed. 254.

24 Watson v. Hunting, C. C. A., 215 Fed. 472; Alexander v. Fidelity Trust Co., C. C. A., 214 Fed. 495; Armstrong Cork Co. v. Ringwalt Linoleum Works, C. C. A., 240 Fed. 1022; Ralston Steel Car Co. v. National Dump Car Co., 222 Fed. 590; Collins v. Bradley Co., 227 Fed. 199; Wright v. Barnard, 233 Fed. 329; United States v. Bergner & Engel Brewing Co., 260 Fed. 764.

25 Wright v. Barnard, 233 Fed. 329.

mon law side of the court where it would have been necessary to transform it into six separate actions.[26]

§ 365. Demurrers under the former practice. A demurrer was a pleading which admitted the truth of a bill, but claimed that the defendant should be excused from answering thereto and the complainant be denied relief on account of some irregularity or insufficiency existing in it. As the name denotes, demurrers were borrowed from the common law.[1] They are so termed because the defendant *demoratur*, or will go no farther.[2] It has been said that a demurrer must not be addressed to a point within the discretion of the court; and if so, that it will be overruled.[3] A demurrer might be to the whole, or to a part of a bill,[4] or to both the whole and separate parts of a bill.[5] Separate demurrers might be filed for different causes to separate parts of a bill.[6] If only a part of the bill were demurred to, the demurrer had to be accompanied by a plea or answer to what remains.[7]

§ 366. Admissions by a motion to dismiss. A motion to dismiss [1] like a demurrer [2] admits the truth of the allegations of fact in the bill. "As a matter of construction of an ambiguous clause, the court is bound to adopt that interpretation which is least favorable to the plaintiff; but the defendant is not entitled to press this principle so far as to draw any inferences of fact he pleases which may happen to be not inconsistent with the averments of the bill." [3] It has been said that "reasonable

26 Clinton Mining & Mineral Co. v. Cochran, C. C. A., 247 Fed. 449.

§ 365. 1 Langdell's Eq. Pl., §§ 53, 92.

2 Daniell's Ch. Pr. (5th Am. ed.), 543; 3 Bl. Com. 314.

3 Verplank v. Caines, 1 J. Ch. (N. Y.) 57.

4 Equity Rule 32.

5 Int. T. C. Lumber Co. v. Marner, 44 Fed. 621.

6 North v. Earl of Strafford, 3 P. Wms. 148; Roberdeau v. Rous, 1 Atk. 544; Daniell's Ch. Pr. (5th Am. ed.) 584.

7 See Story's Eq. Pl., § 442; Daniell's Ch. Pr. (5th Am. ed.) 583.

§ 366. 1 Detroit United Railway v. City of Detroit, 248 U. S. 420; Fordham v. Hicks, 224 Fed. 810; Lowenthal v. Georgia Coast & P. R. Co., 233 Fed. 1010; Puder v. Agler, 242 Fed. 95; Forbes v. Wilson, 243 Fed. 266; First Nat. Bank v. Durr, 246 Fed. 163.

2 Bailey v. Birkenhead, L. & C. J. Ry. Co., 12 Beav. 433, 443; Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504; Boyer v. Boyer, 113 U. S. 689, 701, 28 L. ed. 1089, 1092.

3 Sir Page Wood, V. C., in Simpson v. Fogo, 1 J. & H. 18, 23; s. c.,

presumptions are admitted by demurrer as well as the matters expressly alleged."[4] The court will not infer from an allegation that a fraud was committed at a time beyond the limit of the Statute of Limitations that the fraud was then discovered.[5] "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."[6] The preponderance of authority holds: That where *profert* is made of a recorder paper, it is for all purposes presented to the court as a part of the pleading, and an objection to the same may be taken by demurrer.[7]

6 Jurist (N.S.) 949. See Union Pac. R. Co. v. Mercer, 28 Fed. 9.

[4] Clifford, J., in Amory v. Lawrence, 3 Clifford, 523, 526.

[5] Sheldon v. Keokuk N. L. P. Co., 8 Fed. 769, 777; Johnson v. Powers, 13 Fed. 315; Jones v. Slawson, 33 Fed. 632, 636.

[6] Field, J., in Dillon v. Barnard, 21 Wall. 430, 437, 438, 22 L. ed. 673, 676, 677. See also s. c., 1 Holmes 386; U. S. v. Ames, 99 U. S. 35, 45, 25 L. ed. 295, 300; Cornell v. Green, 43 Fed. 105, 107; Interstate L. Co. v. Maxwell L. Co., 139 U. S. 569, 35 L. ed. 278; Willard v. Davis, 122 Fed. 363. Where deeds and other written instruments were set out in a pleading from which a certain inference as to their legal effect might plausibly be drawn, but it was alleged as a fact that a reason existed for their execution which would justify a different inference as to their legal effect, it was said that it could not be held on demurrer, that the former inference should and the latter should not, be drawn, but proof must be adduced to show the actual facts which determine the proper effect of the instruments. Smith v. Glasgow Ins. Co., C. C. A., 74 Fed. 332.

[7] Bogart v. Hinds, 25 Fed. 484; Knott v. Burleson, 2 G. Greene (Iowa) 600; Wilder v. McCormick, 2 Blatchf. 31, 35; Grahame v. Cooke, 1 Cranch, C. C. 116; Douglass v. Rathbone, 5 Hill (N. Y.) 143; Rantin v. Robertson, 2 Strobh. Law (S. C.) 366; 1 Chitty's Pl. 415, 416. So held of patents and reissued patents, in International T. C. L. Co. v. Maurer, 44 Fed. 618, 619; Enterprise Mfg. Co. v. Snow, 67 Fed. 335; U. S. Credit S. Co. v. Am. Credit Co., 53 Fed.

§ 366a. Effect of conclusions of law upon motions to dismiss. A demurrer did not admit conclusions of law; and in the construction of the bill upon the argument they might be disregarded.[1] Such, for example, are allegations that a State statute is unconstitutional and a direct burden on interstate commerce and an impairment of the usefulness of the complainant's facilities for that purpose;[2] that orders by the interstate commerce commission were beyond its powers and as to the effect of the same upon the carriers subject thereto;[3] that a certain combination and agreement is a conspiracy or a monopoly;[4] that a tax is "unreasonable and excessive," without the statement of any valid reasons for so considering it;[5] that a fee charged by an ordinance styling it wharfage "is not real wharfage, but a duty on tonnage."[6] That a statutory sale was not sufficiently advertised.[7] That certain property is held in trust.[8] "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another they have no more effect than other words of unpleasant signification."[9] The words "fraudulently," "deceitfully,"

818; Germain v. Wilgus, 67 Fed. 597; Heaton P. B. F. Co. v. Schlochtermeyer, 69 Fed. 592; Edison v. Am. Mutoscope & B. Co., 127 Fed. 361; Hogan v. Westmoreland Specialty Co., 145 Fed. 199. But see Indurated F. Ind. Co. v. Grace, 52 Fed. 124, 128; *supra*, §§ 144, 147. In Ulman v. Jaeger, 67 Fed. 980, 982, held that exhibits filed with a bill are upon a demurrer to be read as part of the bill. *Contra*, held under Code practice in Penrose v. Pac. Mut. L. I. Co., 66 Fed. 253. See Kesher v. Lyon, 40 W. Va. 161, 20 S. E. 933.

§ 366a. [1] Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922; *supra*, § 137.

[2] Southern Ry. Co. v. King, 217 U. S. 524, 54 L. ed. 868.

[3] Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 104, 204, 205, 56 L. ed. 729, 733, 734.

[4] Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945, 955.

[5] Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169.

[6] Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584.

[7] Strauss v. Foxworth, 231 U. S. 162.

[8] Alexander v. Fidelity Tr. Co., 215 Fed. 791.

[9] Waite, C. J., in Ambler v. Choteau, 107 U. S. 586, 591, 27 L.

and "by mistake" are conclusions of law, and will be disregarded.[10] Averments that what was done was "colorable," "a fraud," "a breach of trust," and "a scheme by which Blair and Taylor were to get" certain stock or shares of stock in a corporation "without paying for them," are allegations of conclusions of law, which a demurrer did not admit.[11] An allegation, that defendant received certain property, in trust, is a conclusion of law.[12] An allegation, that plaintiff is a preferred stockholder, without stating the facts concerning the contract under which the stock was issued, is a conclusion of law.[13] The following averment was held to be an allegation of fact, which was admitted by a demurrer, and not to be a conclusion of law: "The business of the complainants is founded almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment emanating from the sources aforesaid."[14] When the value of the matter in dispute is not liquidated by law, a statement as to the same was admitted by a demurrer.[15] An averment that a thing was done with the intent to defraud is an allegation of fact.[16] An allegation as to the future effect of an act threatened by the defendant was held to be admitted by a demurrer.[17] An aver-

ed. 322, 324. For allegations held sufficient, see Pac. R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498.

10 Magniac v. Thompson, 2 Wall. Jr. 209; *supra*, §§ 136, 137.

11 Fogg v. Blair, 139 U. S. 118, 127, 35 L. ed. 104, 107.

12 Young v. Mercantile Trust Co., 140 Fed. 61.

13 Hackett v. Northern Pac. Ry. Co., 140 Fed. 717.

14 Am. School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 103, 47 L. ed. 90, 94.

15 Texas & Pac. Ry. v. Kuteman, C. C. A., 54 Fed. 547; Louisville & N. R. Co. v. Smith, C. C. A., 128 Fed. 1; *supra*, § 6.

16 Platt v. Mead, 9 Fed. 91.

17 St. Louis v. Knapp Co., 104 U. S. 658, 26 L. ed. 883. In Hutton v. Joseph Bancroft & Sons, 83 Fed. 17, it was held that a bare allegation that certain matters "will be" done was insufficient.

ment that the injury would be irreparable is not.[18] It has been held: that an allegation as to the law of a foreign country is admitted by a demurrer.[19] In a suit for the infringement of certain trademarks; it was held, that the objection that they were invalid, because consisting of geographical names, could not be considered upon demurrer.[20]

§ 366b. Effect upon a motion to dismiss of facts of which the court takes judicial notice. A motion to dismiss will not admit a false allegation concerning a fact of which the court will take judicial notice.[1] Thus, a demurrer does not admit the allegation that a town is in a certain county in the district, when in fact it is in another county of which the court can take judicial notice.[2] Upon such a motion to a bill against the infringement of a patent the court may take judicial notice of facts within the common knowledge of persons ordinarily well informed; and it may refresh its recollection upon the subject by a reference to books published before the application, which show that the patent is void for lack of novelty, utility or patentability.[3] But it will not apply any special knowledge which the judge may possess,[4] nor investigate the prior state of the art,[5] nor even, it has been said, examine other patents men-

18 Indian Land & Tr. Co. v. Shoenfelt, C. C. A., 135 Fed. 484.

19 Ligeois v. McCracken, 10 Fed. 664; XX Harvard Law Review, 74. *Contra*, Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 113 Am. St. Rep. 863.

20 Jewish Colonization Ass'n v. Solomon, 125 Fed. 994.

§ 366b. 1 Taylor v. Barclay, 2 Simons, 213. *Cf.* Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 252, 27 L. ed. 922, 924; Pierce Oil Corp'n v. City of Hope, 248 U. S. 498. See authorities cited, *supra*, § 329a.

2 Ross v. Fort Wayne, 63 Fed. 466.

3 Am. Fibre Ch. Co. v. Williamson, 69 Fed. 247; Am. Fibre Ch. Co. v. Buckskin F. Co., C. C. A., 72 Fed. 508; Fowler v. New York, C. C. A., 122 Fed. 747; Hogan v. Westmoreland Specialty Co., 145 Fed. 199; Gilbert Mfg. Co. v. Post & Lester Co., 189 Fed. 81; Charles Boldt Co. v. Nivison-Weiskopf Co., C. C. A., 194 Fed. 871. See an essay by Samuel H. Fisher in 5 Yale Law J. 213. But see Krell Auto Grand Piano Co. v. Story & Clark Co., C. C. A., 207 Fed. 946.

4 Cleveland F. Co. v. Vulcan B. Co., 72 Fed. 505; International Mausoleum Co. v. Sievert, 197 Fed. 936. Affi'd C. C. A., 213 Fed. 225. See Bronk v. Charles A. Scott Co., C. C. A., 211 Fed. 338.

5 Rowe v. Blodgett & Co., 87 Fed. 868; Star Ball Retainer Co. v. Klahn, 145 Fed. 834; Voightmann v. Seely, 176 Fed. 371; Corona Chem. Co. v. Latimer Chem. Co, C. C. A., 248 Fed. 493. Wright v. Wisconsin Lime & Cement Co., C. C. A., 239 Fed. 534.

tioned in the bill,[6] nor recitals as to the prior state of the art in the specifications of the letters-patent of which profert is made;[7] nor dismiss such a bill because in previous suits against other parties the patent has been held by a court of review to be invalid when the complainant asks an opportunity to offer new evidence.[8] In the case of a design patent the disposal of the controversy upon such a motion is encouraged.[9] Every doubt was resolved against the demurrer.[10] The patent is not held invalid unless the court is entirely satisfied from its face that by no possible proof can patentable invention and validity be made to appear.[11] It has been said that it requires a very clear case to justify the dismissal of the bill because of facts of which the court takes judicial notice.[12]

§ 367. Classification of demurrers. Demurrers were either to the relief or to the discovery. Demurrers to the relief claim that for some reason apparent upon the face of the bill the plaintiff is not entitled to the relief prayed for in it. They are classified by Mitford, afterwards Lord Redesdale, substantially as follows:[1] Demurrers to the relief are founded on objections to the jurisdiction; to the person; or to the matter of the bill, either in substance or in form. Demurrers to the jurisdiction are allowed either (1) because the subject of the suit is not within the jurisdiction of a court of equity; or (2) because some other court of equity has the proper jurisdiction. A demurrer of this last class was much more frequent here than in England. For the rule, that in a superior court of general jurisdiction the presumption is that nothing shall be intended out of its jurisdiction that is not shown or intended to be so,[2]

6 Cleveland F. Co. v. Vulcan B. Co., 72 Fed. 505; Southern Plow Co., v. Atlanta Agricultural Works, 165 Fed. 214; Voightmann v. Seely, 176 Fed. 371.

7 Indurated F. I. Co. v. Grace, 52 Fed. 124.

8 Mallinson v. Ryan, 242 Fed. 951.

9 Bayley & Sons v. Blumberg, C. C. A., 254 Fed. 696.

10 Krell Auto Grand Piano Co. v. Story Clark Co., C. C. A., 207 Fed. 946; Am. Safety Device Co. v. Liebel Binney Const. Co., C. C. A., 243 Fed. 575.

11 Jackes-Evans Mfg. Co. v. Hemp & Co., C. C. A., 140 Fed. 254.

12 Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 193 Fed. 69.

§ 367. 1 Mitford's Pl., ch. 11, § 2.

2 Daniell's Ch. Pr. (2d Am. ed.) 615; Earl of Derby v. Duke of Athol, 1 Ves. Sen. 203.

does not apply to the courts of the United States; whose jurisdiction is confined to what is expressly given them by the Constitution and statutes and must always appear upon the record.[3] It was held that the objection that one of two plaintiffs suing to enforce a common, not a joint right, is a citizen of the same State as a defendant, could not be raised by a demurrer to the whole bill.[4] Causes of demurrer to the person were: that it appears upon the face of the bill that the plaintiff has not the legal capacity to sue; either at all, as an alien enemy, or an unincorporated association suing as a corporation; or alone, as an infant, idiot, lunatic, and in some States a married woman.[5] Demurrers to the substance of a bill were that it appears upon the face of the bill: (1) That the plaintiff has no interest in the subject-matter of the bill. It has been held that the objection that one of two plaintiffs has no interest in the subject-matter can be raised by a general demurrer for want of equity.[6] (2) That the defendant is not answerable to him, but to some other person. (3) That the defendant has no interest in the subject-matter of the suit. (4) That the plaintiff is not entitled to the relief he prays; but if the bill showed a case for some relief, and yet asked for too much or the wrong relief, it was not demurrable provided it contained the prayer for general relief.[7] (5) That the value of the subject-matter is beneath the dignity of the court. In England the Court of Chancery declined to interfere when the value of the matter in dispute was less than ten pounds, except in suits brought by or on behalf of charities and under bills to obtain relief on account of fraud, or to establish a right.[8] In the District Courts of the United States

3 Turner v. Bank of N. A., 4 Dall. 8; Godfrey v. Terry, 97 U. S. 171.

4 Nebraska City Nat. Bank v. Nebraska City H. G. L. Co., 14 Fed. 763. But see Hodge v. North Mo. R. Co, 1 Dill. 104.

5 *Supra*, §§ 87-89. A bill filed by a next friend was held demurrable when it did not show that the plaintiff was disabled to sue alone. West v. Reynolds, 35 Fla. 317, 71 So. 740. See also Wheeler & Wilson Mfg. Co. v. Filer, 52 N. J. Eq. 164; Paige v. Broadfoot, 100 Ala. 610.

6 Hodge v. North Mo. R. Co., 1 Dill. 104. But see Nebraska C. Nat. Bank v. Nebraska C. H. G. L. Co., 14 Fed. 763.

7 Patrick v. Isenhart, 29 Fed. 339; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106.

8 Daniell's Ch. Pr. (2d Am. ed.) 378, 379; Brace v. Taylor, 2 Atk. 253; Moore v. Lyttle, 4 J. Ch. (N. Y.) 183.

the bill should show affirmatively that the matter in dispute, exclusive of interest and costs, exceeds three thousand dollars,[9] except in certain cases for which the statute specially provides.[10] (6) That the bill does not embrace the whole matter concerning which the suit is brought, and which is capable of being immediately disposed of, so that there is danger of the defendant's being harassed with other suits about the same.[11] (7) That there is a want of proper parties, plaintiff or defendant.[12] (8) That there is a misjoinder [13] of parties plaintiff. A superfluity of defendants, not accompanied by multifariousness, is the subject of objection by those only who were improperly joined.[14] (9) That the plaintiff's remedy is barred by length of time or laches.[15] This objection can be raised by motion.[16] When a bill praying an injunction to restrain the infringement of a reissued patent sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or three years has taken place in applying for the reissue, not explained by special circumstances giving sufficient ground for the delay; the question of laches is a question of law arising on the face of the bill, which avails as a defense upon a general demurrer for want of

9 U. S. v. Pratt C. & C. Co., 18 Fed. 708; 24 St. at L., ch. 373. But see Sharon v. Terry, 36 Fed. 337. The text was cited with approval in Oleson v. No. Pac. R. Co., 44 Fed. 12.

10 See §§ 4, 5, *supra*.

11 Anon., 2 Ch. Cas. 164; Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, 1 Vern. 245; Margrave v. Le Hooke, 2 Vern. 207.

12 Dwight v. Central Vt. R. Co., 9 Fed. 785.

13 Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; Lansdale v. Smith, 106 U. S. 391, 27 L. ed. 219; Taylor v. Holmes, 14 Fed. 498; Markley v. Mutual Ben. L. I. Co., 6 Ins. L. J. 537; Wollensak v. Reiher, 115 U. S. 96, 29 L. ed. 350.

14 Cherrey v. Monro, 2 Barb. Ch. (N. Y.) 618; Toulmin v. Hamilton, 7 Ala. 362. But see Bank v. Carrollton R. Co., 11 Wall. 624, 20 L. ed. 82.

15 Maxwell v. Kennedy, 8 How. 210, 12 L. ed. 1051; Badger v. Badger 2 Wall, 87, 94, 17 L. ed. 836, 838; Marsh v. Whitmore, 21 Wall. 185, 22 L. ed. 485; Sullivan v. P. & K. R. Co., 94 U. S. 806, 24 L. ed. 324; Brown v. Buena Vista, 95 U. S. 161, 24 L. ed. 423; Godden v. Kimmel, 99 U. S. 201, 25 L. ed. 431; National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815. For a definition of equitable laches see De Gendre Byrnes, 44 N. J. Eq. 372. But see Beekman v. Hudson R. W. S. Ry. Co., 35 Fed. 3.

16 Alexander v. Fidelity Tr. Co., 215 Fed. 791. *Supra*, § 182.

equity.[17] The former objection that the plaintiff has an adequate remedy at law has been abrogated by statute.[18] If it appeared by the face of the bill that the case of the complainant was barred by the statute of limitations, it was demurrable.[19] The facts which show that the delay is excusable must be set up in the bill.[20] Where the suit was brought within the time fixed by the statute of limitations, and no special circumstances tending to create an equitable estoppel appeared in the bill; it was held: that the bill was not demurrable for laches because of the delay alone.[21] "This period is within the statute of limitations: and, when this is the fact, it is held by good authority that the bill is not demurrable in the absence of other circumstances than mere delay, but the defense of laches must be set up in the answer."[22] A demurrer would also be sustained where the bill showed that the plaintiff's case was repugnant to the statute of frauds;[23] but when the face of the bill does not show that a contract, conveyance, or agreement was not in writing, there seems to be no presumption that it was invalid.[24] (10) That the bill is multifarious.[25] It has been held that only such defendants as would suffer by the multifariousness can raise this objection.[26] (11) That there is another suit pending between the parties for the same cause of action. Demurrers for insufficiency as to form were either: (1) That the plaintiff's place of abode

17 Wollensak v. Reiher, 115 U. S. 96, 101, 29 L. ed. 350, 351; Lockhart v. Leeds, 195 U. S. 427; Thurmond v. Ches. & O. Ry. Co., C. C. A., 140 Fed. 697.

18 38 St. at L. § 951. See also Equity Rule 22. *Supra*, § 364; *infra*, § 368.

19 U. S. v. Utah Power & Light Co., 208 Fed. 821; Goldschmidt Thermitt Co. v. Primos Chem. Co., 216 Fed. 382; Corsicana Nat. Bank v. Johnson, C. C. A., 218 Fed. 822; Goldschmidt Thermitt Co. v. Primos Chem. Co., 225 Fed. 769; John A. Roebling's Sons Co. v. Kinnicutt, 248 Fed. 596; Brown v. Kosson, C. C. A., 255 Fed. 806. But see Clinton Mining & Mineral Co. v. Cochran, C. C. A., 247 Fed. 449.

20 Edison El. L. Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478; *supra*, § 137. But see Brush El. Co. v. Ball El. L. Co., 43 Fed. 899.

21 Sabre v. United Traction & Electric Co., 156 Fed. 79.

22 Sabre v. United Tr. & El. Co., 156 Fed. 79, 82.

23 Randall v. Howard, 2 Black, 585, 589. But see Chapman v. School Dist., 1 Deady 108. *Supra*, § 124.

24 Sage Land & Improvement Co. v. Ripley, C. C. A., 191 Fed. 785.

25 See §§ 139-143, *supra*.

26 Atwill v. Ferrett, 2 Blatchf. 39, 44; Buerk v. Imhaeser, 3 Fed. 457; Hill v. Bonaffon, 2 W. N. C. (Pa.) 356; *supra*, §§ 139-143.

is not stated; or that a compliance has not been made with any of the other requirements of Rule 20.[27] (2) That the facts essential to the plaintiff's right and within his own knowledge are not alleged positively.[28] (3) That the bill is deficient in certainty.[29] (4) That the plaintiff does not in his bill offer to do equity, when it is the custom of the court to require him to do so.[30] (5) That the bill is not signed by counsel.[31] (6) That the bill is not supported by an affidavit when one is necessary.[32] A demurrer to the relief would not lie upon the ground that the bill contained irrelevant matter. The proper remedy for this was an exception for impertinence.[33] Neither was a bill demurrable because indispensable parties, whom it named and against whom it prayed process, had not been served with subpœnas to appear and answer.[34] If any part of the relief prayed was proper the demurrer was overruled.[35]

§ 368. Election and transfer to the law side of the court. The Equity Rules now provide: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."[1] "If in a suit in equity a matter ordinarily determinable at law arises,

27 Mitford's Pl., ch. 2, § 2; Rowley v. Eccles, 1 Sim. & S. 511.

28 Mitford's Pl., ch. 2, § 2; Daniell's Ch. Pr. 412, 625.

29 Taylor v. Holmes, 14 Fed. 498; Goldsmith v. Gilliland, 22 Fed. 865.

30 U. S. v. Pratt C. & C. Co., 18 Fed. 708. See § 153.

31 Rule 24; Dwight v. Humphreys, 3 M'Lean 104.

32 Findlay v. Hinde, 1 Pet. 241, 244, 7 L. ed. 128, 130.

33 Pac. R. Co. of Mo. v. Mo. Pas. Ry. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504; Howe & Davidson Co. v. Haugan, 140 Fed. 182; Role 26; *supra*, §§ 237, 238.

34 Kilgour v. N. O. G. Light Co., 2 Woods 145.

35 Chicago, M. & St. P. Ry. Co. v. Hartshorn, 30 Fed. 541; Strawberry Hill v. Chicago, M. & St. P. Ry. Co., 41 Fed. 568.

§ 368. 1 Eq. Rule 22. Eastman Kodak Co. v. Nat. Park Branch, 231 Fed. 321-322. It had been previously said: "In the Federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in a State court, but only to the law side of the Federal court." U. S. Life Ins. Co. v. Cable, C. C. A., 98 Fed. 761, 39 C. C. A. 264; North Carolina Min. Co. v. Westfeldt, 151 Fed. 290. Where there was no cause of action at common law, the bill was dismissed. Wingert v. First Nat. Bank, 223 U. S. 670.

such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."[2] When the equitable relief is denied, the court of equity cannot against the objection of either party to the suit assess the complainant's damages if the pleadings show a cause of action at common law and no facts which establish equitable jurisdiction have been proved; because this would take away the constitutional right of trial by jury.[3] But if the bill otherwise shows equitable jurisdiction, a prayer for damages incidental thereto will be considered in equity.[4]

Where a jury is waived and the action tried by the court, it is immaterial that it is tried on the law instead of the equity calendar.[5] The objection must be raised by the defendant at his first opportunity; or otherwise it will be waived.[6] It has been held that it may be made at any time before proofs are taken.[7] An improper transfer from law to equity is a reversible error.[8]

By the previous practice, when the plaintiff sued both at law and in equity, at the same time, for the same matter, the defendant was entitled to an order that the plaintiff elect whether he will proceed in equity or at law.[8a] The rules do not abrogate the former doctrine as to the effect of an election be-

2 Eq. Rule 23.

3 Linden Inv. Co. v. Houston Bros. Co., 221 Fed. 178; Am. Falls Milling Co. v. Standard B. & D. Co., C. C. A., 248 Fed. 487. See Goldschmidt Thermitt Co. v. Primos Chem. Co., 225 Fed. 769.

4 Wright v. Barnard, 233 Fed. 329.

5 Illinois Surety Co. v. United States, C. C. A., 215 Fed. 334.

6 Kelly v. Illinois State Trust Co., 215 Fed. 567; National Leather Co. v. Roberts, C. C. A., 221 Fed. 922; Palmer v. Doull Miller Co., Inc., 233 Fed. 309; Fay v. Hill, C. C. A., 249 Fed. 415. But see Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769.

7 Leo Feist, Inc., v. American Music Roll Co., C. C. A., 251 Fed. 242.

8 Issenhuth v. Kirkpatrick, C. C. A., 258 Fed. 293.

8a Mitford's Pl. (Tyler's ed.) 340; Carlisle v. Cooper, 3 C. E. Green (N. J.) 241; Livingston v. Kane, 3 J. Ch. (N. Y.) 224. It was said in a recent case: "Where a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and, in the absence of facts creating an equitable estoppel, his prosecution of the wrong remedy to a judgment of defeat will not estop him from subsequently pursuing the right one to victory." Bierce v. Hutchins, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. ed. 828; Thomas v. Sugarman, 218 U. S. 129, 133, 30 Sup. Ct. 650, 54 L. ed. 967, 29 L.R.A. (N.S.) 250; Standard Oil Co.

tween inconsistent claims of right.[9] In a case since the new equity rules the plaintiff was required to elect whether he sued at law to recover damages for deceit or in equity to establish a trust upon a fund.[10]

Under the former practice, the case of a mortgagee was an exception to this doctrine; for in the absence of any statutory restriction, he can proceed at the same time to foreclose his mortgage in equity and sue on the bond at law.[11] This exception, however, did not extend to the case of a vendor seeking to enforce his lien and sue at law for his debt.[12] In a special case, the plaintiff might be allowed to proceed partly at equity and partly at law, and compelled to make a special election.[13]

The principle of election was extended to a case where the plaintiff sued at once in both a foreign and a domestic court.[14]

A plaintiff, who had sued at law and recovered nominal damages for a breach of a contract, can not thereafter sue in equity for the specific performance thereof.[15] If, as the trial of the action at law progressed, he discovers that he is not likely to secure sufficient damages, he should ask leave to withdraw a juror, in order that he may thereafter apply for equitable relief.[16]

The defendant could not move for the order, that plaintiff elect until after he had answered, and the time for exceptions had expired without one being taken, or the answer had been adjudged sufficient.[17] The order should allow the plaintiff a

v. Hawkins, 74 Fed. 395, 398, 399, 20 C. C. A. 468, 472, 473, 33 L.R.A. 739; Barnsdall v. Waltemeyer, 142 Fed. 415, 420, 73 C. C. A. 515, 520; Harrill v. Davis, 168 Fed. 187, 195, 94 C. C. A. 47, 55, 22 L.R.A. (N.S.) 1153; In re Stewart (D. C.) 178 Fed. 463, 468; Nauman Co. v. Bradshaw, 193 Fed. 350, 354, 113 C. C. A. 274." Rankin v. Tygard, C. C. A. 198 Fed. 795, 806.

9 Issenhuth v. Kirkpatrick, C. C. A., 258 Fed. 293. See *supra*, § 185a.

10 Murphy v. Mitchell, 245 Fed. 219.

11 Booth v. Booth, 2 Atk. 343; Dunkley v. Van Buren, 3 J. Ch. (N. Y.) 330.

12 Barker v. Smark, 3 Beav. 64.

13 Barker v. Dumaresque, 2 Atk. 119; Anon., 1 Vern. 104; Franklin v. Hersch, 3 Tenn. Ch. 467.

14 Pieters v. Thompson, G. Cooper, 294.

15 Slaughter v. La Compagnie Francaises Des Cables Telegraphiques, C. C. A., 119 Fed. 588.

16 Ibid.

17 Mitford's Pl. (Tyler's ed.) 340; Leicester v. Leicester, 10 Siml. 87. See Fisher v. Mee, 3 Meriv. 45; Soule v. Corning, 11 Paige (N. Y.) 412.

reasonable time within which to make his election.[18] The plaintiff may remove to discharge the order for irregularity in obtaining it, or upon the merits confessed in the answer or proved in an affidavit.[19] If, upon such a motion, any doubt arose as to whether the suit in equity and the action at law were for the same matter, it was customary to direct an inquiry into that fact;[20] during the progress of which all proceedings in both courts were usually stayed,[21] unless the plaintiff could show that justice would be better done by permitting proceedings to some extent, when he may by special leave continue in one or both, at the court's discretion.[22] If the plaintiff required further time within which to make his election, he applied for it to the court by motion upon notice.[23] At the expiration of the time allowed him he made his election, which was usually done by filing a written statement of it signed by him or his solicitor in the clerk's office;[24] or else his bill was dismissed.[25] If he elected to proceed in equity, his proceedings at law were stayed by the order,[26] and either the defendant was allowed to recover the costs of the action, or the plaintiff was directed by the court of equity to pay them.[27] If the plaintiff elected to proceed at law, his bill in equity was dismissed with costs.[28] Such a dismissal was, however, no bar to a subsequent suit.[29] Where, upon a bill for partition, a defendant claimed a paramount title and possession upon colorable grounds, against which the plaintiffs were not entitled to equitable relief; the proper course was to suspend the bill until the plaintiffs had an opportunity to sue at law,[30] although, in a similar case, the court has dismissed the

18 Braeken v. Martin, 3 Yerg. (Tenn.) 55; Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

19 Daniell's Ch. Pr. (2d Am. ed.) 817.

20 Monseley v. Basnett, 1 Ves. & B. 382, n.

21 Mills v. Fry, 3 Ves. & B. 9; Anon., 2 Madd. 395; Daniell's Ch. Pr. 817.

22 Amory v. Brodrick, Jacob, 530; Carwick v. Young, 2 Swanst. 239.

23 Daniell's Ch. Pr. (5th Am. ed.) 817.

24 Ibid.

25 Daniell's Ch. Pr. (5th Am. ed.) 816; Boyd v. Heinzelman, 1 Ves. & B. 381.

26 Daniell's Ch. Pr. (5th Am. ed.) 816.

27 Simpson v. Sadd, 16 C. B. 26; Carwick v. Young, 2 Swanst. 239.

28 Jones v. Earl of Strafford, 3 P. Wms. 79, 90, n. B.

29 Countess of Plymouth v. Bladon, 2 Vern. 32; Livingston v. Kane, 3 J. Ch. (N. Y.) 224; Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

30 Clark v. Roller, 199 U. S. 541.

bill without prejudice.[31] By the former practice in a proper case, the court might require the complainant to separate the same by filing a declaration at law for the recovery of damages, and retaining the bill so far as the same sought equitable relief.[32]

31 Carlson v. Sullivan, C. C. A., 46 Fed. 476.

32 Chapman v. Yellow Poplar Lumber Co., C. C. A., 143 Fed. 201.

CHAPTER XXIII.

THE HEARING.

§ 369. Bringing a suit to a hearing. The old practice in bringing a suit to a hearing was the procurement of an order by the plaintiff setting it down for hearing within four weeks after the closing of the evidence. Upon his failure to do this defendant might either set it down himself, or move to dismiss the bill for want of prosecution. The party setting down was obliged to sue out a subpœna to hear judgment, and to have the same served upon the solicitors of the other parties.[1] If a plaintiff wished to set a cause down for a hearing upon bill and answer, he was obliged to do so within the time allowed him for filing the replication.[2] The Judicial Code provides:

"Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law

§ 369. [1] Daniell's Ch. Pr. (5th Am. ed.) 963-971; 3 Bl. Com. 450. [2] Daniell's Ch. Pr. (5th Am. ed.) 964, 965.

for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature."[3]

"Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.[4]

"After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar,

[3] § 58, 36 St. at L. 1103, Comp. St. § 1040.

[4] § 59, 36 St. at L. 1103, Comp. St. § 1041.

subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."[5]

Under the former practice, when the bill had been dismissed for failure of the complainant to appear at the final hearing his default might be opened and a new hearing allowed upon terms, such as a bond for security for costs.[6]

§ 370. Judges who try cases at law and in equity. The Judicial Code provides: "When any district judge is prevented, by any disability from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit, in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit, in which the district lies, any such circuit judge or justice may, if in his judgment, the public interests so require, designate and appoint the judge of any other district in the same circuit, to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within this circuit to perform the duties of such disabled judge, the Chief Justice may if in his judgment the public interests so require, designate, and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such inability. Such appointment shall be filed in the clerk's office and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court,

5 Eq. Rule 57. See *supra*, § 362. Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733; Adams v. Howard, 21 Off. Gaz. 264; Mackaye v. Mallory, 80 Fed. 256; Walsbach L. Co. v. Mahler, 88 Fed. 427. For a case where the delay was held excusable, see Beirne v. Wadsworth, 36 Fed. 614. See *ex parte* Poultney v. City of La-Fayette, 12 Peters 472, 9 L. ed. 1161.

6 Karns v. W. Imlay Rapid Cyanide Process Co., 184 Fed. 479.

shall be transmitted to the clerk to the judge so designated and appointed."[1]

"When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit, in which the district lies or in the absence of all the circuit judges to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit, to have and exercise within the district first named the same powers that vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time, a district court in such district, and discharge all the judicial duties of the district judge therein."[2]

"If all the circuit judges and the circuit justices are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him, as directed in the preceding section."[3]

"Any such circuit judge or circuit justice or the Chief Justice, as the case may be, may, from time to time, if in his judgment, the public interests so require, make a new designation and appointment of any other district judge, in the manner for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment."[4]

"It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so

§ 370. [1] Jud. Code § 13, 36 St. at L. 1087, re-enacting U. S. R. S. § 591.

[2] Jud. Code § 14, 36 St. at L. 1087, re-enacting U. S. R. S. § 592.

[3] Jud. Code § 15, 36 St. at L. 1087, re-enacting U. S. R. S. § 593.

[4] Jud. Code § 16, 36 St. at L. 1087, re-enacting U. S. R. S. § 594.

requires, to designate and appoint, in the manner and with the powers provided in section fourteen," the preceding section, "the district judge or any judicial judge within its circuit to hold a district court in the place or in aid of any other district judge within the same circuit."[5] In such cases the certificate of a clerk is not required.[6]

"Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court."[7] It has been held, that the senior circuit judge may thus designate and appoint himself in a proper case.[8]

"It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections to discharge all the judicial duties, for which he is so appointed, during the time for which he is so appointed, and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."[9]

"When the office of judge of any district court becomes vacant, or process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof, until such times, as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in section nineteen;"[10] the section immediately preceding.

"In districts having more than one district judge the judges may agree upon the division of business, and assignment of cases, for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies shall make all necessary orders, for the division of business and

5 Jud. Code § 17, 36 St. at L. 1087, re-enacting U. S. R. S. § 596.

6 *Re* National Telephone Co., C. C. A., 230 Fed. 785.

7 Jud. Code § 18, 36 St. at L. 1087.

8 Penn. Steel Co. v. N. Y. City Ry. Co., 221 Fed. 440.

9 Jud. Code 19, 36 St. at L. 1087, re-enacting U. S. R. S. § 595.

10 Jud. Code § 22, 36 St. at L. 1087.

the assignment of cases for trial in said district."[11] In the Southern District of New York, it is customary for the senior district judge to make the division of business.

§ 371. Challenge of a judge for interest. The Judicial Code now provides: "Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."[1] It has been said: that the judge has no option but to retire in any case except that last mentioned in the statute; but that the question whether he is so related to or connected with either party as to render him improper to sit upon the trial, is one for his discretionary decision.[2] Before the statute was passed, it was held that a judge might hear a cause in which he was retained before he received his judicial appointment.[3] A judge is not disqualified because he has been attorney for one of the parties in matters not connected with the litigation.[4] A judge is disqualified if he owns stock in another corporation which is interested in a question of law involved in the case before him.[5] A judge is not disqualified from trying the validity of bonds issued by a county, in which he is a resident and taxpayer;[6] nor, it has been held, from passing upon the validity of his action as a trustee when he had no personal interest therein.[7] The objection may be waived, at least if the interest of the judge is slight.[8] It

11 Ibid., § 23.

§ 371. 1 Jud. Code, § 20, 36 St. at L. 1087, re-enacting U. S. R. S., § 601; § 14 is quoted *supra*, § 370.

2 *Ex parte* N. K. Fairbank Co., 194 Fed. 978.

3 Thelusson v. Rendlesham, 7 H. L. C. 429; The Richmond, 9 Fed. 863, and citations.

4 Duncan v. Atlantic Coast Line R. Co., 223 Fed. 446.

5 *Re* Honolulu Consol. Oil Co., C. C. A., 243 Fed. 348.

6 Wade v. Travis County, 72 Fed. 985.

7 *Re* Bishop's Estate, C. C. A., 250 Fed. 145.

8 Utz & Dunn Co. v. Regulator Co., C. C. A., 213 Fed. 315 (where the judge was a stockholder in the assignor or a claim which was proved before him).

has been held: that, even with the consent of the parties, a Federal judge should not sit in a case in which he is related to one of the parties within the fourth degree of consanguinity.[9]

§ 372. Challenge of judge for prejudice. "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."[1]

It has been held that the statute does not apply to the District of Alaska.[2] It does not apply to the Circuit Courts of Appeals[3] although when one of their judges is disqualified by statute because he has passed upon one of the questions brought up for review, such objection can be duly raised.[4] It applies to a case pending on January 1, 1912, when the Judicial Code took effect.[5]

9 *Re* Eatonton El. Co., 120 Fed. 1010.

§ 372. 1 Jud. Code, § 21, 36 St. at L. 1087.

2 Tjosevig v. U. S., C. C. A., 255 Fed. 5.

3 Kinney v. Plymouth Rock Squab Co., C. C. A., 213 Fed. 449.

4 Rexford v. Brunswick-Balke-Collender Co., 228 U. S. 339, 57 L. ed. —; see *infra*, § 693.

5 *Ex parte* Am. Steel Barrel Co., 230 U. S. 35; Henry v. Speer, C. C. A., 201 Fed. 869, overruling Henry v. Harris (S. D. Ga., W. D.), 191 Fed. 868; *Ex parte* N. K. Fairbank Co. (M. D. Ala., N. D.), 194 Fed. 978, 985; *Ex parte* Glasgow (N. D. Ga.), 195 Fed. 780.

The application may be denied for laches.[6] It is a sufficient excuse for filing the affidavit during the trial term that the mandate of the court of review was not filed below until after the term began; but a delay of six weeks after the mandate had been filed was held to bar the application.[7] So was an application made in a disbarment proceeding four weeks subsequent to the return day after the case had been twice adjourned when the answer raised no issue of fact.[8] It was held to be too late when made on behalf of the complainant in a foreclosure suit pending its motion for a decree, the affidavit having been prepared during the time that it was pressing the motion in the District Court and asking the Circuit Court of Appeals for a writ of mandamus to compel the entry of the decree.[9] The judge challenged has the right, subject to review by the appellate court, to determine whether the facts alleged are sufficient to show personal bias or prejudice,[10] but not to pass upon the truth of the facts.[11] If he disregards an affidavit which makes a sufficient

6 Shea v. U. S., C. C. A., 251 Fed. 433.

7 Shea v. U. S., C. C. A., 251 Fed. 433. See *ex parte* Am. Steel Barrel Co., 230 U. S. 35, 45.

8 *Re* Ulmer, 208 Fed. 461.

9 *Re* Equitable Trust Co., C. C. A., 232 Fed. 836.

10 *Ex parte* N. K. Fairbank Co., 194 Fed. 978, where it was contended by counsel that the prejudice was shown in correspondence resulting from their complaint of a delay in the trial of the case; Henry v. Harris, 191 Fed. 868, where the judge upon an *ex parte* petition had written an opinion concerning the law of the case and had insisted upon publishing the same after the application had been withdrawn. In both these cases the judges disregarded the affidavit. The last was affirmed as Henry v. Speer, C. C. A., 201 Fed. 869, because the affidavit had not charged "personal and bias prejudice." In Epstein v. U. S., C. C. A., 196 Fed. 354, the judge had said at a hearing in bankruptcy. "This is a nasty piece of business. This estate has been looted by someone," and accompanied this by a direction to an officer of the court that he use what was left in the estate, even to the last penny, to investigate the matter and to institute proceedings against anyone who had committed any act that could be reached and punished under the law. It was held that this did not disqualify him from trying an indictment against a person present at the hearing in bankruptcy for suborning a witness to commit perjury there.

In U. S. v. Frickie, 261 Fed. 543, 545, Judge Mayer held to be insufficient an affidavit charging him with personal prejudice because of his refusal to grant an application for an adjournment to a time requested by counsel.

11 Henry v. Speer, C. C. A., 201

showing of personal prejudice, his decision may be excepted to and assigned as error in the court of review.[12] The refusal of the judge to give effect to the affidavit of prejudice in a criminal case cannot be reviewed upon *habeas corpus*.[13] When the affidavit is insufficient, it is the better practice to permit it to be filed and then to strike it from the record; but it was held that a refusal to permit such an affidavit to be filed was not prejudicial error.[14] A certificate of good faith is insufficient when made by nonresident counsel who have not been admitted to the bar of the court where the affidavit is filed.[15] If the affidavit is prepared in good faith and in proper language it is not a contempt of court, although it is held to be insufficient.[16] It has been said: "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the ending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten

Fed. 869. In U. S. v. Cottrell & Leonard, U. S. v. Paris Suit & Cloak Co., U. S. v. Myers, U. S. v. Schenectady Clothing Co., N. D. N. Y., April 8, 1820, Howe, J., denied application to remove the case from him for prejudice based upon statements which the defendants alleged that he had made in court upon the arguments of demurrers of the indictment stating as one of the grounds for his denials that the allegations were false.

12 *Ex parte* Am. Steel Barrel Co., 230 U. S. 35, 45.

13 *Ex parte* Glasgow, 195 Fed. 780.

14 Shea v. U. S., C. C. A., 257 Fed. 433.

15 *Ex parte* N. K. Fairbank Co., 194 Fed. 978.

16 Tjosevig v. U. S., 255 Fed. 5, "That affiant is informed and verily believes that the plaintiff, T. J. Donohoe, is the national committeeman for the Democratic party for the territory of Alaska; that as such he controls the appointment of judges, or to a great extent influences all appointment and con-

days before the beginning of the term.'' [17] The affidavit must charge personal bias or prejudice.[18] The omission of the word personal was held to vitiate an affidavit in what was otherwise a strong case.[19] The decisions by the State courts under analogous statutes may be useful to the practitioner.[20]

firmation of judges; that he is a personal friend of the honorable judge of this court before whom this cause is pending; that such friendship is very intimate and of long standing, and that affiant is informed and verily believes that, prior to the appointment of the honorable judge of this district to the judgeship, said plaintiff spent his time in Washington City, at great personal expense and loss of time to himself, urging upon the President and Senate the appointment and confirmation of the honorable judge of this district; that affiant is informed and verily believes that the said plaintiff, by reason of such friendship and such political services rendered by the said plaintiff, Donohoe, for and on behalf of this honorable judge, claims and intends to thereby influence the decision of the court in this case in his favor; that affiant in no way intends to reflect upon the honor or integrity of the honorable judge of this district, but owing to the circumstances above set forth he feels that he is at a disadvantage in submitting the issues of facts in this case to the decision of said honorable judge, and therefore asks that the issues of facts be submitted to the determination of the jury, and in event that that is denied affiant asks and demands that some other judge be called in to hear and determine said *costs.*''

Re Cottingham, Colorado, Aug. 18, 1919, 182 Pac. 2. But see *re* Reed D. C., Court of Appeals, May, 1916, 44 Wash. Law Rep. 354.

[17] *Ex parte* Am. Steel Barrel Co., 230 U. S. 35, 43, 44, per Lurton, J.

[18] Henry v. Speer, C. C. A., 201 Fed. 869.

[19] Ibid.

[20] It was held too late to make the motion: upon appeal, De La Rama v. De La Rama, 241 U. S. 154; when the action had been pending more than one year, a demurrer and several motions had been passed upon by the judge, the issues had been joined and the case by agreement set down for trial, Eberville v. Leadville Coloring, Tunneling & Drainage Co., 28 Colorado 241, 64 Pac. 200; but see *ex parte* Am. Steel Barrel Co., 230 U. S. 35; after an appearance to the merits or the submission of preliminary motions, German Ins. Co. v. Landram, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. Law Rep. 1039; after the judge had filed several orders in the cause, Dupoyster v. Ft. Jefferson Imp. Co.'s Receivers, 121 Ky. 518, 28 Ky. Law Rep. 504, 89 S. W. 509; and, when the affidavit was filed, after the arrival of the day fixed for the trial or final hearing of any motion upon which the judge was called upon to pass, State v. Donlan, 32 Montana 256, 88 Pac. 244. It was held not too late when the application was made before any other motion was disposed of, Gibbons v. Lord Crawshaw, 21 Ky. Law Rep. 1618, 55 S. W. 905; and even after the issues were framed when it was

§ 373. Arrangement of calendar. By statute, a preference is given in all district courts and in the Supreme Court to actions in which a State is a party or in which the execution of the revenue laws of a State is enjoined.[1] A suit in equity under "the act to protect trade and commerce against unlawful restraints and monopolies," or under the Interstate Commerce law whenever the Attorney General filed with the clerk of the court a certificate that, in his opinion, the case is of general public importance, is given precedence and assigned for hearing at the earliest practicable day, before not less than three Circuit Judges of the Circuit, if there be three or more. If not, then before two Circuit Judges and a District Judge selected by

based upon facts since discovered, Vance v. Field, 89 Ky. 178, 11 Ky. Law Rep. 388, 12 S. W. 190. It has been held that the affidavits must state the charges against the judge, in such a way that they will subject the parties making them to criminal punishment if they are false, and that an affidavit based entirely on hearsay is insufficient, Schmidt v. Mitchell, 101 Ky. 570, 19 Ky. Law Rep. 763, 41 S. W. 929, 72 Am. St. Rep. 427. Upon an indictment charging the defendant as an accessory in a murder alleged to have been committed as part of a political conspiracy, an affidavit was held to be sufficient when it set forth: that the judge was a member of the same political party as the deceased, his intimate personal friend, in close sympathy with him in the political imbroglio resulting in the assassination, and that by reason thereof and of the great excitement at the time, the judge had conceived a feeling of hostility against the defendant, which would prevent him from affording a fair and impartial trial, and which he had shown upon a former trial by vicious acts established by the selection of an unfair and prejudiced jury, Powers v. Commonwealth, 114 Fed. 237, 24 Ky. Law Rep. 1007, 1186, 70 S. W. 644, 1059. It was held to be insufficient to state nothing more than that the trial judge did not do justice to the parties, Dupoysten v. Ft. Jefferson Imp. Co's. Receivers, 121 Ky. 518, 28 Ky. Law Rep. 504, 89 S. W. 509; and that he was a party to the suit and interested therein, and that he was personally hostile to the party objecting, Sparks v. Colson, 109 Ky. 711, 22 Ky. Law Rep. 1369, 60 S. W. 540, where the pleadings did not show that the judge had such an interest, Metcalfe v. Merchants' & Planters' Bank, 89 Miss. 649, 41 So. Rep. 377; and in a contested election as to local option, statements in an affidavit that the judge "is opposed to the sale and traffic in such liquors to the extent that he has a pronounced bias against it," Erwin v. Benton, 120 Ky. 536, 27 Ky. Law Rep. 909, 87 S. W. 291, 9 Ann. Cas. 264.

§ 373. [1] U. S. R. S., § 949; Ward v. State, 12 Wall. 163, 20 L. ed. 260; Hoge v. R. & D. R. Co., 93 U. S. 1, 23 L. ed. 781; Davenport v. Dows, 15 Wall. 390; Miller v. State, 12 Wall. 159, 20 L. ed. 259.

them.[2] This law is still in force, notwithstanding the enactment of the Judicial Code,[3] and it applies to the settlement of a decree upon the mandate of the Supreme Court.[4] It has been said that it does not require three judges to hear a motion for a preliminary injunction or for any relief sought before a formal hearing.[5] There is no rule that civil suits brought under the Sherman Act to dissolve the combination must await the trial of criminal actions against the same defendants.[6] If an original and a cross cause have been set down for hearing at different times, and other causes intervene, the plaintiff in whichever of them is below the other will usually upon motion obtain leave to bring it forward, so that both causes may be heard together.[7]

§ 374. Manner of hearing a cause. The English practice upon the hearing of a cause where all parties appear upon its being called, has been thus described: "The leading counsel for the plaintiff opens the plaintiff's case and in so doing states, first the bill, and then the answers, if any: pointing out the matters in issue, and questions in equity arising therefrom; after which the plaintiff's evidence is read, either by his leading or his junior counsel, and their arguments in support of the case are addueed. The counsel for the defendant are then heard, in support of the defendant's case, and his evidence is read by them; and the plaintiff's senior counsel is then heard in reply. When all are heard, the court pronounces the decree, either immediately or at a subsequent day."[1] It is usual in the

2 Act of February 11, 1903, 32 St. at L. 823.

3 *Ex parte* U. S., 226 U. S. 420, 57 L. ed. —, setting aside United States v. Terminal Ass'n of St. Louis, 197 Fed. 446.

4 Ibid.

5 Southern Pac. Terminal Co. v. Interstate Commerce Commission, 166 Fed. 134, 136.

6 Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20.

7 Hinde's Pr. 415; 3 Bl. Com. 451.

§ 374. 1 Daniell's Ch. Pr. (5th Am. ed.) 1988. By Eq. Rules S. D. N. Y. "6. In the trial of a Patent cause, whenever in the opinion of the Court the cause involves intricate technical or scientific questions of fact the Court will upon consent of all parties appoint some disinterested person skilled in the art to act as an assessor, the reasonable fee for whose services when fixed by the Court shall be a part of the taxable disbursements and enforceable as is a Master's fee. Such assessor shall sit with the Judge at the hearing of the evidence and shall assist the Court in its deliberations upon the cause in such manner as the trial Judge may request, and any written opinion rendered by the assessor at the request of the Judge

United States, to waive the reading, and for counsel to state the substance of the pleadings and testimony, which are submitted to the judge at, or shortly after, the conclusion of the oral arguments, with written arguments upon the law and the facts, called briefs or points. The course is much the same where the cause is set down for a hearing upon bill and answer. The pleadings only are then read, and the answer is admitted to be true in all its material allegations of fact,[2] although not responsive to the bill,[3] even when not stated positively, and the defendant only avers that he believes and hopes to be able to prove such facts.[4] But the plaintiff does not thereby admit conclusions of law, nor allegations as to matters concerning which the court takes judicial notice.[5] No other evidence is then permitted except matters of record to which the answer refers.[6] Unless relevant to some issue, it is not necessary to produce the mortgage bonds upon the hearing of a foreclosure suit.[7] A hearing will not be given upon an agreed statement of facts without pleadings,[8] even if a State statute authorizes such a practice.[9]

§ 375. Rules of decision upon a hearing. All decisions made in a former stage of the cause are open for review upon the final hearing.[1] But if the evidence is unchanged, a judge will rarely refuse to follow a ruling made by one of his colleagues in the same [2] or a similar [3] case. The District Courts are bound

shall be a portion of the record on appeal.'' See also Ferguson v. Babcock Lumber & Land Co., C. C. A., 252 Fed. 705.

2 Lake E. & W. R. Co. v. Indianapolis Nat. Bank, 65 Fed. 690; Parker v. Concord, 39 Fed. 718.

3 Lake E. & W. R. Co. v. Indianapolis Nat. Bank, 65 Fed. 690.

4 Brinckerhoff v. Brown, 7 J. Ch. (N. Y.) 217; Dale v. McEvers, 2 Cow. (N. Y.) 118.

5 Taylor v. Barclay, 2 Sim. 213. See *supra*, §§ 329a, 366.

6 Anon., 1 Barb. Ch. (N. Y.) 3.

7 Dickerman v. Northern Tr. Co., 176 U. S. 181, 44 L. ed. 423; Northern Tr. Co. v. Columbia S. P. Co., 75 Fed. 936; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. 168, 181.

8 Nickerson v. A., T. & S. F. R. Co., 30 Fed. 85; s. c., 1 McCrary, 383.

9 Nickerson v. A. T. & S. F. R. Co., 30 Fed. 85; s. c., 1 McCrary, 383. But see *supra*, § 83, *infra*, § 476.

§ 375. 1 Fourniquet v. Perkins, 10 How. 82; Pulliam v. Pulliam, 10 Fed. 53; Sperry & Hutchinson Co. v. City of Tacoma, 199 Fed. 853. But see Coupe v. Weatherhead, 37 Fed. 16.

2 Cole S. M. Co. v. Va. & G. H. W. Co., 1 Saw. 685; Wakelee v. Davis,

to follow the decisions of the Supreme Court of the United States [4] and those of the Circuit Court of Appeals in their own circuit; [5] but they are not bound by the decisions of a District Court [6] or of a Circuit Court of Appeals [7] of the United States in another circuit. The decisions of a Circuit Court of Appeals unless reversed or overruled by the Supreme Court will ordinarily be followed in another circuit.[8] Great respect will always be paid to the decisions of a District Court in other circuits.[9] *Obiter dicta* in the opinions of the Supreme Court need not,[10] but when a decision is based upon two distinct grounds, the ruling in each should be,[11] followed. The issue of a writ of certiorari by the Supreme Court does not impair the effect of a decision of the Circuit Court of Appeals as an authority.[12]

44 Fed. 532; Taylor v. Decatur M. & Ld. Co., 112 Fed. 449.

3 Worswick Mfg. Co. v. Philadelphia, 30 Fed. 625; In re Markowitz, 233 Fed. 715; *infra*, § 518; but see N. P. R. Co. v. Sanders, 47 Fed. 504.

4 Am. Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. 661; Westinghouse Air Brake Co. v. Christensen Eng. Co., 113 Fed. 594; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; Walker v. Iowa Cent. Ry. Co., 241 Fed. 395.

5 Armat Moving Picture Co. v. Edison Mfg. Co., 121 Fed. 559; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; Stockbridge v. Phœinx Mut. Life Ins. Co., 193 Fed. 558; Seong v. U. S., C. C. A., 242 Fed. 496; Kentucky Coal Lands Co. v. Mineral Development Co., 219 Fed. 45; Minerals Separation v. Butte & Superior Copper Co., 237 Fed. 401; see *infra*, § 277.

6 Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 44 L. ed. 856, 858; Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; Lawson v. Barber & Co., 189 Fed. 165; M'Ilhenny Co. v. Gaidry, C. C. A., 253 Fed. 613; see § 277, *supra*.

7 Ibid.; South Penn Oil Co. v. Miller, C. C. A., 175 Fed. 729.

8 *Re* Baird, 154 Fed. 215; Imbrovek v. Hamburg-American Steam Packet Co., 190 Fed. 229; *infra*, § 479; Harmon v. U. S., C. C. A., 223 Fed. 425; Warren Bros. Co. v. Evans, 234 Fed. 657.

9 Granite Brick Co. v. Titus, C. C. A., 226 Fed. 557; Courtney v. Croxton, C. C. A., 239 Fed. 247; *Re* Gebney Tire & Rubber Co., 241 Fed. 879.

10 Amer. Surety Co. v. United States, C. C. A., 239 Fed. 681; Bright v. Arkansas, C. C. A., 249 Fed. 950.

11 Florida R. R. Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327, but see Gleason v. Thaw, C. C. A., 234 Fed. 570, 574 over Cameron v. United States, C. C. A., 250 Fed. 943.

12 Dernberger v. Baltimore & O. R. Co., 234 Fed. 405.

When the decisions of the Circuit Court of Appeals are conflicting, the refusal of the Supreme Court to issue a writ of certiorari to review one of them was held to indicate its approval thereof.[13] An assumption of jurisdiction without any discussion of the subject is not equivalent to a ruling that jurisdiction exists.[14] Greater respect is paid to a ruling by the Circuit Justice than to one by a Circuit Judge;[15] and a ruling by a Circuit Judge has more weight than one by a District Judge.[16] The decisions of the Court of Appeals of the District of Columbia in interference proceedings are not conclusive on the courts but they are presumptively correct upon questions of fact.[17] In matters of substantive as distinguished from adjective law, that is, of the law creating rights but not of that merely regulating practice, the Federal courts are—certainly so far as property in land is affected thereby, and probably altogether—bound by and will follow the statutes of the State within whose jurisdiction is the property that is the subject of the suit.[18] A State statute, however, which is merely declaratory of the law cannot affect the rules applying to causes of action that arose before its enactment.[19] Whether a State statute has been properly passed so as to take effect is a question of law, in determining which the courts of the United States will follow the decisions in the State wherein it is claimed to be in force.[20] So, too, in construing a statute or the Constitution of a State, the Federal courts will in general follow the construction put upon it by the State courts, "when that construction has been settled by the decisions of its

13 Audiffren Refrigerating M. Co. v. General Electric Co., 245 Fed. 783; B. F. Goodrich Co. v. Consolidated Rubber Tire Co., C. C. A., 251 Fed. 617.

14 J. Homer Fritch v. United States, 248 U. S. 458.

15 Preston v. Walsh, 10 Fed. 315. But see U. S. v. Huggell, 40 Fed. 636, 644; Wells Fargo & Co. v. Cuneo, 241 Fed. 727; Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239.

16 *Cf.* E. Regensberg & Sons v. Am. Exch. Cigar Co., 130 Fed. 549.

17 Webster El. Co. v. Podlesak, 255 Fed. 907.

18 Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437; McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Pulliam v. Pulliam, 10 Fed. 53, 77. See *infra*, § 477.

19 Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886.

20 South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Post v. Supervisors, 105 U. S. 667, 26 L. ed. 1204;

highest tribunal."[21] Even if, before the State courts have construed it, a State statute is given one construction by a Federal court, and subsequently the highest court of the State construes it differently; or if the Federal courts have first construed it in ignorance of its construction by the highest tribunal of the State, —the Federal courts will, in subsequent cases, disregard their former ruling and follow that of the State court.[22] It has even been held that the Federal courts will not investigate the claim that the decision of the State court was obtained by collusion between the parties to the case in which it was obtained.[23] Where a question is pending before the highest court of a State, it is the duty of a District Court of the United States to postpone its decision thereupon until after that of the State tribunal, unless irreparable injury would otherwise be caused.[24] The courts of the United States are not bound by a decision of a State court construing a statute which is claimed to be a contract by the State; since otherwise the clause in the national Constitution forbidding a State to pass a law impairing the obligations of contracts might be violated with impunity.[25] For a similar reason, if different constructions have been given to the same statute or constitutional provision by the courts of a State at

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225.

21 Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Nesmith v. Sheldon, 7 How. 812, 12 L. ed. 925; Walker v. State H. Com'rs, 17 Wall. 648, 21 L. ed. 744; Elmwood v. Marcy, 92 U. S. 289, 23 L. ed. 710; East Oakland v. Skinner, 94 U. S. 255, 24 L. ed. 125; Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784; Peters v Bain, 133 U. S. 670, 33 L. ed. 696; Case v. Kelly, 133 U. S. 21, 33 L. ed. 513; Memphis Street Railway Company v. Moore, Administrator of Douglas, 243 U. S. 299. Where it was claimed that the decision of such a question was pending before the State Supreme Court, a motion for an adjournment until that court had made its decision was denied. Detroit v. Detroit City Ry. Co., 55 Fed. 569. See *infra*, § 477.

22 Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. ed. 544. A decree will be reversed on this ground when the decision of the State court was rendered pending the appeal. Stutsman County v. Wallace, 142 U. S. 293, 35 L. ed. 1018. But see Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359; and *infra*, § 477.

23 East Oakland v. Skinner, 94 U. S. 255, 24 L. ed. 125.

24 F. W. Cook Brewing Co. v. Garber, 168 Fed. 942. See Act of March 3, 1913, quoted § 105d, *supra*.

25 Jefferson Brank Bank v. Skelly, 1 Black, 436, 17 L. ed. 173. See Railroad Co. v. Falconer, 103 U. S. 821, 822, 26 L. ed. 471.

different times, the Federal courts are not "bound to follow the latter decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."[26] Otherwise, said Chief Justice Taney, "the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory."[27] It seems that the Federal courts will give to a right created by a well-recognized local custom established and acquiesced in within a State, the same force as if it had been created by a State statute.[28] In deciding questions of general commercial law, however, upon which the statutes of a State are silent, the Federal courts are not bound by the decisions of the State courts, but decide according to their own views of what the law is and should be.[29] In a patent suit where it is held that certain claims of the patent are valid and have been infringed by the defendant, he is entitled to a finding as to the other claims an infringement of which is charged in the bill.[30] The courts will never pass upon

26 Waite, C. J., in Douglass v. County of Pike, 101 U. S. 677, 686, 25 L. ed. 968, 971. See also Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Ohio L. Ins. & Tr. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Thompson v. Perrine, 103 U. S. 806, 26 L. ed. 612; Dernberger v. Baltimore & O. R. Co., 243 Fed. 21.

27 Rowan v. Runnels, 5 How. 134, 12 L. ed. 85.

28 Swift v. Tyson, 16 Pet. 1, 18, 10 L. ed. 865, 871; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Railroad Co. v. National Bank, 102 U. S. 14, 29, 26 L. ed. 61, 67; Old Colony Trust Co. v. City of Tacoma, 219 Fed. 775; see *supra*, §§ 79, 82.

29 Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044; Oats v. National Bank, 100 U. S. 239, 25 L. ed. 580; Railroad Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; Butler v. Douglass, 3 Fed. 612. See Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359. See *infra*, § 477. A plea of *res adjudicata* by a decision of a State court between the same parties or their privies is valid, although the question there decided arose on demurrer and was a question of general commercial law and equity jurisprudence. Fuller v. Hamilton County, 53 Fed. 411. See § 186d, *supra*. In one case, where the rule of the Federal was different from that of the State courts, Judge McCrary followed the latter, since otherwise there was a probability that a party to the suit would be subjected to a double payment. Sonstiby v. Keeley, 7 Fed. 447.

30 National Malleable Casting Co. v. T. H. Symington Co., 234 Fed. 343.

the constitutionality of a statute, unless this is absolutely necessary.[31]

§ 376. Objections which cannot be made at the hearing. As the provisions of the equity rules and the other regulations of practice are chiefly designed to facilitate the speedy and orderly progress of a cause to a hearing, after a cause has been brought to a hearing it is a general rule that no objections as to form or the delay in taking a previous proceeding will be allowed to be taken then for the first time.[1] Thus, the rules provide that "if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties."[2] "Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require."[3] An amended bill filed without leave upon the day of the hearing may be disregarded by the court.[4] The objection that the allegations in the bill show no ground for the interference of a court of equity may be taken by motion.[5] The objection that the plaintiff has an adequate remedy at law is waived by the defendant unless raised in a demurrer, plea or answer,[6] but it may be taken by

31 Weyman-Bruton Co. v. Ladd, C. C. A., 231 Fed. 898; Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385; Cameron v. United States, C. C. A., 250 Fed. 943.

§ 376. 1 Allen v. Mayor, etc., of N. Y. 18 Blatchf. 239.

2 Eq. Rule 44.

3 Eq. Rule 43.

4 Terry v. McLure, 103 U. S. 442, 26 L. ed. 403.

5 Baker v. Biddle, Bald. 394; Quirolo v. Ardito, 1 Fed. 610.

6 Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934; Kilburn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005; Brown v. Lake Sup. I. Co.,

the court at any time.[7] In a stockholders' suit the objection that the complainant has failed to seek relief through the corporation should be raised by motion before the hearing.[8]

§ 377. Action of the court upon a hearing. The court may upon the hearing of a cause either decide all the questions raised therein and make a final decree, or merely dispose of some of them and give directions to facilitate the decision of those which remain.[1] "If upon a separate hearing before the granting of an interlocutory decree it should be determined that a single act of infringement was committed—which so far as infringement is concerned is all that is required to support such a decree—under conspiracy or pursuant to control, authority or direction, manifestly that determination should not control the action of the master in dealing with the evidence of acts of infringement committed under circumstances different from those found to exist by the court on the separate and preliminary hearing and justifying an interlocutory decree."[2] Where

134 U. S. 530, 33 L. ed. 1021. See Lawson v. Barber & Co., 189 Fed. 165.

7 Lewis v. Cocks, 23 Wall. 466, 23 L. ed 70; Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43; Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945; Beyer v. Le Fevre, 186 U. S. 114, 118, 46 L. ed. 1080, 1082.

8 See *supra*, § 145.

§ 377. 1 It has been held that where the court has denied an *ex parte* application which has been withdrawn, it is not improper for it to file an opinion upon the question. Henry v. Harris, 191 Fed. 868.

2 Union Sulphur Co. v. Freeport Texas Co., 234 Fed. 191, 193, 194, *per* Bradford, J.: "But wholly aside from the question whether an issue of infringement under conspiracy together with an issue of infringement pursuant to control, authority or direction, formerly could properly form the subject-matter of a plea, or can now, under rule 29 be heard and disposed of 'before the trial of the principal case,' it is obvious that considerations different from those usually applicable to other cases apply to suits in equity to recover profits and damages for infringement of letters patent. In such a suit the granting of the interlocutory decree, if there be one, marks the divisional line between the introduction of evidence touching infringement for the purpose of obtaining or preventing the granting of such decree, and the introduction of evidence as to infringement before the master to establish the amount of profits or damages. It does not follow that because one act of infringement was the result of conspiracy or of control, authority or direction, on the part of the defendant, that all others were. If upon a separate hearing before the granting of an interlocutory decree it should be determined that a single act of infringement was committed—which

in a suit to enjoin the infringement of a patent, the defendant has defaulted after the evidence has been taken, the court should not pass in detail upon the questions that have arisen, but should only go over the case sufficiently to dispose of the actual controversy, not to establish a precedent that might be used in subsequent patent litigation between other parties.[3] Where, at the time a bill was filed, the plaintiff had the right to the injunction which was the only relief therein prayed except costs, but subsequent events make it improper to grant this relief on the final decree, the bill may be retained for the assessment of any damages to the plaintiff that have accrued;[4] or, if no damages are awarded for costs and in case an undertaking has been filed as a condition for an interlocutory injunction, for a declaration that plaintiff was entitled to that relief in order to relieve him and his sureties from liability upon such undertaking;[5] but no appeal will lie from a decree in such a case when the only grievance of the plaintiff is that he has been denied his costs.[6]

so far as infringement is concerned is all that is required to support such a decree—under conspiracy or pursuant to control, authority or direction, manifestly that determination should not control the action of the master in dealing with evidence of acts of infringement committed under circumstances different from those found to exist by the court on the separate and preliminary hearing and justify an interlocutory decree. To require all evidence touching infringement to be introduced before the time for the entry of the interlocutory decree would be to uproot the settled practice in patent suits in equity. On the other hand, if the master is not bound with respect to infringement by the action of the court in the first instance, save so far as the court has specially found acts of infringement, the question of conspiracy, or control, authority and direction touching other acts of infringement is left open for determination on the circumstances surrounding and explanatory of such other acts, and 'the examination must be at large.' It is a matter of regret that the hearing and decision of this case should be attended with what at first sight might seem unnecessary delay and expense; but for the reasons above given the court is compelled to hold that in the exercise of a sound discretion the motion must be denied.''

3 Victor Talking Mach. Co. v. Leed & Catlin Co., 180 Fed. 778.

4 Wingert v. First Nat. Bank of Hagerstown, 223 U. S. 670, 56 L. ed. 605; McCormick v. Oklahoma City, C. C. A., 203 Fed. 921.

5 Smith v. Ingersoll-Sergeant Rock Drill Co., 7 Misc. (N. Y.) 374, 377; Williams v. United Wireless Tel. Co., (N. Y. Sup. Ct., per Bischoff, J.) N. Y. L. J. April 24, 1912, in which the writer was counsel.

6 Wingert v. First Nat. Bank of

If the court inclines in favor of the defendant, it will usually render a final decree dismissing the bill. The dismissal may be absolute or without prejudice. An absolute decree of dismissal is an absolute bar to any subsequent suit brought for the same cause.[7] A dismissal without prejudice is no bar to another suit brought for the same cause of action, provided that the defects on account of which the bill was dismissed are remedied.[8] A dismissal without prejudice is usually ordered when a bill is dismissed for want of parties,[9] or for want of jurisdiction in a Federal court,[10] or for multifariousness,[11] or for "a slip or mistake in the pleadings or in the proof,"[12] or because of the complainant's election to proceed at law.[13] Where the facts as they exist do not entitle the complainant to an injunction; but it appears not impossible that a subsequent change of circumstances will entitle him to such relief; a bill may be dismissed without prejudice to the right to apply for the same relief under changed conditions.[14] The Supreme Court will reverse a decree which dismissed a bill absolutely when the dismissal should have been without prejudice.[15] Where the dismissal is because the plaintiff has an adequate remedy at law, the decree should

Hagerstown, 223 U. S. 670, 56 L. ed. 605.

7 Case v. Beauregard, 101 U. S. 688, 25 L. ed. 972; Durant v. Essex Co., 7 Wall. 107, 19 L. ed. 154.

8 Walden v. Bodley, 14 Pet. 156, 161, 10 L. ed. 398, 400; Daniell's Ch. Pr. (5th Am. ed.) 994, 995; Rosse v. Rust, 4 J. Ch. (N. Y.) 300.

9 Kendig v. Dean, 97 U. S. 423, 24 L. ed. 1061.

10 Hartell v. Tilgham, 99 U. S. 547, 25 L. ed. 357; Gaylords v. Kelshaw, 1 Wall. 81, 17 L. ed. 612; Hollins v. Brierfeld C. & T. Co., 150 U. S. 371, 37 L. ed. 1113.

11 Williams v. Jackson, 107 U. S. 478, 484, 27 L. ed. 529, 531.

12 Daniell's Ch. Pr. (2d Am. ed.) 994, 995; McNeill v. Cahill, 2 Bligh, 228; Woollam v. Haern, 7 Ves. 211, 222; Rosse v. Rust, 4 J. Ch. (N. Y.) 300. For example, when the bill showed a good ground of equitable relief as to one plaintiff, but failed to show what interest the other had in the subject-matter of the litigation. House v. Mullen, 22 Wall. 42, 22 L. ed. 838. But see Ogsbury v. La Farge, 2 N. Y. 113, and § 187.

13 Countess of Plymouth v. Bladon, 2 Vern. 32; Livingston v. Kane, 3 J. Ch. (N. Y.) 224; Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

14 Galveston, H. & S. A. Ry. Co. v. United States, 222 Fed. 175; Des Moines Gas Co. v. Des Moines, 238 U. S. 153; Phoenix Rys. v. Geary, 239 U. S. 277.

15 House v. Mullen, 22 Wall. 42, 22 L. ed. 383; Texas & P. Ry. Co. v. Interstate Tr. Co., 155 U. S. 585, 39 L. ed. 271; Fougere v. Jones, 66 Fed. 316.

state that it is without prejudice to a suit at law.[16] Upon a hearing of a demurrer a case improperly upon the common-law docket was transferred to the equity docket and at the same time decided.[17]

If, on the other hand, the court inclines in favor of the plaintiff, unless the bill pray merely for a perpetual injunction, it rarely renders a final decree at the first hearing of the cause. It often directs a reference to a master to take accounts and assess damage;[18] and it not infrequently gives leave to either party to apply for further orders or directions "at the foot of the decree" which it orders entered.[19] If the court is in doubt concerning the facts, it may direct a feigned issue, or an action at law, or a reference to a master, to aid in determining them. In some cases under the anti-trust acts the court may deny an injunction but retain the bill for further action in case of the commission of illegal acts charged in the bill but not yet committed nor proved to have been threatened.[20] In one case, when a bill had been filed by a bondholder praying for the appointment of a receiver of a canal company, the court at the hearing denied the application for a receiver, but retained the bill so far as to compel the corporation to file an annual account.[21]

16 Sanders v. Devereux, C. C. A., 60 Fed. 311, 316.

17 Daneel v. United Shoe Mach. Co., 120 Fed. 839.

18 See ch. XXV.

19 Legrand v. Whitehead, 1 Russ. 309; Wetmore v. St. Paul & P. R. Co., 3 Fed. 177, *infra*, § 405. But see Hughes v. Jones, 3 De G., F. & J. 307.

20 U. S. v. U. S. Steel Corporation, 251 U. S. 417, 445; U. S. v. Am. Can Co., 234 Fed. 1019.

21 Stewart v. C. & O. C. Co., 5 Fed. 149.

CHAPTER XXIV.

ISSUES AT LAW.

§ 378. Power of court to direct issues at law. When the chancellor was in doubt concerning any question of fact arising in the cause, the evidence in regard to which was conflicting or insufficient,[1] it was his custom to compel its trial before a jury upon a feigned issue; and, if their verdict was satisfactory to him, to assume the truth of the facts established by the same as the basis of his decree.[2] This power of the chancellor is also vested, independently of any special statute, in all the courts of the United States which have equitable jurisdiction;[3] but in cases arising under the patent laws it has been increased by a statute providing that the Circuit Courts of the United States, "when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may from time to time be made by the Supreme Court,[4] and submit to them such questions of fact arising in such cause as such Circuit Court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings."[5] The power to direct an issue at law concerning incidental and subordinate facts still exists notwithstanding the new equity rules.[6] A trial of an issue at law may be directed at any

§ 378. 1 Moons v. De Bernales, 1 Russ. 301; Burkett v. Randall, 3 Mer. 466.

2 3 Bl. Com. 452.

3 Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Goodyear v. Providence R. Co., 2 Cliff. 351; Johnson v. Harmon, 94 U. S. 371, 378, 24 L. ed. 271, 273.

4 No rules upon this subject have hitherto been made.

5 18 St. at L., ch. 77, p. 315; 1 Supp. U. S. R. S. 136; Watt v. Starke, 101 U. S. 247, 25 L. ed. 826.

6 Vosburg Co. v. Watts, 221 Fed. 402, construing equity rule 23.

time.[7] The application for this may be denied for laches after the report of a master.[8] The court may decide a cause without a trial of an issue which it has ordered, and even without revoking its previous order directing one.[9] The order of a judge directing an issue at law is discretionary, and it is doubtful whether or not it may be reviewed upon appeal.[10]

It was formerly an almost invariable custom to direct an issue when the question to be determined was the validity of a will as against an heir, or the true heir-at-law of a decedent, or the right of a rector to tithes.[11] Where the defendants in a suit for partition, deny the plaintiffs title and possession of any interest in the land, they are entitled to a trial on that issue at law.[12] It was very common, moreover, when an allegation in a sworn answer, the plaintiff not having waived answer under oath, was only controverted by the testimony of a single witness supported by corroborating circumstances;[13] or when, by determining in the way he inclined, the judge would find a person guilty of forgery.[14] It seems to have been the opinion of Judge Hammond that it is the duty of a Federal court of equity to direct an issue at law of a common-law claim against a receiver.[15] An issue may be directed notwithstanding a report of auditors upon the facts.[16] The court sometimes directs only a single issue and sometimes several, according to the number of substantial points upon which it deems it necessary to take the opinion of a jury; and it will, when the question to be decided embraces several disputed circumstances, direct an issue upon each of them.[17] If the parties cannot agree upon the form of an issue,

7 N. J. & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., 113 Fed. 395.

8 Richmond Cedar Works v. Pinnix, 288 Fed. 785.

9 Field v. Holland, 6 Cranch 8, 3 L. ed. 136; Cook v. Bay, 4 How. (Miss.) 485.

10 See Black v. Lamb, 1 Beasley (N. J.), 108; Ward v. Hill, 4 Gray (Mass.), 593; Crittenden v. Field, 8 Gray (Mass.) 621.

11 3 Bl. Com. 452; Lord Fingal v. Blake, 1 Molloy, 113; Vaigneur v. Kirk, 2 Desaus. (S. C.) 640; Williams v. Price, 4 Price, 156, 160.

12 Gilbert v. Hopkins, C. C. A., 254 Fed. 196.

13 Daniell's Ch. Pr., ch. XXVI, § 1.

14 Bishop of Winchester v. Fournier, 2 Ves. Sen. 445, 446; Apthorp v. Comstock, 2 Paige (N. Y.) 482. But see Peake v. Highfield, 1 Russ. 559.

15 Atkyn v. Wabash Ry. Co., 41 Fed. 193; *supra*, § 331.

16 Field v. Holland, 6 Cranch 8, 3 L. ed. 136.

17 Bryan v. Parker, 1 Y. & C.

it will be settled either by the judge or by a master, as the court deems most expedient.[18] By going to trial upon an issue neither party is precluded from any right he may afterwards have to appeal from the order directing it.[19]

§ 379. Matters concerning which an issue is directed. No party will be permitted to take an issue in a different form from that which he has stated in his pleadings;[1] but the court may upon its own motion direct an issue to try a matter not in issue arising upon the hearing, and which it thinks should be determined before a final decree is rendered.[2] An issue also may be directed upon claims brought in under a decree by persons not upon the record.[3] An issue will not, however, be directed to establish a point which a party set up in his pleading but omitted in his proof.[4]

§ 380. Time when an issue is directed. According to the old practice an issue was rarely directed before the original hearing of a cause.[1] Instances have occurred, however, when this has been done before that time upon motion,[2] and even to determine the facts upon a motion for an injunction or a receiver, when the affidavits for or against the motion were conflicting.[3] An issue has been often granted after the original hearing at a hearing for further directions;[4] and even after wards.[5] Under the statute providing for the direction of issues in patent causes, it would seem that one can now be directed by an interlocutory order more frequently than formerly.[6]

170; Bailey v. Sewell, 1 Russ. 239; Earl of Newburgh v. Countess, 5 Madd. 364.

18 Daniell's Ch. Pr., ch. XXVI, § 1.

19 White v. Lisle, 3 Swanst. 342; Legare v. Daly, 1 Ves. Sen. 192; De Tastet v. Bordenave, Jacob, 516.

§ 379. 1 St. Paul's v. Kettle, 2 V. & B. 1; Bennett v. Neale, Wightw. 324; Savage v. Carroll, 1 Ball & B. 548.

2 Balch v. Tucker, 2 Ch. Cas. 40.

3 Price v. Price, cited in 2 Smith's Ch. Pr. 76.

4 Savage v. Carroll, 1 Ball & B. 548; Price v. Berrington, 3 Macn. & G. 486.

§ 380. 1 Fullagar v. Clark, 18 Ves. 481.

2 Middleton v. Sherburns, 4 Y. & C. 358; Kent v. Burgess, 11 Sim. 361; Townley v. Deare, 3 Beav. 213; Lancashire v. Lancashire, 9 Beav. 259.

3 Gardiner v. Howe, 4 Madd. 236; De Tastet v. Bordenave, Jacob, 516.

4 New Orleans G. L. & B. Co. v. Dudley, 8 Paige (N. Y.) 452.

5 Price v. Price, cited in 2 Smith's Ch. Pr. 76. See Goodyear v. Providence R. Co., 2 Fish. Pat. Cas. 499.

6 18 St. at L., ch. 77, p. 315; 1 Supp. U. S. R. S. 136.

§ 381. Manner of trying an issue. The manner of trying a feigned issue is thus described by Blackstone. "But as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of King's bench, or at the assizes of a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of 5*l*. with the defendant that A was heir-at-law to B; and then avers that he is so; and therefore demands the 5*l*. The defendant admits feigned wager, but avers that A is not the heir to B, and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the juror at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans: and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause."[1] The legal fiction is, however, now practically out of use; and issues are tried upon the common-law side of a Circuit or District Court frequently by the same judge that directed them.[2] The course of proceeding upon the trial of an issue is substantially the same as that in ordinary trials at common law, unless the judge who directed it has given special directions upon the subject.[3] When, however, a will was sought to be proved against an heir-at-law, at the suit of a devisee, it was necessary by the former practice to prove the execution of the will by examining all the witnesses who were alive and capable of giving testimony.[4] If the order for an issue direct that a number of witnesses be examined, but the plaintiff declines to call some, the judge himself will call and examine the rest.[5] It seems, too, that the jury should be sworn in the words of the order of issue.[6] The order of issue, usually contains directions as to admissions to be made and documents to be produced by the parties.[7] No admission of

§ 381. [1] 3 Bl. Com. 452.

[2] See Wilson v. Riddle, 123 U. S. 608, 31 L. ed. 280.

[3] See Kerr v. South Park Com'rs, 117 U. S. 379, 29 L. ed. 924; Wilson v. Riddle, 123 U. S. 608, 31 L. ed. 280.

[4] Townsend v. Ives, 1 Wilson, 216; Ogle v. Cook, 1 Ves. Sen. 177; Bullen v. Michel, 2 Price, 399; Bootle v. Blundell, 19 Ves. 494.

[5] Groom v. Chambers, 2 Mont. & Ayr. 742.

[6] Wilson v. Barnum, 1 Wall. Jr. 342.

[7] Duke of Beaufort v. Morris, 2

any fact not clearly admitted by the pleadings will, however, be required.[8] If such directions are omitted in the order for the issue, they may be obtained afterwards upon motion.[9] The party upon whom the burden of proof rests, whether he be plaintiff or defendant in the original suit, is directed by the order to act as plaintiff in the issue.[10]

It is the defendant's duty to name an attorney to appear for him at the trial of the issue. If he fails to do so, it has been held that an order may be obtained directing that he name an attorney in four days, or else that the issue be taken as tried and a verdict given for the plaintiff.[11] The decree or order for the issue should specify a time when it is to be tried.[12] If the plaintiff make default in having the case ready for trial at the appointed time,[13] or either party fail then to appear, the court will order the issue taken *pro confesso* against him, unless he can show a reasonable ground for a postponement.[14] It seems that an application for a postponement,[15] or for a special jury, if one be desired,[16] should be made to the judge who directed the issue. A case of doubtful authority holds that it is error to try an issue in equity before the same jury which decides upon an issue at common law in the same case.[17] A person interested in the result of an issue, but who refuses to be a party to it, may be allowed to attend the trial by counsel, in which case he may be compelled to produce documents material to the case and in his possession.[18]

After the trial, the trial judge certifies how the verdict was found, but judgment should not be entered upon it.[19] If any special circumstances have occurred at the trial which he thinks

Phil. 683; Apthorp v. Comstock, 2 Paige (N. Y.) 482; Cart v. Hodgkin, 3 Swanst. 161.

8 Duke of Beaufort v. Morris, 2 Phil. 683.

9 Marsh v. Sibbald, 2 V. & B. 375.

10 Parker v. Morrell, 2 Phil. 453.

11 Wilson v. Ginger, 2 Dick. 521; Hartland v. Dancocks, 5 De G. & Sm. 561.

12 Daniell's Ch. Pr., ch. xxvi, § 1.

13 Bearblock v. Tyler, 1 J. & W. 225; Casborne v. Barsham, 5 M. & C. 113.

14 Casborne v. Barsham, 5 M. & C. 113; Hargrave v. Hargrave, 8 Beav. 289.

15 Kebel v. Philpot, 9 Sim. 614.

16 Anon., 2 P. Wms. 68. As to depositions, see Cahoon v. Ring, 1 Cliff. 592.

17 Union Pac. R. Co. v. Syas, C. C. A., 246 Fed. 561.

18 Pindar v. Smith, Mad. & Geld. 48.

19 Kerr v. S. Park Com'rs, 117 U. S. 379.

it right to report to the court, he indorses them on the *postea*.[20] He may also furnish to the court of equity a description of the trial.[21] An irregularity or omission in this respect may, however, be corrected or disregarded.[22]

§ 382. Effect of the finding of a jury upon an issue. "The verdict of a jury upon an issue out of chancery is only advisory and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded, and a decree rendered contrary to it."[1] If therefore, either party be dissatisfied, he must move for a new trial on the equity and not on the common-law side of the court;[2] "and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either by moving the Chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The Chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken."[3] Unless such a motion is made, no error committed in the course of the trial of the issue can be reviewed upon appeal.[4] Such an application should be made by motion or petition before the cause comes on for hearing upon further directions.[5]

The form of an issue cannot, however, be changed in this

20 White v. Lisle, 3 Swanst. 342; Trenton B. Co. v. Russell, 1 Green, Ch. (N. J.) 492.

21 Bassett v. Johnson, 1 Green, Ch. (N. J.) 154.

22 Wilson v. Riddle, 123 U. S. 608, 31 L. ed. 280.

§ 382. 1 Bradley, J., in Watt v. Starke, 101 U. S. 247, 252, 25 L. ed. 826, 827. See also Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452; Allen v. Blunt, 3 Story, 742, 746.

2 Watt v. Starke, 101 U. S. 247, 250, 25 L. ed. 826, 827; Johnson v. Harmon, 94 U. S. 371, 378, 24 L. ed. 271, 273.

3 Bradley, J., in Watt v. Starke, 101 U. S. 247, 250, 251, 25 L. ed. 826, 827. See also Johnson v. Harmon, 94 U. S. 371, 24 L. ed. 271.

4 Brockett v. Brockett, 3 How. 691, 11 L. ed. 786; Johnson v. Harmon, 94 U. S. 371, 24 L. ed. 271; Watt v. Starke, 101 U. S. 247, 25 L. ed. 826.

5 Atty. Gen. v. Montgomery, 2 Atk. 378; Van Alst v. Hunter, 5 J. Ch. (N. Y.) 148, 152 .

manner. A party desiring to alter it must do so by presenting a petition for a rehearing of the decree or order directing it.[6]

The manner in which the verdict is reviewed in equity is thus described by Lord Eldon: "In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."[7] Upon an appeal an assignment of an error in instructions to the jury will not be considered.[8] The usual grounds for directing a new trial of an issue are, "1st, the alleged improper summing up of the judge: 2dly, because the weight of evidence is against the verdict; and 3dly, because of an informality in the evidence."[9] Surprise and fraud are also reasons for granting a new trial.[10] When the dispute concerns the title to land, in imitation of courts of law two trials of the issue have often been granted, when the first verdict was satisfactory upon the evidence;[11] and sometimes the court

6 Daniell's Ch. Pr. (3d Am. ed.) 1114.

7 Lord Eldon in Barker v. Ray, 2 Russ. 63. See also Bootle v. Blundell, 19 Ves. 494; Tatham v. Wright, 2 Russ. & M. 1; Watt v. Starke, 101 U. S. 247, 252, 25 L. ed. 826, 827; McKinley Creek Min. Co. v. Alaska Min. Co., 183 U. S. 563, 46 L. ed. 331.

8 McKinley Creek Min. Co. v. Alaska Min. Co., 183 U. S. 563, 46 L. ed. 331.

9 Smith's Ch. Pr. (Phila. ed.), vol. ii, p. 84. See also Tatham v. Wright, 2 Russ. & M. 1; Watt v. Starke, 101 U. S. 247, 253, 25 L. ed. 826, 828.

10 Exton v. Turner, 2 Ch. Cas. 80; Standen v. Edwards, 1 Ves. Jr. 133.

11 Earl of Darlington v. Bowes, 1

has directed a second trial for the solemn determination of the matter, without setting aside the first verdict, the effect of which was that the first verdict was admitted in evidence upon the second trial, and had its weight with the jury.[12] In such case, the court usually made it a condition of granting a second trial, that the applicant should pay to the other party the costs of the first.[13] It has been held that this practice does not apply to the issue of title, seisin, or possession in a suit for partition; but that the verdict in such a case is conclusive upon the facts.[14]

§ 383. Proceedings after the trial of an issue. After the trial of an issue and the completion of the record by the addition of the *postea*, the cause, unless a new trial is obtained should be set down for hearing.[1] This may be done in the usual manner; but it seems, not before the expiration of the first four days of the term following the trial, in order that the party against whom the verdict has been found may have an opportunity of moving for a new trial.[2] The course then comes on in the regular course, when such final or other decree as is proper is pronounced. The costs of an issue do not follow the verdict as a matter of course, but are in the discretion of the court which directed the issue;[3] though they are usually given to the party in whose favor the verdict was rendered.[4] In one case the court ordered an advance out of a fund in its possession, in order to enable the parties to try an issue directed by it.[5]

Eden, 271; Stace v. Mabbot, 2 Ves. Sen. 552.

12 Baker v. Hart, 3 Atk. 542.

13 Baker v. Hart, 3 Atk. 542; Edwin v. Thomas, 1 Vern. 489.

14 Gilbert v. Hopkins, C. C. A., 204 Fed. 196.

§ 383. 1 Allen v. Blunt, 3 Story, 742; Daniell's Ch. Pr., ch. xxvi.

2 1 Newland's Ch. Pr. 357.

3 Decker v. Caskey, 2 Green Ch. (N. J.) 446.

4 Corporation of Rochester v. Lee, 2 De G. M. & G. 427.

5 Coombs v. Brooks, 3 De G. & S. 452.

CHAPTER XXV.

PROCEEDINGS IN A MASTER'S OFFICE.

§ 384. References to masters. In general. The labors of a judge in a court of equity are often materially lightened by referring the consideration of matters of fact to a master in chancery, who is directed by it to investigate the same and report his opinion thereon to the court. Certain ministerial acts which a court of equity undertakes are also performed by it through a master. The questions which are ordinarily referred to masters in chancery are: as to who are the heirs, next of kin, creditors, members of a particular class of legatees or other persons who are entitled to share in a fund or in an estate in the hands of the court for distribution; as to whether the title to real estate is good; as to the state of the law of a foreign country; as to whether one of two books or other publications is pirated from the other; as to the amount of damage suffered by the granting or withholding of an injunction; the taking of accounts;[1] the computation of interest; the settlement of conveyances, and other deeds; the selling of property; the appointment of trustees, receivers, and guardians. A master has been appointed in a suit to enjoin the enforcement of a statute regulating the charges of a corporation engaged in a public service,[2] and it has been said that this is the proper practice;[3] and the superintendence of the performance of their duties by receivers to supervise an election of directors of a corporation.[4]

§ 384. [1] As to the preliminary proof required before a reference for an accounting, see Columbian Eq. Co. v. Merc. Tr. & D. Co., C. C. A., 113 Fed. 23; *infra*, § 389.

[2] Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417; Lincoln Gas & El. Light Co. v. City of Lincoln, 223 U. S. 349, 357, 56 L. ed. 466, 469.

[3] Lincoln Gas & El. Light Co. v. City of Lincoln, 223 U. S. 349, 361, 56 L. ed. 466, 471.

[4] Bartlett v. Gates, 118 Fed. 66; which contains the order. For subsequent proceedings, see 37 Am.

The judge may himself, however, attend to any of these matters without the aid of a master.[5] The decision of the case or of the issues joined by the pleadings cannot be referred to a master, except by consent.[6] Such references are, however, very frequent, especially in the First Circuit.

"Save in matters of account, reference to a master shall be the exception and not the rule and shall be made only on a showing that some exceptional condition requires it."[6a]

A master in equity cannot be given power to grant an injunction.[7] The new equity rules have not deprived the courts of any power to refer questions to a master which they previously possessed.[8]

Where the order recited that the master was appointed to investigate the cause and report to the court what amount, if any, was due by reason of the claim, and that his report be filed "subject to the further orders of the court"; it was held that this did not refer the issues to him for final decision.[9] An

Law Rev. 124. A similar reference was made in Du Pont v. Du Pont, 242 Fed. 78, 138.

5 Pepper v. Addicks, 153 Fed. 383; McManus v. Sawyer, 237 Fed. 231, 235; Alexander v. Fidelity Trust Co., 238 Fed. 938, 947.

6 Kimberley v. Arms, 129 U. S. 512, 523, 524, 32 L. ed. 764, 768, 769; Morris v. Taylor, 23 N. J. Eq. 131; Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328, 334; Garinger v. Palmer, C. C. A., 126 Fed. 906. The stipulation that new issues be referred to a master to whom the court has previously referred the original issues does not make the whole reference one by consent. Central Improvement Co. v. Cambria Steel Co., C. C. A., 201 Fed. 811.

6a Eq. Rule 59.

7 *Re* Gordon, 250 Fed. 789; as to the practice in bankruptcy see, however, *infra*, §§ 633, 638.

8 Holt Mfg. Co. v. C. L. Best Gas Traction Co., 245 Fed. 354.

9 Blassengame v. Boyd, C. C. A., 178 Fed. 1. It was held that an order referring an action to a master commissioner to take testimony, hear the cause, and report all the matter and findings therein to the court for further proceedings, contemplated a finding by the master upon the facts and the law, with the right to the parties to file exceptions, and with power in the court to review and reconsider on such exceptions all the findings of law and of fact, and for that purpose to examine and weigh the evidence, and enter judgment according to the result of such re-examination. Albert F. Remy Co. v. La. Dow, C. C. A., 230 Fed. 378. Where after a reference to report to the court, a stipulation was signed that the court might refer the cause, with respect to a supplemental bill subsequently filed and the proceedings thereupon, to the

objection to an order of reference should be made by a motion to vacate or modify such order.[10] Otherwise, except perhaps when an exception is noted at the time of the order, all objection thereto is waived.[11] Where the record does not show that there was any objection to the reference to the master, the court presumes that there was an implied consent thereto;[12] but there is no such presumption as to a party when the record does not show that he was present when the reference was ordered.[13] A consent to a reference to a master is a waiver of the objection that there is an adequate remedy at law.[14]

The extent of a master's authority is limited by the decree or order appointing him;[15] and it has been said that it cannot be extended even by consent,[16] nor upon appeal.[17]

Where no objection to the language of an order of reference was made for several years, and in the meanwhile one of the parties had died, the Circuit Court of Appeals refused to modify it on an appeal from the final decree.[18] A standing master need not be required to file a bond.[19]

§ 385. Who may be appointed master. The District Courts, "a majority of all the judges concurring in the appointment," have the power to appoint standing masters in chancery in their

master for the same purposes as of the original bill and agreeing that he might include in his report of the case made by the original bill his report of that made by the supplemental bill and the proceedings thereupon; it was held that the stipulation did not broaden the master's authority conferred by the original order and confined his jurisdiction over the supplemental issues within the limits of the authority given him over those originally raised, so that it was the duty of the judge to examine the evidence and to determine the law and facts after the report was filed. Keller v. U. S., C. C. A., 168 Fed. 697.

10 Flanders v. Coleman, 249 Fed. 757.

11 Ibid.

12 Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328, 334. *Contra*, Guarantee Gold Bond Loan & Sav. Co. v. Edwards, C. C. A., 164 Fed. 809, where the reference was under a general order made before the suit was brought; Southern Ry. Co. v. Simon, 184 Fed. 959.

13 Wm. Edwards Co. v. La Dow, C. C. A., 230 Fed. 378.

14 Sanders v. Riverside, C. C. A., 118 Fed. 720.

15 Lonsdale Co. v. Moies, 2 Cliff. 538.

16 Farmers' L. & Tr. Co. v. Central R. Co. of Iowa, 2 Fed. 656; Gordon v. Hobart, 2 Story, 243.

17 Briggs v. Neal, C. C. A., 120 Fed. 224.

18 Gunn v. Black, C. C. A., 60 Fed. 151.

19 Seaman v. N. W. Mut. L. I. Co., 86 Fed. 49.

respective districts.[1] A District Court may also appoint a master *pro hac vice* in any particular case.[2] "No clerk of a district court of the United States, or deputy, shall be appointed a receiver or master in any case, except where a judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment."[3] An order appointing a clerk of the court master, to conduct a judicial sale, without assigning special reasons, is to that extent erroneous; but the error does not affect the rest of the order, which is amendable in that respect.[4] It has been held that it can only be set aside upon appeal, and cannot be questioned in a collateral proceeding, as by exceptions to his report of a sale, or by a motion to set aside an appraisal by him.[5] Another statute provides that "no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to be employed by such court or judge in any office or duty in any court of which such notice or judge may be a member."[6] The Federal Trade Commission may be appointed master in chancery to settle and recommend to the court the form of a decree in a suit by the Attorney General under the Anti Trust Acts.[7]

§ 385. 1 Eq. Rule 68, re-enacting rule 82 of 1842.

2 Ibid.

3 Ind. Code § 68, 36 St. at L. 1087 re-enacting 20 St. at L., ch. 183, p. 415. It has been held: that this prohibition is for the benefit of the parties to the litigation, and may be waived by their consent to an order appointing such an officer master in a particular case; and that after such an order of decree has thus been entered and the parties have proceeded before the master, it may be amended by the assertion of a clause stating that the court has determined that such consent is a sufficient special reason for such appointment. Fisher v. Hayes, 22 Fed. 92.

4 Quinton v. Neville, C. C. A., 154 Fed. 432.

5 N. W. Mut. L. I. Co. v. Seaman, 80 Fed. 357; s. c., in C. C. A., Seaman v. N. W. Mut. L. I. Co., 86 Fed. 493.

6 24 St at L., p. 552, ch. 373, § 7. A final decree entered upon the report of a master whose appointment was forbidden by this statute is not void, and cannot be set aside upon motion at a subsequent term. Farmers' L. & Tr. Co. v. Iowa Water Co., 80 Fed. 467. Whether the statute forbids the appointment of a man who has married a sister of the judge's wife is an open question. Farmers' L. & Tr. Co. v. Iowa Water Co., 80 Fed. 467, 469.

7 38 St. at L. 722, § 7, Comp. St. § 8836g, *supra*, §§ 77h, 151a.

§ 386. Bringing on a reference. The rules provide that, whenever a reference is made, the party at whose instance or for whose benefit it was directed must bring the same to a hearing within twenty days succeeding the date of the order for a reference.[1] Otherwise the adverse party may forthwith cause proceedings to be had before the master at the cost of the party who procured the reference.[2] The master need not report evidence unless required by either party.[3] It is the master's duty, as soon as he reasonably can after the matter referred to him is brought before him, to assign a time and place for proceeding, and to give due notice thereof to each of the parties, or their sólicitors.[4] Notice may be served by mail or otherwise.[5] It need not be served by the marshal.[6]

By the old English practice parties interested in the subject-matter of a reference were brought before the court by the service of a warrant in the State courts of New York now called a summons. This was a memorandum, upon a slip of paper entitled in the cause, and signed by the master, appointing a day and hour for all parties concerned to attend him on the matter of the reference.[7] It was in substantially the following form: "By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on —— next, at —— of the clock, in the ——noon, at my Chambers in ——, at which time and place all parties concerned are to attend. [Signature.] Dated the —— day of ——, ——."[8] It is the better practice, however, for the warrant to contain a statement of the nature of the reference.[9] Upon a reference for an accounting it is customary for the master to include in his warrant directions as to the matter to be included in the account. In a proper case the warrant may be quashed,[10] or some of the directions be stricken therefrom by the court.[11]

§ 386. 1 Eq. Rule 59.

2 Eq. Rule 59.

3 Union S. R. v. Mathiesson, 3 Cliff. 146, 149. See Kerosene L. H. Co. v. Fisher, 1 Fed. 91.

4 Eq. Rule 60.

5 Kerosene L. H. Co. v. Fisher, 1 Fed. 91.

6 Ibid.

7 Daniell's Ch. Pr., ch. xxvi.

8 Ibid.

9 Manhattan Co. v. Evertson, 4 Paige (N. Y.) 276.

10 Beckwith v. Malleable Iron Range Co., 195 Fed. 291, order set aside upon application from *mandamus*. *Re* Beckwith, C. C. A., 201 Fed. 518; *Re* Beckwith, C. C. A., 203 Fed. 45.

11 Beckwith v. Malleable Iron

This warrant is often called a "summons."[12] There was required to be at least one clear day between the day of issuing the warrant and the day appointed by it for the attendance of the parties thereon.[13] The warrant was obtained from the master's clerk by the solicitor applying for it; and the latter underwrote a memorandum expressing its object, and saw that due service of it was made.[14] Whenever a document of any kind was left at the master's office by the solicitor of either of the parties, he usually took out a warrant, which he underwrote, "on leaving the," &c.[15] This was termed a "warrant on leaving," and was served in the usual manner, but was considered a mere formal notice, to afford the opposite party an opportunity of obtaining a copy of the document left that he might either admit or contest the circumstances there stated, as he might be advised.[16] A certified copy of the decree and opinion of the court may stand as the commission to the master.[17]

§ 387. Parties entitled to attend a reference before a master. The general rule appears to be, that all parties beneficially interested, either in the estate or in the fund or matter in question, are entitled to attend before the master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund.[1] The only exception to this rule is said to be the case of a reference to a master of the title to an estate purchased under a decree, when the vendor's solicitor only has the right to appear before the master on the inquiry.[2] An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estate; but after there has been a report of debts, if all the persons interested in the personal estate are before the court, the executor is only entitled to attend on those proceedings in which he is personally interested as an accounting party.[3] Trustees were

Range Co., 207 Fed. 848; see *infra*, § 389a.

12 Ibid.

13 1 Newland's Ch. Pr. 324. See Bernie v. Vandever, 16 Ark. 616.

14 Daniell's Ch. Pr., ch. xxvi.

15 Ibid.

16 Ibid. See Manhattan Co. v. Evertson, 4 Paige (N. Y.) 276.

17 Bay State Gas Co. v. Rogers, 147 Fed. 557.

§ 387. 1 Daniell's Ch. Pr., ch. xxvi. See Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547.

2 Daniell's Ch. Pr., ch. xxvi.

3 Ibid.

formerly not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the beneficiaries were before the court; but if there were any persons *in esse*, or who might "come into *esse*," who might become interested and whose interests were only represented by the trustees, and were not too remote, the trustees were entitled to attend the proceedings affecting those interests.[4] The rule that all parties interested in the result are entitled to attend before the master applies not only to those who are parties to the record, but to those who are "quasi-parties," by having come in under the decree and established a claim.[5]

In a suit for the distribution of a fund, or creditors' suit, it is the usual practice for the court to make an order directing that all parties interested present their claims within a time prescribed in the order or by the master; and that the master publish a notice to that effect in certain newspapers.[6] Such an order does not apply to a person who claims the title to specific property, such as a trust fund, of which a receiver has possession,[7] nor to one who has a prior lien which is recognized at common law;[8] but an order may be made limiting the time for the presentation of claims for a preference.[9] After the expiration of the time thus limited, any creditor or other person interested in the fund may come in and prove his claim at any time before the final distribution of the fund, even, it seems, although the order for an advertisement has provided to the contrary,[10] although an order from the court authorizing such

4 Ibid.

5 Ibid.

6 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 646. For an order directing a balance to be held ten years, in order to meet unproved claims, see Fowler v. Jarvis Conklin Co., 118 Fed. 1022.

7 N. Y. Security & Tr. Co. v. Lombard I. Co., 75 Fed. 172.

8 Trust Co. of America v. Norfolk & S. Ry. Co., 183 Fed. 803.

9 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 200 Fed. 312, 316, holding that typical claims of this character upon *ex parte* application should be sent to the master for determination as to their *status;* and that after a determination that one claim of a certain class was entitled to a preference, a general order should be made requiring all persons with claims of a similar character to present them within a specified time. See s. c., Pennsylvania Steel Co. v. N. Y. City Ry. Co., 187 Fed. 287; *supra*, § 305.

10 Harrison v. Kirk, House of Lords 1904, 1. *Contra, Re* Ennis, C. C. A., 198 Fed. 381, a case in bankruptcy, where there was no

belated proofs is usually required.[11] An infant will always be allowed indulgence in this respect.[12] In case a partial but not a complete distribution of the funds has then been made, in bankruptcy at least, he can only share in the subsequent dividends.[13] After distribution a person who has thus failed to prove his claim before the master may file a bill against the persons between whom the funds have been distributed to compel them to refund his *pro rata* share, but he cannot sue the master or receiver.[14] When the claimants are dilatory, the master may be directed to require them to present their proofs within a time to be fixed by him, and if they fail so to do to disallow the same for lack of proof.[15]

A party who has appeared, but allowed a decree to be taken against him by default for want of an answer, is, it seems, entitled to notice of the proceedings against him under the decree in the master's office;[16] but cannot appear upon such notice before such master without previously obtaining an order for that purpose, which is usually only granted upon terms.[17] The proper course to test a party's right to attend before a master is, after the latter's refusal, to apply to the court by petition for an order permitting the party to attend before him.[18] The court may require the claimant of a share in the fund to contribute to the expense of the suit before he proves his claim,[19] even if he is entitled to a preference.[20]

§ 388. Proceedings before a master. In general. The rules give the master authority to regulate all the proceedings upon

proof that the claimant did not have actual knowledge of the notice within the period of limitation. It was held that such an order will not be presumed to apply to and bar a claimant whose claim is then in suit before the same court. Southern Ry. Co. v. Townsend, C. C. A., 161 Fed. 310.

11 Wilder v. Keeler, 3 Paige (N. Y.) 164, 23 Am. Dec. 781; Pennsylvania Steel Co. v. New York City Ry. Co., 201 Fed. 781.

12 Park v. N. Y., L. E. & W. R. R., 140 Fed. 799.

13 *Re* Stein, 94 Fed. 124.

14 David v. Frowd, 1 M. & K. 200, Gillespie v. Alexander, 3 Russ. 130; Sawyer v. Birchmore, 1 Keen, 391; Daniell's Ch. Pr. (1st Am. ed.) 1403.

15 Pennsylvania Steel Co. v. New York City Ry. Co., 175 Fed. 811. See *supra*, § 320, and *infra*, § 394.

16 King v. Bryant, 3 M. & C. 191; Daniell's Ch. Pr., ch. xxvi.

17 Heyn v. Heyn, Jacob, 49; Daniell's Ch. Pr., ch. xxvi.

18 Daniell's Ch. Pr., ch. xxvi.

19 Chick v. Northwestern Shoe Co., 118 Fed. 933.

20 Ibid.

a reference to him.[1] In case of an abuse of his discretion by a master, any party aggrieved may apply to the court for an order, requiring the master to act properly;[2] but such applications are not encouraged,[3] and are only granted in extraordinary cases.[4] If any party fail to appear at the appointed time and place, the master may either proceed *ex parte*, or, in his discretion, may adjourn the proceedings.[5] In the latter case, he should give notice of the adjournment to the party who failed to appear, or to his solicitor.[6] Where a claimant before a master dies pending a hearing, no report can be made upon the claim until an executor or administrator has been appointed.[7]

The master has the power to speed the cause.[8] It is the master's duty to proceed in the reference with all reasonable diligence and with the least practicable delay.[9] Otherwise, either party may apply to the court, or a judge thereof, for an order requiring the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.[10]

The master has no power to allow an amendment by the pleadings,[11] nor to grant an injunction.[12]

There is no necessity for the master's taking any oath, unless the order of reference especially requires him to do so.[13]

By the English practice, the time for a single hearing before a master did not usually exceed one hour, unless the master continued the hearing longer, when an increased fee might, it seems, be charged.[14] It was the duty of the master or his clerk to mark in the master's book the names of the solicitors who

§ 388. 1 Eq. Rule 62.

2 Daniell's Ch. Pr., ch. xxvi; Bate Ref. Co. v. Gillette, 28 Fed. 673; Eq. Rule 60. See *Re* Thomas, 35 Fed. 337, 340.

3 Lull v. Clark, 20 Fed. 454; Wooster v. Gumbirnner, 20 Fed. 167; Bate Ref. Co. v. Gillette, 28 Fed. 673.

4 Lull v. Clark, 20 Fed. 545; Wooster v. Gumbirnner, 20 Fed. 167; Bate Ref. Co. v. Gillette, 28 Fed. 673.

5 Eq. Rule 60.

6 Eq. Rule 60.

7 Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

8 Rollman Mfg. Co. v. Universal Hardware Works, 229 Fed. 579.

9 Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470, where a delay of six years before the completion of the reference was held to be improper.

10 Eq. Rule 60.

11 Shapiro v. Engel, 257 Fed. 854.

12 *Re* Gordon, 250 Fed. 798.

13 Thompson v. Smith, 2 Bond 20.

14 Daniell's Ch. Pr., ch. xxvi.

attended, and no other attendance than those so marked was allowed in taxing costs.[15]

§ 388a. Instructions to masters. When difficult questions of law arise upon a reference, the decision upon which may admit or exclude a large amount of evidence, the party aggrieved by the master's rulings may apply to the court for instructions to the master upon the subject.[1] These applications are not encouraged,[2] and are only granted in extraordinary cases,[3] except when evidence is improperly excluded when in the Second Circuit they are encouraged.[4] Such motions are more frequently granted upon accountings than in other cases.[5] Where the master upon an accounting limits the scope of the inquiry it is proper immediately to apply to the court for instructions to him.[6]

§ 389. Proceedings upon accountings. A reference to a master to take an account will not be directed unless the complainant affords some proof tending to show that the accounting party has collected something as to which an account should be made.[1] The cases in which bills for accountings can be sus-

15 Daniell's Ch. Pr., ch. xxvi.

§ 388a. 1 Cottingham v. Propfe, 112 Fed. 1016; Walker Patent Pivoted Bin Co. v. Miller, 146 Fed. 249, 252; *supra*, § 388; *infra*, § 391. But see Howe v. Scott, 87 Fed. 220.

2 Lull v. Clark, 20 Fed. 454; Wooster v. Gumbirnner, 20 Fed. 167; Bate Ref. Co. v. Gillette, 28 Fed. 673.

3 Ibid.

4 Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476, 478, *infra*, § 393.

5 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 182 Fed. 155, 159, Lacombe, J.: "This accounting may be a long, difficult and expensive operation, and it would be most unfortunate if the special master should conduct it to a conclusion upon one theory only, to have his conclusion reversed by the court of last resort, leaving the work to be done all over again on some other theory. This might be avoided by an application to this court to instruct the special master that in stating these accounts he should consider the lease as terminating on such a date, or as continuing in force till such another date or to give him any further instructions which may be thought necessary. That application may be made on any part of the record which may be material and on further evidence, if necessary. It surely ought not to take long to submit this question, and when it is finally disposed of the accounting will be greatly simplified and can be much sooner disposed of."

6 Walker Patent Pivoted Bin. Co. v. Miller, 146 Fed. 249.

§ 389. 1 Columbian Equipment Co. v. Mercantile Tr. & Dep. Co., C. C. A., 113 Fed. 23; Ludington

tained are previously discussed.[2] "A reference will not be made to state an account without some evidence to show the necessity for the accounting."[3] In a suit, because of the infringement of a patent,[4] trade mark,[5] or for unfair competition[6] reference will not be ordered when it appears that there should be no substantial recovery.

All parties who are required to account before a master must bring in their accounts in the form of debtor and creditor.[7] Should a party fail to do so, the master may make an order requiring him to furnish such an account.[8] The order should not be granted till the first hearing of the reference.[9] The order must be served personally with a copy of this order and a notice of the day to which the hearing is adjourned.[10] Service may be made by any disinterested person.[11] If the defendant then fails to appear and account, he is in contempt.[12] Upon a decree for an accounting by defendant, of profits made by his infringement of a patent, it seems that the complainant cannot be required by the master to bring in an account, if the court has not so directed.[13] Where fire insurance companies sued in equity to restrain the prosecution of several actions at law on policies covering the same property praying a cancellation of the policies as fraudulent, and in the alternative that, in case they should be found to be valid, the damage sustained be apportioned and that an accounting be then directed for that purpose; it was held that the court had power to render judgment against them upon such accounting and that the costs of the actions at law might be therein included;[14] but where,

Novelty Co. v. Leonard, C. C. A., 127 Fed. 155, 157, 62 C. C. A. 269, a trademark case; Keystone Type Foundry v. Portland Pub. Co., 180 Fed. 301, a trademark case; Perkins El. Switch Mfg. Co. v. Yost El. Mfg. Co., 189 Fed. 625.

2 *Supra*, § 151d.

3 Columbian Equipment Co. v. Mereantile Tr. & Dep. Co., C. C. A., 113 Fed. 23, 25.

4 Perkins El. Switch Mfg. Co. v. Yost El. Mfg. Co., 189 Fed. 625.

5 Gallet v. R. & G. Soap & Supply Co., C. C. A., 254 Fed. 802.

6 Shredded Wheat Co. v. Humphrey Cornell Co., 244 Fed. 508.

7 Eq. Rule 63.

8 Kerosene L. H. Co. v. Fisher, 1 Fed. 91.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid.

13 Goss Printing Press Co. v. Scott, 148 Fed. 393.

14 Spring Garden Ins. Co. v. Amusement Syndicate Co., C. C. A., 178 Fed. 519.

upon a receivers' accounting, a bank intervened to prove its claim to a preference for money borrowed by the receivers, it was held to be error for the master, when disallowing its claim for a preference, without pleading or process against the bank or notice of an application to the master for such a recommendation, to report that it should return payments made to it by the receivers.[15] The accounts should contain items of both debits and credits and should be verified by affidavit.[16] If any of the other parties is dissatisfied with the accounts rendered, he may examine the accounting party either orally or by interrogatories or by deposition, as the master directs.[17] At the end of a specified time fixed by the master, the complainant should file what is termed the charge, or surcharge. This it has been said should contain a transcript of all the debit items of the account as filed together with the added items or increases in items, with which it has been said he seeks to charge the defendant,[18] it should also contain a statement of the items of credits which he wishes disallowed.[19] The more usual modern practice, however, is for the charge merely to contain the items which the complainant wishes added or increased or disallowed and not to transcribe all the debit items of the account as originally filed. When the charge has been filed with the master, the case proceeds upon the examination of the defendant and the taking of other testimony until all evidence concerning the items in the charge has been completed. Thereupon it has been said, that the defendant should file his "discharge," consisting of all the credit items taken from the account and separated by his vouchers for amounts over twenty dollars and testimony then taken on the items of the discharge, and upon the completion thereof the master should state the account.[20] The burden of proof is upon the complainant as to any items of debits which are surcharged, that is not admitted, in the ac-

15 People's Savings Bank & Trust Co. v. Rogers, C. C. A., 177 Fed. 386.

16 Ommen v. Talcott, 175 Fed. 261, 267.

17 Eq. Rule 63 re-enacting Eq. Rule 79 of 1842.

18 Ommen v. Talcott, 175 Fed. 261, 267.

19 Remsen v. Remsen, 2 Johns. Ch. (N. Y.) 495, 501.

20 Ommen v. Talcott, 175 Fed. 261, 267. But see Hoffmen's Ch. Pr. I. 522-525.

count as filed[21] and upon the party accounting as to all the credits claimed,[22] which are falsified, that is disputed although, in New York at least, his affidavit annexed to the account is sufficient to substantiate a receipt for an account not in excess of twenty dollars,[23] when the creditor swears positively to the fact of payment and states to whom paid and for what and when; but the items so established cannot exceed five hundred dollars, and the defendant cannot, by way of charge, charge another person in this manner.[24]

The question of defendant's liability is concluded by the decree and cannot be reopened before the master.[25] The complainant cannot before the master take a position inconsistent with the allegations or case made by his bill.[26]

Upon an accounting by a trustee the burden rests upon him to show how much he has received and what he has disbursed.[27] The fact that he has rendered to the beneficiary from time to time statements of accounts which were retained without objection, does not change this rule.[28] Where it has been found that the transfer of assets to a trustee was fraudulent, the burden is upon him to show that he made no profit therefrom.[29] Where a tenant in common of a mining claim had failed to keep an account of the proceeds of ore which he had taken and sold, all doubtful questions were resolved against him upon an accounting.[30] He was allowed the reasonable expense of mining and selling the ore, although he had kept no accounts, caved the slopes and made it difficult and expensive to ascertain what he had taken and realized.[31] But not the cost of cleaning and

21 Ommen v. Talcott, 175 Fed. 261, 267; McManus v. Sawyer, 231 Fed. 231.

22 Ommen v. Talcott, 175 Fed. 261, 267; McManus v. Sawyer, 231 Fed. 231.

23 Remsen v. Remsen, 2 Johns. Ch. (N. Y.) 495, 501.

24 Remsen v. Remsen, 2 Johns. Ch. (N. Y.) 495, 501.

25 De Long Hook and Eye Co. v. Francis Hook & Eye & Fastener Co., 159 Fed. 292.

26 Lorain Steel Co. v. New York Switch & Crossing Co., C. C. A., 184 Fed. 301.

27 Marvin v. Brooks, 94 N. Y. 71; Potomac Insurance Co. v. Kelly, 173 App. Div. N. Y. 791.

28 Potomac Insurance Co. v. Kelly, 173 App. Div. N. Y. 791, see Lovewell v. Schoolfield, 217 Fed. 689.

29 Balfe v. Tilton, 235 Fed. 448.

30 Silver King Coalition Mines Co. v. Conkling Mining Co., C. C. A., 255 Fed. 740.

31 Ibid., s. c., C. C. A., 204 Fed. 166.

extending a tunnel used for this and other purposes.[32] He was not charged with compound interest.[33] When ore had been taken by a trespasser under an honest belief of ownership, he was allowed the reasonable cost of mining and selling the ore, or the actual cost if less than the reasonable cost, but not charges for freight to a mill, which were greater than the complainant would have paid to transport the ores to its own mill.[34] He was not charged with the value of the ore caused by a subsequent rise in the market;[35] nor with the value of mill tailings had they been saved till the time of the accounting, when, at the time they were taken, they had no market value.[36] Such a trespasser was allowed to remove his machinery and tools with a credit for the value of permanent and useful improvements made.[37]

Applications to the court for instructions to the master are more favorably considered when they concern intricate accountings than in other cases.[38] Where the master upon an accounting makes rulings limiting the scope of the inquiry, it is proper to apply immediately to the court for instructions.[39] Trifling errors in a master's statement of an account will be disregarded.[40] Where upon an accounting the court sustained an exception by one of several persons having a common interest in the fund, and thus surcharged the account, it was held by the courts of two States that all persons interested took the benefit of the exception and of the increase of the fund, and that the decree should not merely add to the share of the exceptor his proportion of the amount surcharged.[41]

Where the master worked out a difficult apportionment any error as to the details should be pointed out, in the exceptions

32 Ibid.

33 S. c., C. C. A., 204 Fed. 166.

34 Clarke-Montana R. Co. v. Butte & Superior Copper Co., 233 Fed. 547.

35 Ibid.

36 Clark-Montana R. Co. v. Butte & Superior Copper Co., 233 Fed. 547.

37 U. S. v. Midway Northern Oil Co., 232 Fed. 620; but see Bothwell Co. v. Bice, C. C. A., 247 Fed. 60.

38 Thompson v. Smith, 2 Bond 320, *supra*, § 388a.

39 Ibid.

40 Taylor v. Robertson, 27 Fed. 537.

41 Martin's Appeal, 33 Pa. St. 395; Landis v. Scott, 32 Pa. St. 495; Estate of Chalmers, N. Y. L. J. of April 8, 1897; People v. Am. Loan & Tr. Co., 177 N. Y. 467. *Cf.* Union Tr. Co. v. Trumbell, 137 Ill. 146, 27 N. E. Rep. 24.

to his report, and in the assignments of error made to the decree.[42] Every reasonable presumption is in favor of the master's findings upon conflicting testimony;[43] but it has been said in such cases the court is not bound by the rule that his findings have the weight of a special verdict.[44]

§ 389a. Accountings of profits in patent cases. The cases in which bills in equity may be filed to procure an accounting by the infringer of a patent have been previously explained.[1] When it appears that the profits were only nominal a reference in a patent case for an accounting thereof, will not be directed.[2] The master has power to determine what infringements have been committed up to the time of his report and to award profits and damages as the case may require until that time.[3] The question whether there has been an infringement and the general scope of the patent cannot be considered by the master since they have been decided by the decree.[4] It is his duty to determine the extent of the infringement and the particular infringing devices made or used by the defendant.[5] The defendant may, however, dispute the question whether he has committed any infringement subsequent to the decree.[6]

Such accountings are regulated by Equity Rule 63 as follows: "All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct."[7] The accounting party, however, should

42 Oehring v. Fox Typewriter Co., C. C. A., 251 Fed. 584.

43 Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199.

44 Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co., 248 Fed. 508, see infra, § 393. Racine Engine & M. Mfg. Co., C. C. A., 234 Fed. 876; Underwood Typewriter Co. v. Fox Typewriter Co., C. C. A., 220 Fed. 880.

§ 389a. 1 *Supra*, § 146.

2 Perkins El. Switch Mfg. Co. v. Yost El. Mfg. Co., 189 Fed. 625.

3 Stebler v. Riverside Heights Orange Growers' Ass'n, 211 Fed. 985.

4 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 861, 862.

5 Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487.

6 Frumentum Co. v. Lauhoff, C. C. A., 216 Fed. 610.

7 *Re* Beckwith, C. C. A., 201 Fed.

not be required to specify evidence in his accounts although he may be subsequently examined concerning them.[8]. Such have been held to be the names of the purchasers, the prices, discounts, rates and rebates allowed each purchaser, the profits and costs and expenses of each article containing the infringement and the items of cost for labor, material, and other matters included in the credits claimed.[9] Where, after a decree

579, s. c., C. C. A., 203 Fed. 45; Beckwith v. Malleable Iron Range Co., 207 Fed. 845.

8 Beckwith v. Malleable Iron Range Co., 207 Fed. 848.

9 Beckwith v. Malleable Iron Range Co., 207 Fed. 848. There the court struck out the following directions in the master's warrant:

"Second. That you specify, giving the names and addresses of the persons purchasing said infringing reservoirs, also date of the purchase, the number purchased, and the size and complete description of the range with reservoir attached so purchased.

"Third. That you indicate for the period of your infringement of said patent, the selling price of each of said ranges and also of each of said reservoirs, together with the other elements of claim 11 of said patent, and the discounts, freights, and rebates or credits of any description allowed to the purchaser and also the net amount of money actually received by you for: (a) The range; (b) the reservoir.

"Fourth. That during the period of your said infringement you indicate and itemize the manufacturer's cost of the range, itemize the costs for labor and cost for material, and also for the same period that you itemize the manufacturer's cost of the reservoirs, the contact plates, and all attachments used in connection therewith, itemizing the cost for material and the cost for labor.

"Fifth. That you indicate the cost and expense (for the period of said infringement) of selling said ranges with infringement reservoirs attached down to the time you ceased to infringe.

"Sixth. That you indicate the entire profits derived by you from each sale of said ranges with said infringing reservoirs attached as provided in said decree:

"Seventh. That you indicate the entire profits derived from the sale of ranges with reservoirs attached on account of the utilization of the features contained in the letters patent referred to in the decree in this case.

"Eighth. Also specify the gains and savings made by you during the period mentioned in said decree, by the use of said infringing reservoir over the style formerly used by you.

"Ninth. Also specify the price at which you sold your ranges without reservoirs: also your ranges with reservoirs: and also the actual cost to you of said ranges without reservoir and the actual cost to you of said ranges with said reservoir during the infringing period referred to in said decree."

The court allowed the following matter only to remain in the directions, that the defendant be required: to render a sworn state-

for an accounting of infringements of a patent, it was claimed that there had been subsequent infringements of devices not mentioned in the interlocutory decree; it was held that the proper practice was to set up such new infringements by supplemental bill upon the disposition of which the order of reference could be modified as required, rather than extend the accounting to those devices without any prior adjudication upon the same.[10] Where the bill alleged the marking of the patented article in accordance with the Revised Statutes and notice to defendant of the infringement, the court permitted proof of these allegations to be made upon the accounting after an interlocutory decree, in order to carry the accounts back of the filing of the bill, when no objection founded upon the omission had been raised upon the hearing and no proof upon the point had then been introduced by either party.[11] Where an accounting of profits is made by the infringement of a patent or copyright, the infringer is not entitled to deduct, from the profits made during a certain term, a loss subsequently incurred in a separate transaction. Losses concurrent with the profits and directly resulting from the particular transactions that resulted in such profits are all that can be considered.[12] Where the infringement was a play and the defendant had made its contracts by the theatrical season, each season was taken as a unit in the computation, and the defendant was disallowed credits against the profits of one season for losses incurred in another.[13]

ment of account, in writing of the number of infringing devices made, sold, or used, the details of sales, and the gains and profits made thereon; also requiring specifications in such account these further items:

"First. The whole number of ranges made by you with reservoirs described in claim 11 of the patent to complainant, No. 787, 425, and referred to in said decretal order."

"Tenth. That you have with you in court all the books and vouchers in your possession on which the said data were originally entered together with all books and vouchers in your possession which show the cost of labor and materials used in making said infringing reservoirs, especially all daybooks, journals, ledger, order books, blotters and cashbooks used by you during said infringing period."

10 Murray v. Orr & Lockett Hardware Co., C. C. A., 153 Fed. 369. But see Walker Patent Pivoted Bin Co. v. Miller, 146 Fed. 249.

11 Underwood Typewriter Co. v. Elliott-Fisher Co., 171 Fed. 116.

12 Canada Bros. v. Michigan Malleable Iron Co., C. C. A., 152 Fed. 178; Dam v. Kirk La Shelle Co., 189 Fed. 842.

13 Dam v. Kirk La Shelle Co., 189 Fed. 842.

The account is not limited to the profits of such infringements as the complainant has proved at the hearing before the accounting was directed.[14]

If dissatisfied with the account the complainant is entitled to a full examination of the accounting party,[15] and the production of the defendant's books which relate to the subject of the accounting.[16] The latter cannot seal parts of the books and upon an ex-parte affidavit that there was no sale of an infringing article made during the time to which these relate refuse to permit an examination thereof until the plaintiff has proved such sales during the time; but he may cover the names of the consignees and the prices at sales until it is shown that they relate to the infringing articles.[17]

The infringer is a wrong doer and his acts are torts.[18] Upon the accounting he stands in the position of a trustee *ex maleficio*.[19]

The Statute of Limitations which is applied upon such accountings has been previously considered.[20]

Where, after a decree for an accounting of infringements of a patent there have been subsequent infringements, by the use of devices, not mentioned in the interlocutory decree and there is no colorable difference between the new devices and those thus mentioned; the complainant may move to punish the defendant for contempt of court,[21] or he may prove such infringements before the master without further proceedings.[22] Where the difference is colorable the proper practice is to set up such new infringements by a supplemental bill, upon the disposition of which the order of reference can be modified as

14 Corrugated Paper Patents Co. v. Paper Working M. Co., C. C. A., 237 Fed. 380, 390.

15 Corrugated Paper Patents Co. v. Paper Working M. Co., 237 Fed. 380, 383.

16 Rollman Mfg. Co. v. Universal Hardware Works, 218 Fed. 651.

17 Rollman Mfg. Co. v. Universal Hardware Works, 218 Fed. 651.

18 Decker v. Smith, 225 Fed. 776; aff'd on this point, C. C. A., 234 Fed. 646.

19 Wales v. Waterbury Mfg. Co., C. C. A., 101 Fed. 126, 128 (in which the author was counsel).

20 29 St. at L. 694, *supra*, § 180. Seeger Refrigerator Co. v. Am. Car & Foundry Co., 212 Fed. 743.

21 Gordon v. Turco-Halva Co., C. C. A., 247 Fed. 487, 491, *infra*, § 428.

22 Stockham v. Duncan, C. C. A., 226 Fed. 740, 742.

required rather than to extend the accounting to the new devices without any prior adjudication thereupon.[23] Where the difference is considerable the court may compel the complainant to file a new original bill.[24] Where the bill alleged the marking of the article as patented in accordance with the revised statutes[25] or notice to the defendant of the infringement; but there was no proof upon the hearing of either of these things, nor was objection then made to the omission of such proof: the court permitted proof thereof to be made upon the accounting after an interlocutory decree, in order to carry the accounts back of the filing of the bill.[26]

Exceptions to the report of a master upon a reference to compute damages for the infringement of a patent, which raised the points that the infringement was not wilful, that the reduction of plaintiff's profits was not solely due to the infringement, and that the master should have reported nominal damages, were held sufficient to bring before the court the whole subject of the computation of damages.[27]

In suits to enjoin the infringement of patents, the court has the power to increase the damages awarded to an amount not exceeding three times the amount of the actual damages sustained.[28] An infringer of a patent for a design is liable to damages in the amount of $250, in addition to the total profit made by him.[29]

§ 389b. Rules for computation of profits, and burden of proof upon patent accountings. Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all the profits thereof.[1] Where a patent, although using old elements, gives entire value to the combination, the plaintiff is entitled to recover all of the profits of its use.[2] Where profits

23 Murray v. Orr & Lockett Hardware Co., C. C. A., 153 Fed. 369; Gordon v. Turco-Halver Co., C. C. A., 247 Fed. 487, *supra*, § 231.

24 Murray v. Orr & Lockett Hardware Co., C. C. A., 153 Fed. 368, 370.

25 U. S. R. S., § 4900.

26 Underwood Typewriter Co. v. Elliott-Fisher Co., 171 Fed. 116.

27 Boesch v. Graff, 133 U. S. 697.

28 U. S. R. S., § 4921, as amended 29 St. at L. 692, § 6, 5 Fed. St. Ann. 577, Pierce Fed. Code, § 8788.

29 Act of February 4, 1887, 24 St. at L. 387, 5 Fed. St. Ann. 603, Comp. St. 3398, Pierce Fed. Code, § 8785.

§ 389b. 1 Westinghouse El. Co. v. Wagner Mfg. Co., 225 U. S. 604, 614, 56 L. ed. 1225.

2 Hurlbut v. Schillinger, 130 U. S. 456, 472, 32 L. ed. 1011, 1016; Westinghouse El. Co. v. Wagner

are made by the use of an article patented as an entirety, the infringer is liable for all the profits, unless he can show—and the burden is on him to show—that a part of them is the result of some other thing used by him.[3] Where the plaintiff's patent applies to only part of a machine and consequently creates only part of the profits, he must give evidence tending to separate or apportion the defendant's profits or his own damages between the patented and the unpatented features, and such evidence must be reliable and tangible, not merely conjectural or speculative, or else he must show by equally satisfactory evidence that the profits and damages are to be calculated on the whole machine because the entire value thereof as a marketable article is properly and legally attributable to the patented features.[4] Mathematical accuracy is not required, but only reasonable approximation.[5] The testimony of experts and of persons in-

Mfg. Co., 225 U. S. 604, 614, 56 L. ed. 1222, 1225.

[3] Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Westinghouse El. Co. v. Wagner Mfg. Co., 225 U. S. 604, 614, 56 L. ed. 1222, 1225; Clark v. Johnson, C. C. A., 199 Fed. 116, and cases cited.

[4] Garretson v. Clark, 111 U. S. 120, 28 L. ed. 371; Westinghouse El. Co. v. Wagner Mfg. Co., 225 U. S. 604, 615, 56 L. ed. 1222, 1225; Beckwith v. Malleable Iron Range Co., 195 Fed. 291; Dunn Mfg. Co. v. Standard Computing Scale Co., C. C. A., 204 Fed. 617; Seeger Refrigerating Co. v. American Car & Foundry Co., 212 Fed. 742; Herman v. Youngstown Car Mfg. Co., C. C. A., 216 Fed. 605; Underwood Typewriting Co. v. E. C. Stearns & Co., C. C. A., 227 Fed. 74; Yesbera v. Hardesty Mfg. Co., C. C. A., 166 Fed. 120, 124, *per* Severens, J. (speaking of Garretson Clark, *supra*): "The unanimity with which infringers seek the shelter of that case is something remarkable."

[5] Westinghouse El. Co. v. Wagner Mfg. Co., 225 U. S. 604, 617, 56 L. ed. 1222, 1227; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 647; Wales v. Waterbury Mfg. Co., C. C. A., 101 Fed. 126, 127, 128 (in which the author was counsel), *per* Wallace, J.: "It is manifest that the defendant would not have sold the 9,361 gross of pencil holders if it had not attached them to the patented buckle, or to some other buckle which would have satisfactorily supplied its place as an adjunct of the holder. The proofs indicate that other buckles, which were open to public use, could have been attached to the holders, but the organized device would have been a clumsy and unattractive one, while the patented buckle was peculiarly adapted for the purpose and was the part which commended the organized device to purchasers. The master found that the patented buckle was 'the best and only known buckle that could have sold pencil holders, and no part of the profits would have been made ex-

formed by observation and experience is admissible.[6] Testimony of this character is generally helpful and at times indispensable in the solution of such problems.[7] Where the patentee proves that some profits were made by the sale of the infringing articles and defendant proves that there were other elements contributing to the same, it then devolves upon the plaintiff to apportion the amount of profits;[8] but where the infringer by intermingling the elements renders it impossible for the patentee to make such apportionment, the entire inseparable profit must be awarded to the patentee.[9] When the plaintiff proves that the defendant has caused such a mixture, he has sustained the burden of proof resting upon him.[10] When the evidence offered by complainants is sufficient to support a finding of profits, the inferences must be drawn in his favor, if the defendant fails to produce evidence within its control which might reduce them.[11]

cept for it.' It is reasonable to suppose that the defendants' managers would not have exposed it to liability as an infringer if they had believed that some other buckle, which they were at liberty to use, would have answered the purpose of the patented buckle as an adjunct of the holders; and notwithstanding, some evidence to show that it would, and that the spring buckle plate, an unpatented feature added to the buckle, contributed to its popularity, we are satisfied upon the proofs that the master was correct in his finding, and that there would have been no appreciable demand for the holders if they had not been attached to the patented buckle. The license in fixing such a large royalty upon the buckle when sold with the holders points also to this conclusion.''

6 Ibid. Conroy v. Penn. El. & Mfg. Co., C. C. A., 199 Fed. 427. Herman v. Youngstown Car Mfg. Co., C. C. A., 216 Fed. 604, 607.

7 Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 647, *per* Van Devanter.

8 Westinghouse El. Co. v. Wagner El. Co., 225 Fed. 604, 617, 622; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 647.

9 Westinghouse El. Co. v. Wagner Mfg. Co., 225 U. S. 604, 618, 56 L. ed. 1222, 1227; Roth v. Harris, 197 Fed. 929; Seeger Refrigerator Co. v. American Car & Foundry Co., C. C. A., 219 Fed. 565; La Crosse Plow Co. v. Van Brunt, C. C. A., 220 Fed. 626; Decker v. Smith, 225 Fed. 777; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 861.

10 Ibid.

11 Byerly v. Sun Co., 226 Fed. 759, 763. Herman v. Youngstown Car Mfg. Co., C. C. A., 216 Fed. 604, 608, *per* Dennison, J.: ''The marketed device really consists of two main parts to one of which the invention pertains and to the other of which it is incidental

"'Burden of proof' as a phrase is not strictly applicable to any criticism of the views of the master in the accounting he has returned, because the master has categorically stated the principle to be that the burden is always upon the plaintiff to show the profits claimed. The question is rather one of evidential weight. In the practical solution of the problem of finding the amount of the profits, the two things are likely to merge and the distinction be shaded out of existence. When the fact of profits has been affirmatively shown, and we come to the ascertainment of the amount, this also must be shown by the plaintiff. The amount of the sales does not indicate it, because this would not justify a finding that the receipts were all profits. When, however, the plaintiff introduces testimony and evidence by which we can trace the process from raw materials to marketed product, with its attendant cost, if this is sufficient to justify a finding of the total cost of production, we have evidence from which the amount of the net profits may be determined. What weight certain features of the evidence should have, and to what mathematical results it should lead, depend upon all those considerations which fairly deepen or lessen the impression made. The expression of the resolution of doubts is perhaps not a happy one, because associated in the legal mind with conditions foreign to cases of the character of the present one. Inasmuch, however, as is usually the case, or when, as here it is one of the conditions of the inquiry, that the evidence must be sought in the opposing camp, and clear proofs are or ought to be within the control of the party to be charged, inferences, which, if unsound, could be readily negatived are justified in favor of the plaintiff which would not be justified if the measure of proofs was controlled by him instead of the defendant.

"Applying the principle to the facts of this case, if the facts, as they appear, justify such a statement of receipts and expenditures as to show the found balance on the profit side, as this balance, if wrong, could be shown to be wrong by evidence of expenditures made by defendant, and as it avers the disclosure of all evidence of expenditures made, the fact that the weight of the evidence produced might be affected by facts which do not appear, because of its inability to produce evidence of what additional cost had been incurred, ought not to cause the mind

to hesitate to reach (and in this sense to render doubtful) the inference which would otherwise be drawn." [12]

In a suit to enjoin the infringement of a patent for the design of a piano case where the evidence showed the cost of the cases, the cost of the whole piano and the profits made by the sale of the latter, but there was no instance in which the case or the works were separately sold, nor evidence from which the extent to which the use of the design had contributed to the sales, could be determined, under the Act of February 4, 1887, subsequently quoted,[13] a decree was entered against the defendant for that proportion of all the profits which the cost of a case bore to the cost of a complete piano.[14] Profits are not disallowed because the infringement was made in connection with a structure, the cost of which, aside from the improvement, was much greater than that of the patented device.[15] If the defendant could have obtained the same result through the use of non-infringing patents or processes, the measure of profit, is the lessened cost of production by the infringement,[16] even though

* * * it follows that in the absence of any condition making an equal division improper, and in the presence of the undisputed testimony that this general method is correct, the profits should be divided into two equal parts, one of which should be apportioned to the light-giving part of the device. Further than this, we cannot go. We cannot sub-divide this function of the machine."

12 Byerly v. Sun Co., 226 Fed. 759, 763, per Dickinson, J.

13 24 St. at L. 387, Comp. St., § 9476; *infra*, § 389e.

14 Bush & Lane Piano Co. v. Becker Bros., 234 Fed. 79.

15 Roth v. Harris, 197 Fed. 929.

16 Cambria Iron Co. v. Carnegie Steel Co., C. C. A., 224 Fed. 947; Schmertz Wire Glass Co. et al. v. Western Glass Co., 203 Fed. 1006; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730; B. F. Goodrich Co. v. Consol. Rubber Co., C. C. A., 251 Fed. 617, 622. "Likewise in this case appellees should not be compelled to accept their own profits as the basis for determining a reasonable royalty. Originally the owner of the patent did not contemplate manufacturing all its solid rubber tires. To obtain its output it made an exclusive contract with appellant. When the latter company turned infringer appellees were in no position to engage in the manufacturing business and conduct it at a profit. They did not, like the appellant and other infringers have unlimited capital and an established business extending to every corner of the United States to support their venture. It is worthy of notice that appellees' profit of 6.7 cents per pound was based on its business during the first half of this period. During the last four or five years

the other processes or devices were patented.[17] But the award for profits will not be reduced because of a process developed after the infringement was begun and used only experimentally or occasionally during the infringement for the purpose of avoiding or minimizing liability;[18] nor because of an increase

there is evidence tending to show appellees' profits from the manufacture of this rubber tire exceeded 10 cents per pound. While it should be added that the reliability of these figures is vigorously assailed by appellant, we are convinced that the reasonable royalty varied somewhat during this period due to the holdings of the courts.''

17 American Pneumatic Service Co. v. Snyder, 241 Fed. 274.

18 Expanded Metal Co. v. General Fireproof Co., 247 Fed. 899; Lee v. Malleable Iron Range Co., 247 Fed. 795, 800, 801, 802, 804, per Geiger, J.: ''Whatever may be the applicability of this standard of comparison rules to other situations, there ought to be at least hesitation in adopting it where profits have been figured and apportioned without its aid. The obvious danger of attempting to measure recovery not by what the infringer as a manufacturer or seller in fact made as a manufacturer's and seller's profit on the particular combination, but by the gain, if any, as compared with what he would have made, had he manufactured something which he might, but did not, make—the obvious danger involved is this: It introduces a conjectural basis of evidence: it compels assumptions which are repugnant to the very purpose of giving relief to the patentee for the appropriation which the infringer for some reason chose. It compels comparison of what he actually did as against a standard which he chose not to follow; it gives prominence to what, but for the invention, he might have done, thereby to get the measure or value of what apparently, because of the invention, he did so. In other words, the realm of speculation is explored, collaterally inquired into, with the inevitable result of always finding some standard which will lead to nominal recoveries; a practical result of treating the infringement or appropriation as a mere fortuity, a mere accident of making a selection of one out of several desirable courses to pursue.

''In further consideration of this let it be assumed that the very reservoirs suggested by the defendant as standards of comparison could have been made at precisely the same or at variant costs; the infirmity of the rule—the injustice. I believe, of its attempted applications—rests in the added hypothesis or assumption that, had any other been it would have achieved corresponding results in respect of the number of infringing reservoirs which the defendant in fact made and sold. In this way, although the whole manufacture and resulting trade may have been bottomed upon the act and commercial merit of the appropriated invention, an infringer may still retain his gains and go acquit, except for nominal recovery because he can show that he gained or saved or profited no more than his competi-

tors in their manufacture and sales of 'what he would have been free to make and sell, but did not.' The proof may be overwhelming that the particular infringer, in the course of his manufacture and sale not only met competition, but distanced it, by creating a greater commercial favor for the infringing article, yet so long as he can show that he made no more money than he would have made, had he followed the course of his competitors, he may retain his gains because this enables him to say that he made nothing out of the invention. It results in denial of gains by an infringer who is fortunate enough to have actual or possible competitors in the same general line, through whom and whose experience he can place before the court an hypothesis which after all, enables him to travel in a circle on this matter of gains and profits. * * * I believe that the matter may be stated in another way: A basic infirmity of the so-called rule of comparison resides in the effort to fasten upon the words 'attributable to the invention' a meaning which, with the aid of this rule, can never be satisfied, except by showing increased profits on the individual infringing, as against the 'standard' structure. Whereas, the invention and the endeavors of the inventor, not only may have been designed and exerted to increase, but actually do increase, cost and thereby reduce profits, which reduction is expected to find compensation either in increased sale price on increased volume of business, or not at all; or that they were calculated either to reduce or increase in like proportion cost of manufacture and sale price, and thereby maintain the same profit as was earned upon the unpatented or unimproved structure. In other words, the 'standard' itself, its high cost of manufacture, and its high price, its profit yield to say nothing of its inferiority, may have prompted the inventor in his efforts, by mere improvement, to lessen the cost of making, the price, the yield as well as to do something new and useful. So, too, as bearing upon this question of relevancy, these further considerations are not to be overlooked. The infringer, presumably, knows the 'standard' and its yield of profit, but he also can and does fix and control, not only the cost, but the sale price, of the infringing structure and thereby its yield. Therefore it is within his power, at all times, by contenting himself with a yield equal to or smaller than that of the 'standard' to escape accounting for profits, 'attributable' to the invention; and though, by greatly reducing his yield upon the particular structure, he may, as stated, by a greatly increased volume of manufacture and sale, increase his aggregate yield of profits. True, while he may not create or control the 'open' or 'standard' structure or its yield, yet he can by his own conduct at will, frustrate the probative force or effect of the 'standard' and hence the *result* of a 'comparison.' Or, as indicated, assuming that he might be quite innocent respecting the standard, his whole endeavors may have been exerted, his whole profits may have been earned, in his estimate of, and upon the pub-

in profits due to an economy introduced after the infringement was begun.[19]

Every infringement must be treated by itself if it resulted in profit, that profit belongs to the patentees and if it resulted in loss that loss must be borne by the infringer.[20]

The defendant is to be charged with all products of value resulting from the infringement, although there is no such product claim in the patent.[21] The cost of the raw material should be taken at the price paid, when bought, not at its value when it was used.[22] The defendant is not to be charged with the value of the good will which he gained through the infringement.[23]

When the complainant has proved that profits were made by the defendant the latter has the burden of showing by clear proof that he has paid, made or incurred expenses for which deduction should be made.[24] Where he claims a deduction of

lic's faith in, the 'improvement'; he still has the right, under this rule, to learn in an accounting suit that he in fact made his profit in spite of, not because of, the 'improvement.' ''

19 Lee v. Malleable Iron Range Co., 247 Fed. 795.

20 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

21 Byerly v. Sun Co., 226 Fed. 759.

22 Byerly v. Sun Co., 226 Fed. 759; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 865.

23 Byerly v. Sun Co., 226 Fed. 759.

24 Decker v. Smith, 225 Fed. 776, 781, ''where an infringer of a patent engaged in making or causing to be made, and also in selling, the infringing articles and also in making and selling other non-infringing goods, and perhaps in both making and selling others, fails to keep books or accounts or memoranda which enable him or others to separate and distinguish the expense of making and selling the infringing article from that of the others and so commingles and intermingles his manufacturing and selling businesses and the expenses thereof as to make it impossible to separate the expense of the others, with any reasonable degree of certainty, such infringer cannot be allowed a deduction from the gross profits on sales of infringing goods proved, on mere surmise, guess, speculation, or estimates or on mere opinion evidence not based on definite facts but mere opinion based on general recollection as to the time actually spent and salaries or wages paid in making and selling the infringing articles. The negligence or loose business methods of an infringer cannot be used by him as a shield or as a weapon of offense, in dealing with the one whose rights he has thus invaded or to defeat the recovery of profits actually made by the infringer. In this case

part of overhead charges, taxes, insurance repairs, or depreciation of plant, the burden is upon him to produce evidence from which such an apportionment can be made.[25]

§ 389c. Deductions from profits in patent cases. The cost of the manufacture and sale by him of the infringing articles are credited to the defendant in estimating his profits. An allowance is made for the traveling expenses of salesmen, rent, drayage and the reasonable salaries and wages of those engaged, directly or indirectly, in the infringement.[1] Royalties paid for the right to use other patents can be allowed if they cover the addition of substantially different and non-infringing elements to the structure of a limited patent,[2] but not otherwise.[3]

Expenses of advertising the infringing article can be deducted, provided that they can be separated from or apportioned with the expenses of advertising the defendant's other products.[4] Otherwise not.[5] Deductions are also made for amounts paid commercial agencies for reports concerning customers and intending purchasers of the infringing articles.[6]

When an infringement has been made by a corporation and extended to its entire business, the usual salaries of managing officers may be allowed;[7] but where these seem to be excessive and to be in reality a division of the profits, the credit for such expenses is reduced to a reasonable amount.[8]

all deductions have been made except certain alleged expenses of selling the infringing goods.'' See Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487.

25 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

§ 389c. 1 National Folding Box & Paper Co. v. Dayton Paper Novelty Co., 95 Fed. 991, 993.

2 Herman v. Youngstown Car Mfg. Co., 216 Fed. 605, C. C. A.

3 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

4 Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487.

5 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

6 National Folding Box & Paper Co. v. Dayton Paper Novelty Co., 95 Fed. 991, 993.

7 Rubber Co. v. Goodyear, 9 Wall. 788; Williams v. Leonard, 9 Blatchf. 476, 29 Fed. Cas. No. 1372; Winchester Repeating Arms Co. v. Am. Buckle & Cartridge Co., 62 Fed. 278, 280; National Folding Box & Paper Co. v. Dayton Paper Novelty Co., 95 Fed. 991, 994.

8 Ibid. Lee v. Malleable Iron Range Co., 247 Fed. 795 (sales managers); Bush & Lane Piano Co. v. Becker Bros., C. C. A., 234 Fed. 79.

The later authorities hold that in such a case the defendant is entitled to credit for payments for insurance,[9] taxes,[10] use or depreciation of plant and machinery[11] and even for interest upon the capital employed;[12] and that, when evidence can be given to show a proper basis for the calculation,[13] such charges, except perhaps those for depreciation,[13a] and also the salaries and expenses of travel for traveling salesmen,[13b] can be apportioned between the operations of the infringement and the rest of the business, and a reasonable proportion thereof, credited against the profits.[14] The defendant must however offer proof to show that such an apportionment can be made with reasonable accuracy.[15] A credit for interest on capital invested in an old plant and machinery previously used for other business will not be denied, because the plant and machinery were not made for the manufacture of the infringing article, actually so used.[16]

The defendant is not entitled to credit for the cost of the manufacture of any part of his products for the sales of which

[9] Carborundum Co. v. Electric Smelting & Aluminum Co., C. C. A., 203 Fed. 976, 985; Oehring v. Fox Typewriter Co., 251 Fed. 584. *Contra*, Piaget Novelty Co. v. Headley, 123 Fed. 897; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

[10] Ibid. *Contra*, Nat. Folding Box Co. v. Dayton Paper Novelty Co., 95 Fed. 991, 994.

[11] See Manufacturing Co. v. Cowing, 105 U. S. 223; Winchester Rep. Arms Co. v. Am. B. & C. Co., 62 Fed. 278, Piaget Novelty Co. v. Headley, 123 Fed. 897.

[12] Western Glass Co. v. Schwertz Glass Co., C. C. A., 226 Fed. 730, citing Mfg. Co. v. Cowing, 105 U. S. 253, 257, 26 L. ed. 987; Seabury v. Annendy, 152 U. S. 561, 14 Sup. Ct. 683, 38 L. ed. 553. *Contra*, Rubber Co. v. Goodyear, 9 Wallace 788, 804, 19 L. ed. 566; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899.

[13] Oehring v. Fox Typewriter Co., C. C. A., 251 Fed. 584. *Contra*, Saxlehner v. Eisner & Mendelson Co., C. C. A., 138 Fed. 22.

[13a] Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

[13b] Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

[14] Oehring v. Fox Typewriter Co., C. C. A., 251 Fed. 584.

[15] Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

A failure to keep books which apportion the expense of the time of a traveling salesman does not deprive the infringer of the right to an appropriate credit when he shows by satisfactory evidence how much of the former salesman's time should be charged to the sales of the infringing articles. Decker v. Smith, C. C. A., 234 Fed. 646, modifying 225 Fed. 776.

[16] Oehring v. Fox Typewriter Co., C. C. A., 251 Fed. 584.

he does not account.[17] Salaries paid for their services to different members of an infringing firm cannot be credited to them as expenses.[18] The defendant is not entitled to charge a manufacturer's profit.[19] Nor for the cost of unsuccessful experiments to accomplish the same result without infringement.[20] But the cost of designing the infringing machine was allowed as a deduction when there was no evidence that either the designer[21] or the defendant then knew of the plaintiff's patent.[22]

No credit is allowed for losses[23] such as bad debts[24] or the cost of replacing defective articles made at a loss.[25] These cannot be set off against sales made at a profit,[26] nor for a loss incurred in the sale of another article by giving away another infringing device as a part of it in order to stimulate sales.[27] Nor for the nominal price at which old machines were taken in exchange when these were scrapped and valueless.[28] Nor for the cost of changes made after a sale to satisfy the purchaser.[29] Nor for expenses in attempts to make sales which were not consummated.[30] A credit will not be allowed for abnormal expenses for salesmen made in an effort to build up a

17 Continuous Glass Press Co. v. Schmertz Wire Glass Co., C. C. A., 219 Fed. 199.

18 Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. 177.

19 Lee v. Malleable Iron Range Co., 247 Fed. 795.

20 Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 457, 12 Sup. Ct. 49, 35 L. ed. 809.

21 Page Mach. Co. v. Dow, Jones & Co., 238 Fed. 369, 374.

22 Page Mch. Co. v. Dow, Jones & Co., 238 Fed. 369, 375.

23 McLee Glass Co. v. H. C. Fry Glass Co., C. C. A., 248 Fed. 125.

24 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

25 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

26 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864. The testimony of one of the defendant's officers that some of the accounts for machines sold are not collectible is not enough to justify deduction of the profits upon such sales, when there is no proof of attempts to collect or offer to assign such accounts to the plaintiff. Peerless Brick Machine Co. v. Miracle Pressed Stone Co., 181 Fed. 526; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 864.

27 Underwood Typewriter Co. v. Fox Typewriter Co., C. C. A., 220 Fed. 880.

28 Racine Eng. & M. Co. v. Confectioners' M. & Mfg. Co., C. C. A., 234 Fed. 876.

29 Morgan Const. Co. v. Forter-Miller Engineering Co., C. C. A., 234 Fed. 325.

30 Decker v. Smith, 225 Fed. 776.

good will for the sale of the infringing article, the patent upon which was near its expiration,[31] nor for unsuccessful attempts to extend the market.[32] Nor for attorney fees.[33] Nor for expenses in the Patent Office.[34] Nor, it has been held, for payments to physicians for injuries to employees.[35]

§ 389d. Interest upon profits. Unless the infringement is fraudulent and wanton, interest upon the profits will not be allowed prior to the filing of the master's report.[1] Interest is usually allowed from the date of the filing of the master's report, which was confirmed.[2] When the court set aside two inconsistent reports made by a master and finally reached a result which was a substantial confirmation of one of these, interest was allowed from the date of such report.[3] When at the time of the infringement the validity of the patent was in serious controversy and a District Court had held that it was invalid, the infringement cannot be deemed wanton and deliberate.[4] But the advice of counsel is not always an excuse.[5]

§ 389e. Assessment of damages for infringement of patents. The assessment of damages in suits for the infringement of patents was first authorized by the Act of July 8, 1870.[1] This as re-enacted in the Revised Statutes and subsequently amended provides: "The several courts vested with jurisdiction of cases under the patent laws shall have power to grant injunctions according to the course and principles of the courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits

31 Oehring v. Fox Typewriter Co., C. C. A., 251 Fed. 584.

32 Ibid.

33 National Folding-Box & Paper Co., v. Dayton Paper Novelty Co., 95 Fed. 991, 994.

34 Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860, 863.

35 Nat. Folding Box Co. v. Dayton Paper Box Novelty Co., 95 Fed. 991, 994.

§ 389d. 1 Tilghman v. Proctor, 125 U. S. 136, 160, 31 L. ed. 664, 8 Sup. Ct. 906; National Folding-Box & Paper Co. v. Dayton Paper Novelty Co., 97 Fed. 331; Western Glass Co. v. Schwertz Glass Co., C. C. A., 226 Fed. 730; B. F. Goodrich Co. v. Consol. Rubber Tire Co., 251 Fed. 617.

2 Ibid.

3 Ibid.

4 Oehring v. Fox Typewriter Co., C. C. A., 251 Fed. 584.

5 Lee v. Malleable Iron Range Co., 247 Fed. 795, 808.

§ 389e. 1 29 St. at L. 694.

to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its directions, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case. But in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action."[2]

On account of the difficulty in obtaining technical proof of the profits and damages in case of the infringement of a patent for a design the Act of February 4th, 1887, provides, "Hereafter during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without license of the owner, have been applied, knowing that the same has been so applied. Any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as aforesaid of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered in any circuit court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement."[3]

The damages and profits which are assessed upon an infringement of a patent are distinct from, and independent of each

2 U. S. § 4921, as amended Mar. 3, 1897, 391, § 6, 29 St. at L. 694, Comp. St. § 9468.

3 24 St. at L. 387, ch. 105, § 1, Comp. St. § 9476.

other. They are governed by different principles and the allowance of one does not preclude recovery of the other.[4] The law does not permit a duplication in damages of what has been recovered in profits.[5] When the profits made by the defendant are in excess of the complainant's damages the complainant cannot recover damages in addition to profits.[6] It does not follow that no damages are recoverable because no profits were realized.[7] The usual measure of damages is either the loss of complainant's sales caused by the infringement,[8] or a reasonable royalty upon the sales made by the defendant.[9]

When the plaintiff has been accustomed to grant licenses to others, the established royalty can be proved as a basis for the measure of damages,[10] even though the license fees were not always exactly the same.[11] But the plaintiff is not compelled to allow as a standard for comparison the royalties paid by auxiliary companies with exclusive licenses for different territories who incurred expense in introducing and exploiting the patented articles.[12] Nor on the other hand can he thus use a so-called royalty which included the rest of a machine.[13]

In the absence of other evidence there is no presumption that those who bought the infringing articles would have purchased those made by the plaintiff, had there been no infringement,[14] although the complainant had facilities in his factory for making the articles made and sold by defendant;[15] where the

4 Beach v. Hatch, 153 Fed. 763; Underwood Typewriter Co. v. C. E. Stearns, C. C. A., 227 Fed. 74, 82.

5 Yesbera v. Hardesty Mfg. Co., C. C. A., 166 Fed. 120; Underwood Typewriter Co. v. C. E. Stearns & Co., C. C. A., 227 Fed. 74, 82.

6 Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899; see McKee Glass Co. v. H. C. Fry Glass Co., C. C. A., 248 Fed. 125.

7 Underwood Typewriter Co. v. C. E. Stearns, C. C. A., 227 Fed. 74, 82.

8 Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 648.

9 Ibid.

10 Phillip v. Knock, 17 Wall. 460, 462; Birdsall v. Collidge, 93 U. S. 64, 70; Clark v. Wooster, 119 U. S. 332, 326; Tilman v. Proctor, 123 U. S. 136, 143.

11 Consolidated Rubber Tire Co. v. Diamond Rubber Co., C. C. A., 232 Fed. 475.

12 Reliance Const. Co. v. Hassam Paving Co., C. C. A., 248 Fed. 701.

13 Consol. Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455, 457.

14 Underwood Typewriter Co. v. C. F. Stearns, C. C. A., 227 Fed. 74, 83.

15 U. S. Frumentum Co. v. Lauhoff, C. C. A., 216 Fed. 610. But see Stockham v. Duncan, 226 Fed. 740, 743.

articles were sold in competition with others not infringements which served the same purpose.[16]

Where the infringement consisted in the use of the invention the complainant must show that the defendant on the balance of preference would have preferred his invention with its appendant cost to the alternative open to him.[17] In the choice between such alternatives the royalties necessary to secure their use must be considered.[18] It has been said, that "it makes no difference whether the supposed patented standard of comparison is owned by the plaintiff or third parties. The point is that the existence of a monopoly over such a standard is a relevant fact in considering the preference between them."[19] Where the infringing article was a special apparatus and it did not appear that anything else accomplishing the same purpose or generally similar was on the market, the profits which plaintiff would have made had he sold all that were sold by the defendant may be allowed.[20] Testimony that defendant's customers had formerly bought from plaintiff or were in a territory where plaintiff was making sales may be considered.[21] Where the defendant before the infringement bought the patented article from the plaintiff, whose business was previously established and flourishing, and the business substantially diminished during the infringing period, its loss of profits to an amount equal to the defendant's sales may be allowed.[22] But the court refused to make such a presumption from the previous sales when the defendant was a partner of the complainant.[23] Where there are several competitors, statements to plaintiff's salesmen by those to whom they offered his patented articles are admissible to show why sales were not made; but the defendant should be

16 Underwood Typewriter Co. v. C. E. Stearns, C. C. A., 227 Fed. 74, 83.

17 Page Mach. Co. v. Dow, Jones & Co., 238 Fed. 369, 373.

18 Ibid.

19 Page Mach. Co. v. Dow, Jones & Co., 238 Fed. 369, 373.

20 Gould v. Cowing, 105 U. S. 253, 26 L. ed. 987; U. S. Frumentum Co. v. Kauhoff, C. C. A., 216 Fed. 610, 614; Stockham v. Duncan, C. C. A., 226 Fed. 740, 741, 744.

21 U. S. Frumentum Co. v. Lauhoff, C. C. A., 216 Fed. 610, 614.

22 Bemis Car Box Co. v. J. G. Brill, C. C. A., 200 Fed. 749, 758; Creamer v. Bowers, 35 Fed. 306; Rose v. Hirsh, C. C. A., 94 Fed. 177, 51 L.R.A. 801.

23 Clarke v. Schieble Toy & Novelty Co., C. C. A., 248 Fed. 276, 279.

allowed to contradict this by the testimony of the same persons duly offered to show their reasons for buying.[24]

In fixing the selling price for the purpose of determining the complainant's damages, the master may in the absence of other controlling circumstances include with the infringing period the years immediately preceding and take the average selling price during such time.[25] The actual cost paid by plaintiff unless unreasonable or likely to be reduced by an increased quantity of orders should be deducted.[26] A manufacturer's profit of ten per cent has been included in the deduction.[27]

In computing the profits which plaintiff lost, payments for excessive advertising caused by the competition of the infringing articles should not be deducted when the normal advertising expense was proved but it was held that damages could not be allowed for increased advertising, since the plaintiff might have realized a benefit then.[28]

Where the damages are measured by the loss of royalty, interest is allowed from the time it would regularly have been paid, usually from the end of each year.[29] Where the measure of damages is loss of the profits of sales, interest thereupon is allowed from the filing of the master's report.[30] Where the damages are trebled, interest is allowed only on the increase.[31] Where there was no established royalty, nor proof of loss of sales caused by the infringement the measure of damages is such a sum as under all the circumstances would have been a reasonable royalty for the defendant to have paid.[32] Evidence

24 J. D. Randall Co. v. Fogelsong Mach. Co., C. C. A., 216 Fed. 601.

25 Bemis Car Box Co. v. J. B. Brill, C. C. A., 200 Fed. 749, 756, 764.

26 Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199; Consol. Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455; 458.

27 Bemis Car Box Co. v. G. J. Brill, C. C. A., 200 Fed. 749, 758.

28 Anti-Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 457.

29 Tilgham v. Proctor, 125 U. S. 136, 143; Munising Paper Co. v. Am. Sulphite Pulp Co., C. C. A., 228 Fed. 700, 708; in B. F. Goodrich Co. v. Consol. Rubber Tire Co., C. C. A., 251 Fed. 617, 624, an average royalty for a period of ten years was fixed and the interest did not run until the end of the period.

30 Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459.

31 Ibid.

32 Suffolk Co. v. Hayden, 3 Wall. 315, 18 L. ed. 76; Hunt v. Cassiday, C. C. A., 64 Fed. 584; Dowa-

can be considered which shows the utility and advantage of the

giac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 649; McKnen v. B. & O. R. R. Co., C. C. A., 154 Fed. 63; B. F. Goodrich Co. v. Consol. Rubber Tire Co., C. C. A., 251 Fed. 617, 621, 622, per Evans, J.: "It is well nigh inconceivable that this large and successful business concern should engage in this unlawful business, year after year, in defiance of the patentee's rights with a suit for damages pending, if the business was conducted at a loss. It is highly improbable that this concern, with its record of success and its stupendous figures of net profits for ten years would have conducted, as part of that most successful business, a branch of no inconsiderable size that was run at a loss. Nor should appellees be compelled to go forth without relief, if there be any other reasonable basis for measuring damages simply because appellant has so kept its books, that the court, as the master found, is unable to accept its figures, and unable to determine from these books the profits actually enjoyed." Clark v. Schieble Toy & Novelty Co., 248 Fed. 276, 282, 283, per Warrington, J.: "The value as well as the earning capacity of the power device may, however, be safely based on the average profit earned upon each of the toys containing that device during the non-infringing period. As it seems to us, that is the normal period from which such value is to be derived; it was the time in which Clark, as well as Schieble devoted his unbiased efforts to ascertain the utility and advantage of the invention, the power device, 'over the old modes or devices for working out similar results.' Considering the opposed accountants' estimate of the net profits earned by the partnership during its life of five years, in connection with the number of toys the firm produced in that time containing the power device, and giving effect to the rule of apportionment and considering also the tortious character of the taking and the value of the cultivated trade field which Schieble had bought from the partnership, we conclude that a conservative estimate of the value of the patent property taken, or of the earning capacity of that property, is 21 cents per dozen toys, or $1\frac{3}{4}$ cents each, one size and style with another. By either name (value of property or earning capacity) we merely describe the damage suffered by complainant reduced to a unit basis. We do not see that it would be improper to call this a royalty, whether fixed by a court or jury after the event, instead of by the parties in advance; the name is immaterial." Lee v. Malleable Iron Range Co., 247 Fed. 795, 806. "Now, if the idea of a reasonable royalty as a measure of damage to a patentee is at all analogous to other situations where the law imports 'reasonableness' as an element, then the degree to which the act of the wrongdoer has been profitable or unprofitable to himself cannot be a controlling test. When therefore the fact that defendant is shown to have made $47,000 'profits,' apportioned as 'legally attributable' to the embodiment of the invention in the combination structures made by him cannot limit the proofs in their

invention in producing a similar result.[33] Where there has been no established royalty, proof may be offered to show what would have been a reasonable royalty considering the nature of the invention, its utility and advantages and the extent of the use involved.[34] The testimony of experts properly qualified

legitimate tendency — as it may develop—to either a larger or smaller amount as reasonable royalty damage. True, profits actually made may be considered; but that their amount must be taken as the test of reasonableness, or that profitless infringing just negative damage by defeating the exaction of a reasonable royalty by a patentee, is no more possible in measuring damages in respect of infringement, than would be the attempt of a lessee at will or sufferance to limit or defeat reasonable recovery by proving his occupation of the tenement to have resulted in little or no profit to him.

"When, therefore, the restriction contended for cannot be recognized and the inquiry is subject to be tested, not by the infringer's 'legally attributable' profits, but rather by the character and value of the patentee's property right and damage to him by its invasion or appropriation, the master was bound to resort to the large range of testimony pertinently bearing upon the reasonable amount to be awarded. In the discharge of that duty he rightfully considered everything disclosed in this litigation which had a tendency to establish that Beckwith's invention was a highly important and valuable contribution to the art, its creation of profits actually made by defendant upon its embodiment in infringing structures, its efficacy to contribute directly or indirectly, and its actual direct or indirect contribution to the success of the infringer's business of manufacturing and selling reservoir ranges, and, generally, its value as property, to the end of ascertaining the reasonable value of its use or the exercise of the rights growing out of it.

"Certainly the defendant's conduct and actual experience during the infringing period, insofar as it disclosed its own estimate of the importance and value, and the court's adjudication respecting the merit, of the invention have persuasive bearing upon this matter, which is at the bottom of the inquiry. Admittedly the plaintiff may not have resorted to evidence sometimes offered to prove reasonable royalty —he may not have been able to— but he did not bar resort to 'other available, pertinent proofs.' Frumentum v. Lauhoff, 216 Fed. 610, 132 C. C. A. 614. So, when the plaintiff offered the opinions of one qualified by experience to speak directly to the matter of reasonable royalty, when the wide range of testimony in the record is appealed to, the case in my judgment presents a great array of facts and circumstances, not only competent, but persuasive, to support the award made by the master."

33 Suffolk Co. v. Hayden, 3 Wall. 315, 18 L. ed. 76; McCune v. B. & O. R. R. Co., 154 Fed. 63; Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 759.

34 Dowagiac Mfg. Co. v. Minne-

may be considered.[35] There is no reason why the same results

sota Moline Plow Co., 235 U. S. 641, 648; Hunt v. Cassidy, C. C. A., 64 Fed. 584, 587; Cassidy v. Hunt, 75 Fed. 1012; McCune v. Baltimore & Ohio R. R. Co., C. C. A., 154 Fed. 63; Bemis Car Co. v. Brill Co., C. C. A., 200 Fed. 749; U. S. v. Frumentum Co. v. Lauhoff, C. C. A., 216 Fed. 610.

35 U. S. Frumentum Co. v. Lauhoff, C. C. A., 216 Fed. 610, 617, per Dennison, J.: "We can see no reason why the owner of patent may not be compensated upon the same principles or why the perfect analogy between the rules of damages as to general property and as to patent property which apply with reference to market value and with reference to lost sales should be discarded when we come to what may, for convenience, be called general damages. The jury, in a patent case can be shown what plaintiff's patent property was, to what extent defendant has taken it, its usefulness and commercial value as shown by its advantages over other things and by the extent of its use and as shown by profits and savings which could be made upon its sale or adoption. The jury can learn how much of the realized profit should be credited to the manufacturing process and business risk and how much to the patent, also, what share of the profits of the selling price it may be customary in that or similar business to allow for the use of such an invention. Experts may be amply qualified to give useful opinions as to the value of the property which is to be appraised. More or less of these things may appear in a given case, all having a bearing on the real value of that for which plaintiff is to be compensated and the case presents no greater difficulty in computing and ascertaining damages than is met by a hundred juries every day. This damage or compensation is not, in precise terminology a royalty at all, but it is frequently spoken of as a 'reasonable royalty'; and this phrase is a convenient means of naming this particular kind of damage. It may also be well called 'general damage'; that is to say, damage not resting on any of the applicable, exact methods of computation but upon facts and circumstances which permit the jury or court to estimate in a general, but in a sufficiently accurate, way the injury to plaintiff caused by each infringing sale." Lee v. Malleable Iron Range Co., 247 Fed. 795. "Whatever may be the applicability of this standard of comparison rule to other situations there ought to be at least hesitation in adopting it where profits have been figured and apportioned without its aid. The obvious danger of attempting to measure recovery not by what the infringer as a manufacturer or seller in fact made as a manufacturer's and seller's profit on the particular combination, but by the gain, if any, as compared with what he would have made, had he manufactured something which he might, but did not, make—the obvious danger involved is this: It introduces a conjectural basis of evidence; it compels assumptions which are repugnant to the very purpose of giving relief to the patentee for the appropriation which the infringer for some reason chose. It compels comparison of

what he actually did, as against a standard which he chose not to follow; it gives prominence to what, but for the invention, he might have done, thereby to get the measure or value of what, apparently because of the invention, he did do. In other words, the realm of speculation is explored collaterally inquired into, with the inevitable result of always finding some standard which will lead to nominal recoveries: a practical result of treating the infringement or appropriation as a mere fortuity, a mere accident of making a selection of one out of several equally desirable courses to pursue. In further consideration of this, let it be assumed that the very reservoir suggested by the defendant as standards of comparison could have been made at precisely the same or at variant costs; the infirmity of the rule—the injustice, I believe, of its attempted application—rests in the added hypothesis or assumption that, had any other been chosen, it would have achieved corresponding results in respect of the number of infringing reservoirs which the defendant in fact made and sold. In this way, although the whole manufacture and resulting trade may have been bottomed upon the actual and commercial merit of the appropriated invention, an infringer may still retain his gains and go acquit, except for nominal recovery, because he can show that he gained or saved or profited no more than his competitors in their manufacture and sales of 'what he would have been free to make and sell, but did not.' The proof may be overwhelming that the particular infringer, in the course of his manufacture and sale, not only met competition, but distanced it, by creating a greater commercial favor for the infringing article, yet so long as he can show that he made no more money than he would have made, had he followed the course of his competitors, he may retain his gains because this enables him to say that he made nothing out of the invention. It results in denial of gains by an infringer who is fortunate enough to have actual or possible competitors in the same general line through whom and whose experience he can place before the court an hypothesis which after all enables him to travel in a circle on this matter of gains and profits. I believe that the matter may be stated in another way: A basic infirmity of the so-called rule of comparison resides in the effort to fasten upon the words 'attributable to the invention' a meaning which, with the aid of this rule, can never be satisfied, except by showing increased profits on the individual infringing, as against the 'standard,' structure. Whereas, the invention and the endeavors of the inventor, not only may have been designed and exerted to increase, but actually do increase, cost and thereby reduce profits, which reduction is expected to find compensation either in increased sale price or increased volume of business, or not at all; or that they were calculated either to reduce or increase in like proportion cost of manufacture and sale price and thereby maintain the same profit as was earned upon the unpatented or unimproved structure. In other

should not prevail before a master as before a jury.[36] A verdict fixing damages for each infringing device was held to be no evidence that the damages for subsequent infringements were of the same amount.[37]

Increased damages under the statute will be awarded when the infringement was deliberate,[38] but not when it was made in good faith.[39] Evidence that at the time of the infringement the patent was contested by others as well as by the defendant

words, the 'standard' itself, its high cost of manufacture and its high price, its profits yield, to say nothing of its inferiority, may have prompted the inventor in his efforts, by mere improvement, to lessen the cost of making, the price, the yield, as well as to do something new and useful. So, too, as bearing upon this question of relevancy, these further considerations are not to be overlooked. The infringer, presumably, knows the 'standard' and its yield of profits but he also can and does fix and control, not only the cost, but the sale price, of the infringing structure, and thereby its yield. Therefore, it is within his power, at all times, by contenting himself with a yield equal to or smaller than that of the 'standard,' to escape accounting for profits 'attributable' to the invention; and though, by greatly reducing his yield upon the particular structure, he may, as stated, by a greatly increased volume of manufacture and sale, increase his aggregate yield of profits. True, while he may not create or control the 'open' or 'standard' structure, or its yield, yet he can by his own conduct, at will, frustrate the probative force or effect of the 'standard' and hence the *result* of a 'comparison.' Or, as indicated, assuming that he might be quite innocent respecting the standard, his whole endeavors may have been exerted, his whole profits may have been earned, in his estimate of, and upon the public's faith in, the 'improvement'; he still has the right under this rule, to learn, in an accounting suit that he in fact made his profit in spite of, not because of, the 'improvement.'"

[36] Locomotive Co. v. Pennsylvania Co., 2 Fed. 677, 682; U. S. Frumentum Co. v. Lauhoff, C. C. A., 216 Fed. 610, 625. In Consol. Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455, 459, per Learned Hand, J.: "I am quite aware that in these matters we are not able to tell with accuracy what the reasonable profits or reasonable royalties would be; but we can meet that difficulty by taking only most conservative estimates. This is becoming the tendency of the court in all the best considered of the later opinions."

[37] Cheatham Electric Switching Device Co. v. Transit Development Co., C. C. A., 261 Fed. 792.

[38] Consol. Rubber Tire Co. v. Diamond Rubber Co., C. C. A., 232 Fed. 475; affirming s. c., 226 Fed. 455; Anti-Vacuum Freezer Co. v. Wm. A. Sexton Co., 250 Fed. 457.

[39] Consol. Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455, 464.

may be a ground for refusing to increase the damages.[40] But a continuance of the infringement after adjudications in favor of the patent may be a sufficient ground for the increase.[41] And an attempt to obtain a patent embodying the essential[42] features of the infringed invention may be considered. Evidence that the defendant enticed skilled workmen from the complainant is material.[43] Evidence of the advice of counsel that there was no infringement is not conclusive.[44]

§ 389f. Apportionment of liability between infringers. Notwithstanding the fact that the two parties contributed to an infringement so that they may be joined as defendants to the same suit for an injunction, an accounting and damages, they are not jointly liable for damages and profits except those resulting from their joint acts.[1] It was so held when one sold the materials and the other manufactured and sold the infringing article,[2] where one bought and sold at his own prices some of the articles which another manufactured,[3] and in the case of the successive owners of an infringing business.[4] Where defendant made and sold to manufacturers an article fitted and obviously intended for use as a component part of an infringing article, upon an accounting, he has the burden of showing that it was not so used.[5] A defendant is not liable for damages and profits after it has actually turned over its business to another.[6] The purchase of all the property of an infringing corporation does not under ordinary circumstances before judgment and execution against the vendor make the vendee liable for infringe-

40 Ibid.

41 Consol. Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455, 464, 465, where an increase of $50,000 was made; Lee v. Malleable Iron Range Co., 247 Fed. 795.

42 Lee v. Malleable Iron Range Co., 247 Fed. 795.

43 Miner v. T. H. Symington Co., C. C. A., 247 Fed. 521.

44 Lee v. Malleable Iron Range Co., 247 Fed. 795, 808.

§ 389f. 1 Vrooman v. Penhollow, C. C. A., 222 Fed. 894; Underwood Typewriter Co. v. C. E. Stearns & Co., C. C. A., 227 Fed. 74; Young v. Herman, C. C. A., 232 Fed. 361; Consol. Rubber Tire Co. v. Goodrich Co., 237 Fed. 893.

2 Consolidated Rubber Tire Co. v. B. F. Goodrich Co., 237 Fed. 893. But see Barrett v. Sheaffer, C. C. A., 251 Fed. 74.

3 Underwood Typewriter Co. v. C. E. Stearns, C. C. A., 227 Fed. 74.

4 Young v. Herman, C. C. A., 232 Fed. 361.

5 Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455.

6 Herman v. Youngstown Car Mfg. Co., C. C. A., 216 Fed. 605.

ments committed before the sale.[7] A judgment or settlement against an infringer for the profits made by the manufacture and sale of the infringing articles does not authorize his vendee to continue their use and the latter is liable for an injunction and an accounting for the profits which he thus makes.[8]

A judgment against and settlement with the manufacturer for damages, does not relieve his vendee from liability for damages by use or sale of the infringing article[9] unless there was proof that the purchasers would otherwise have taken licenses from the patentee in which case damages for the use by the latter are presumed to have been included therein.[10]

§ 389g. Accounting for profits in copyright cases. By the Act of March 4, 1909, the infringer of a copyright is liable "to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims."[1] The statutory accounting is otherwise regulated by the usual rules of equity.[2]

When the infringement constitutes a material part of the defendant's publication and is so intermingled with the rest that it is impracticable to separate the profits derived from each, all the profits made by the sale of the defendant's book may be allowed.[3] Where, however, as in the case of a single illustra-

7 Racine Engine & M. Co. v. Confectioners' M. & Mfg. Co., C. C. A., 234 Fed. 876.

8 De Laski & Thropp C. W. T. Co. v. Empire R. & T. Co., 239 Fed. 139.

9 Ibid.

10 Ibid. Stebler v. Riverside Heights Orange Growers' Ass'n, 211 Fed. 985.

§ 389g. 1 Ch. 320, § 25, 35 St. at L. 1081, amended Aug. 24, 1912, ch. 356, 37 St. at L. 489, Comp. St., 9546.

2 Haas v. Leo Feist, Inc., 234 Fed. 105, 107, as to limitations and laches, see *supra*, §§ 180, 182.

3 Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177. In case of the infringement of a copyright controlling the parts of instruments serving to reproduce mechanically a musical work, the infringing manufacturer must pay a royalty of two cents on each such part manufactured. He must account therefor under oath on the 20th of each month. "In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award tax-

tion in a book or newspaper, the piratical matter is an insignificant part of the defendant's publication, it is very doubtful whether any profits can be allowed.[4] The complainants may then be given relief by an award of damages in accordance with the statute.[5] Where a play was a violation of a copyright in a story the owner of the copyright was allowed to recover all the profits.[6]

Where the master upon an accounting makes rulings limiting the scope of the inquiry, it is proper to apply immediately to the court for the instructions.[7] Where an accounting of profits is made by the infringement of a patent or copyright, the infringer is not entitled to deduct, from the profits made during a certain term, a loss subsequently incurred in a separate transaction. Losses concurrent with the profits are all that can be considered.[8] Where the infringement was a play and the defendant had made its contracts by the theatrical season, each season was taken as a unit in the computation, and the defendant was disallowed credits against the profits of one season for losses incurred in another.[9] Where the complainant has failed to publish the statutory notice he cannot recover damages from an innocent infringer,[10] nor damages in lieu of profits,[11] but it has been held that he may recover any profits he can prove.[12] When the copyright notice was duly published absence of intent on the part of the infringer does not relieve him from accounting for his profits.[13]

able costs to the plaintiff and a reasonable counsel fee; and the court may, in its discretion, enter judgment, therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this act, not exceeding three times such amount." Act of March 4th, 1909, 35 Stat. at L. 1075, Pierce's Fed. Code, Supp. § 1578.

4 Lillard v. Sun Printing & Pub. Ass'n, 87 Fed. 213.

5 *Infra*, § 389h.

6 Dam v. Kirk LaShelle Co., C. C. A., 175 Fed. 902, 909; Haas v. Leo Feist, Inc., 234 Fed. 105.

7 Thompson v. Smith, 2 Bond 320; *supra*, § 388a.

8 Canada Bros. v. Michigan Malleable Iron Co., C. C. A., 152 Fed. 178; Dam v. Kirk La Shelle Co., 189 Fed. 842.

9 Dam v. Kirk La Shelle Co., 189 Fed. 842.

10 Act of August 4, 1909, ch. 320, § 2, 35 St. at L. 1080, Comp. St. 9541; Alfred Decker Cohen Co. v. Etchinson Hat Co., 225 Fed. 135.

11 Strauss v. Penn Printing & Pub. Co., 220 Fed. 979.

12 Ibid.

13 Haas v. Leo Feist, Inc., 234 Fed. 105.

When resales have been made of second-hand books purchased subsequent to their original sale, the profits of the second sales should also be included.[14] Amounts received from advertisers in the infringing book must be accounted for.[15] Profits may be recovered from a book seller who has received commissions upon sales[16] or by a printer and binder.[17]

In determining the profits that are to be allowed the complainant, the actual and legitimate manufacturing cost should be deducted from the gross sales.[18] It has been held that no credit can be allowed for stereotyping typewritten matter[19] nor for editorial work,[20] nor for an excessive salary paid to an officer of the infringing corporation,[21] nor for salaries paid members of an infringing firm.[22] An apportionment of overhead charges and general expenses of the business may be credited when the defendant establishes by clear proof what proportion should be allowed.[23]

§ 389h. Assessment of damages in copyright cases. By the Act of March 4, 1909, the infringer of a copyright protected under the laws of the United States is liable "(a) To an injunction restraining such infringement: (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement as well as all the profits which the infringer shall have made from such infringement and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its

14 Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. 177.

15 Hartford Printing Co. v. Hartford Directory & Prl. Co., 148 Fed. 470.

16 Stevens v. Gladding, 2 Curtis 608, Fed. Cas. 13, 399.

17 Bilford v. Scribner, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. ed. 514.

18 Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. 177. It has been held that the cost to others of similar work is inadmissible, except for comparison in testing defendant's claims for credit. Conroy v. Penn. El. & Mfg. Co., C. C. A., 199 Fed. 427.

19 Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. 177.

20 Ibid.

21 Dam v. Kirk La Shelle Co., C. C. A., 189 Fed. 842.

22 Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. 177.

23 Dam v. Kirk La Shelle Co., C. C. A., 189 Fed. 842. See *supra*, § 389e.

discretion allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyright dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing per-

formance; in the case of other musical compositions ten dollars for every infringing performance;

"(c) To deliver up on oath, to be impounded during the pendency of the action upon such terms and conditions as the court may prescribe all articles alleged to infringe a copyright.

"(d) To deliver up on oath for destruction all the infringing copies or devices as well as all plates, molds, matrices or other means for making such infringing copies as the court may order.

"(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work then in case of infringement of such copyright by the unauthorized manufacture, use or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e) of this Act: Provided also, That whenever any person, in the absence of license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e) by way of damages and not as a penalty, and also a temporary injunction until the full award is paid.

"Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States." [1]

§ 389h. [1] Act of March 4, 1909, ch. 320, § 25, 35 St. at L. 1081, amended Aug. 24, 1912, ch. 356, 37 St. at L. 489; S. E. Hendricks v. Thomas Pub. Co., C. C. A., 242 Fed. 37, 40, 42. "That the language of the section (25) of the Copyright Act relating to the as-

"Where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission

sessment of damages and profits, is 'somewhat obscure' we have pointed out before. Mail & Express Co. v. Life Pub. Co., 192 Fed. at page 901, 113 C. C. A. 377 at page 378. The relevant words of the statute are that the infringers shall pay 'such damages as the profits which the infringers shall have made from such infringement * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just; and in assessing such damages as the court may, in its discretion, allow the amounts' fixed by the act, etc. The statute then specifies certain limits of assessment in respect of copyrighted matters relevant to this case, and concludes: 'And same damages shall in no case exceed the sum of $3,000 nor be less than the sum of $250 and shall not be regarded as a penalty.'

"The same section gives plaintiff 'one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employes' in respect of books such as are here in question.

"As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. In the Mail & Express Co. case, *supra*," 192 Fed. 901, "we held that, in respect of an infringing publication, coming under the same general category as does the present one, $250 was the minimum amount to which the plaintiff could be entitled. In Gross v. Van Dyk Gravure Co., 230 Fed. 412, 144 C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, * * * but to estimate them within the sums given, without the limitations of usual legal proof. The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for the rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof.' On appeal from that construction of the statute, this court approved the method pursued.

"That the statute limits the discretion of the court to a minimum award of $250 and a maximum of $5,000 in lieu of actual damages has also been held in L. A. Westerman Co. v. Dispatch, etc., Co., 233 Fed. 609, 147 C. C. A. 417 (C. C. A. 6th). In Woodman v. Lydiard, etc. Co. (C. C.) 192 Fed. 67, (affirmed on another point 204 Fed. 921, 123 C. C. A. 243, and 205 Fed. 902, 126 C. C. A. 434); Alfred Becker, etc. Co. v. Etchinson, etc. Co., 225 Fed. 135, and F. A. Mills v. Standard, etc. Co., 223 Fed. 849, several District Courts have asserted a larger discretion; so that, where little or no injury appeared, even nominal damages have been awarded for proven infringement.

"There may be circumstances

by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice: and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion shall so direct."[2]

The liability for damages exists irrespective of the knowledge of the copyright or intent of the infringer.[3] But when the statutory notice has not been given, no damages in lieu of profits can be awarded.[4]

The word "actual" in the statute means real, as opposed to nominal, or existent without precluding the thought of change.[5]

under which discretion revolts from any award, by reason of the trivial nature of the thing copyrighted or the slight success of attempted infringement; but the facts of this case present no such problem. That keeping plaintiff out of a possible market for 2,800 copies of its own publication, by the issuance of a book competitive in every sense of the word, works some considerable injury, is a matter too plain to require more than statement. The assessment of damages or ascertainment of profits under the facts hereinabove recited would be not only difficult but expensive is similarly obvious. We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do: and (2) to give the new right of application to the court for such damages as shall 'appear to be just' in lieu of actual damages." L. A. Westermann Co. v. Dispatch Printing Co., 249 U. S. 100, 106, 107; per Van Devanter, J.: "The court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them."

2 Act of March 4, 1909, ch. 320, § 20, 35 St. at L. 1080.

3 Haas v. Leo Feist, Inc., 234 Fed. 105.

4 Strauss v. Penn Printing & Publishing Co., 220 Fed. 977.

5 S. E. Hendricks Co. v. Thomas Pub. Co., C. C. A., 242 Fed. 37.

The phrase "in lieu" means in place of the actual damages and profits.[6]

It has been held that where the evidence shows an actual loss of more than five thousand dollars the whole amount which is proved can be recovered.[7]

Where obvious and substantial pecuniary injury has been caused by the infringement, the minimum reward should be $250.00[8] for each infringement of each copyright infringed.[9] The object of the statute in this respect was to allow the court in such a case to estimate the damages within the sums given, without the usual limitations of legal proof.[10] It has been held that the sum of one dollar for each infringing copy, made, sold or found as stated in the statute, is not a minimum.[11]

It was said in an English case, "defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies."[12]

6 Ibid.

7 Turner & Dahnken v. Crowley, C. C. A., 252 Fed. 749.

8 L. A. Westermann Co. v. Dispatch Printing Co., 249 U. S. 100; see S. E. Hendricks Co. v. Thomas Pub. Co., C. C. A., 242 Fed. 37, 42.

9 S. E. Hendricks Co. v. Thomas Pub. Co., C. C. A., 242 Fed. 37, 42.

10 Gross v. Van Dyke Gravure Co., C. C. A., 230 Fed. 412, 413, opinion of learned Hand, J., in D. C. S. D. N. Y.; S. E. Hendricks Co. v. Thomas Pub. Co., C. C. A., 242 Fed. 37, 42; Turner & Dahnken v. Crowley, C. C. A., 252 Fed. 749, 753.

11 Turner & Dahnken v. Crowley, C. C. A., 252 Fed. 749, 754, where the sum was reduced to 8 cents a copy, there being no proof of actual loss or profits but the court saying "we gather from the testimony that at a retail price of 15 cents a copy of the song the profit to the plaintiff could not have exceeded 8 cents per copy. Per Hunt, J.: "The allowance of $700, or $1 per copy of the song and music, seems to have been based upon the view that $1 per copy is a fixed sum, to be allowed under any circumstances of infringement after notice. But, as we do not so construe the law, the duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial. Thus, while the discretion of the court may be used to award damages where no proof of actual damage is offered, yet the award should have relation to such inferences as are reasonably deducible from the whole case of infringement, and such damages are not to be awarded as based upon the idea of punishment. 13 Corpus Juris, p. 1179."

The full amount was allowed in Journal Pub. Co. v. Drake, C. C. A., 199 Fed. 572.

12 Pike v. Nichals, L. R., 5 Ch. 251, 260.

"But it has been declared that this rule is not applicable in all cases,[13] and it may be doubted whether it is applicable in any, unless aided by further proof, for obviously it permits the recovery of purely speculative damages."[14]

Where the copyright to a play was infringed by its production as a moving picture the court assessed the damages at the price for which the complainant had offered to sell the screen rights plus $400.00 for the loss of publicity which he would have received had his name been included in the advertisement of the cinema production.[15]

Resistance to liability for punitive damages is not a reason for imposing them.[16] Where there was no evidence of concealment or piracy but defendant was in default in failing to render monthly reports of royalties which were less than five hundred dollars and in failing to make payment within thirty days after demand; punitive damages were assessed at the sum of one hundred dollars.[17]

All persons who unite in an infringement of a copyright are liable for the damages, although they may not be liable for profits in which they did not share.[18]

§ 389i. Accounting of profits and assessment of damages in suits to restrain infringements of trade-marks. The Act of February 20, 1905, provides "The several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any case for wrongful use of a trade-mark the complaint shall be entitled to recover, in addition to the profits to be accounted

13 Citing Huebsch v. Arthur H. Crist Co., 209 Fed. 885; Scribner v. Clark, 50 Fed. 473 (affirming 144 U. S. 488, 12 Sup. Ct. 734, 36 L. ed. 514); Smiles v. Belford, 23 Grant Ch. (U. C.) 590.

14 Hale on Copyright and Literary Property, 13 Corp. Juris 1218, citing Woodman v. Lydiaed-Peterson Co., 192 Fed. 67, aff'd 204 Fed. 921.

15 Stodart v. Mutual Film Corp., 249 Fed. 507, 511, in the aggregate sum of $900, besides the counsel fee of $300.

16 Leo Feist v. Am. Music Roll Co., 253 Fed. 860.

17 Ibid.

18 Gross v. Van Dyk Gravure Co., C. C. A., 230 Fed. 412.

for by the defendants the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its directions. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law: and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed."[1]

Section sixteen is as follows: "The registration of a trade-mark under the provisions of this Act shall be *prima facie* evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration and shall use, or shall have used, such reproduction, counterfeit, copy or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."[2]

Upon an accounting of profits, made by the infringement of a trade mark or by unfair competition in the description of an article sold by the defendant, it may be presumed that the simulation of complainant's manufacture was one of the causes which induced the defendant's sales and which prevented sales by the complainant; and where it is impossible to determine whether that or some other cause induced a sale, defendant may be required to account for the whole profit.[3] But where

§ 389i. [1] Act of Feb. 20, 1905, ch. 592, § 19, 33 St. at L.

[2] Act of Feb. 20, 1905, ch. 592, § 16, 33 St. at L.

[3] G. & C. Merriam Co. v. Saalfield, C. C. A., 198 Fed. 369, 378; N. K. Fairbank Co. v. Windsor, 118 Fed. 96; Saxelehner v. Eisner

the infringement consisted in the use of a single word and there was no proof of bad faith nor of actual damages, no profits or damages were allowed.[4] And where the only unfair competition consisted in two letters urging plaintiff's customers to refrain from purchasing from plaintiff with improper innuendoes, the court held that there was no basis for an accounting of profits, or an award of substantial damages and rendered a decree for nominal damages and one-half the costs.[5] Where the goods of the parties sold at different prices the court held that there was no basis for damages and that profits alone could be awarded.[6] Where a decree which was affirmed directed that complainants should recover of defendant "damages" sustained by reason of defendant's unlawful acts and might apply for a reference to ascertain and assess such damages; it was held that there could be no accounting of profits.[7] Clerks and officers of a corporation which has been guilty of unfair competition or an infringement of a trade-mark should not be required to account,[8] except under special circumstances.[9] In a suit to enjoin the infringement of a trade-mark and unfair trade, where there is a serious doubt as to the right to the trade-mark, the master should find separately the damages and profits awarded because of the infringement and because of the unfair trade.[10]

The court may require the account to state the names and addresses of all buyers of the goods which infringe the trade-mark.[11]

§ 390. A state of facts and claim. By the English practice a party who intended to examine witnesses before a master under a decree was obliged to carry in a state of facts detail-

& Mendelson Co., C. C. A., 138 Fed. 22, 70 C. C. A., 452. See also Regis v. Jaynes, 191 Mass. 245, 249, 77 N. E. 774. But see Ludington Novelty Co. v. Leonard, C. C. A., 127 Fed. 155.

4 Ammon & Person v. Narragansett Dairy Co., 254 Fed. 208.

5 Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251; Howard Dustless Duster Co. v. Carleton, 244 Fed. 882.

6 Howard Dustless Duster Co. v. Carleton, 244 Fed. 882; Am. Specialty Co. v. Collis Co., 235 Fed. 929.

7 Hiram Walker & Sons v. Gribman, 222 Fed 478.

8 P. E. Sharpless Co. v. Lawrence, C. C. A., 213 Fed. 423.

9 Hiram Walker & Sons v. Grubman, 222 Fed. 478; see *supra*, § 111.

10 Cushman & Denison Mfg. Co. v. Grammes, 225 Fed. 883.

11 O. & W. Thum Co. v. Dickinson, 254 Fed. 219. *Contra* Cushman & Denison Mfg. Co. v. Grammes, 225 Fed. 883.

ing the circumstances which he desired to prove.[1] This was also the general form by which the prosecution of every reference to a master was commenced.[2]

"A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeasance of that of his adversary. It is, in effect, the pleading of the party before the master, and is governed by nearly the same rules and principles as pleadings in the court, although, not being signed, nor, in general, prepared by counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal; and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out.

"A state of facts is intituled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party: when the party carrying in the state of facts makes any claim upon the fund in court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief to the bill, as follows:—'And the said A. B., therefore, claims, etc.;' in such case the proceeding is called 'a state of facts and claims.' When the object of the party is to charge another with the receipt of money, etc., the state of facts concludes with a charge in the following form:—'and the said A. B., therefore, charges, etc.;' in such case the proceeding is called 'a state of facts and charge.' It may be remarked, that a charge is not always preceded by a state of facts, but if the matter appear from any admissions in any account, or examination or proceeding in the master's office, and requires no other proof in support of it, it is usual to make 'a charge' only.

When a state of facts is prepared, it is carried in to the master's office and a warrant 'on leaving' must be served upon the other parties, who may then apply for and obtain copies

§ 390. 1 Daniell's Ch. Pr., ch. xxvi. 2 Ibid.

from the master's clerk, and if they have a counter state of facts to leave, they must proceed in the same manner. It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant, 'on leaving,' should be taken out and served, as when an original state of facts is left."[3] It has been held that an amendment should not be allowed after the case has been submitted to the master for decision.[4] Parties severally, although similarly, interested cannot ordinarily unite in the same claim.[5]

§ 391. Evidence before a master. "All affidavits, depositions, and documents which have been previously made, read or used in the court upon any proceedings in any cause or matter may be used before the master."[1] These should, however, be regularly offered in evidence, so that the other party may have an opportunity to explain or rebut them.[2] Otherwise, they cannot be referred to upon the argument, or used in support of the report.[3]

The master has power to examine under oath the parties in the cause, and any witnesses produced by them,[4] and any creditor or other person coming in to claim before him.[5] The testimony should be taken down in writing by the master, or by some one in his presence, so that the court may use the same.[6]

3 Daniell's Ch. Pr., ch. xxvi.

4 Clyde v. Richmond & D. R. Co., 59 Fed. 394; Central Tr. Co. v. Marietta & N. G. Ry. Co., 75 Fed. 41.

5 Pa. Steel Co. v. New York City Ry. Co., U. S. C. C., S. D. N. Y., N. Y. L. J. May 27, 1908.

§ 391. 1 Equity Rule 80. But see Hammacher v. Wilson, 32 Fed. 796. Upon the reference of a claim of a judgment creditor for a preference, his judgment roll is admissible to prove the date when he began the suit, the nature of his cause of action and the amount of damages recovered by him, and it was held to be *prima facie* evidence of those facts against a mortgagee. Southern Ry. Co. v. Bouknight, C. C. A., 70 Fed. 442, per Fuller, C. J.

2 Bell v. U. S. Stamping Co., 32 Fed. 549.

3 Ibid.

4 Equity Rule 52.

5 Equity Rule 65.

6 Equity Rule 65.

It is the master's duty to be present when the testimony is taken.[7] He cannot decide upon testimony taken before another master in the same or another proceeding when the witnesses are alive and within the jurisdiction of the court.[8]

Witnesses who live in the district may, upon due notice to the opposite party, be summoned to appear before a master, by a subpœna issued from the clerk's office in blank and filled by the party applying for the same, or by the master, requiring the attendance of the witnesses at a time and place therein specified.[9] Such witnesses are entitled to the same compensation as for attendance in court.[10] A refusal to appear in obedience to such subpœna is a contempt punishable by the court or a judge thereof by an attachment issued upon the master's certificate.[11] The production of documents may be compelled by a master.[12] Upon the master's certificate a commission issues from the clerk's office to take the depositions of witnesses according to the acts of Congress or equity rule.[13] Under extraordinary circumstances, a master may take testimony beyond the territorial jurisdiction of the court.[14]

A master has power to direct the mode in which matters requiring evidence shall be proved before him.[15] The court [16] may but rarely will interfere with the master's ruling in this respect before his report is brought before it for review.[17] It is the safer practice, when a master erroneously excludes evidence, to move the court for an immediate correction of his error.[18] It has been held that the failure to object to the taking of evidence before a master is not equivalent to a consent to his appointment, nor an estoppel to controvert his findings of facts.[19]

7 Rubin & Lipman, 215 Fed. 669.

8 Ibid.

9 Equity Rule 55.

10 Equity Rule 52.

11 Equity Rule 52.

12 Goss Printing-Press Co. v. Scott, 119 Fed. 941.

13 Equity Rule 77.

14 Bate Ref. Co. v. Gillette, 28 Fed. 673.

15 Equity Rule, 77.

16 Webster L. Co. v. Higgins, 43 Fed. 673.

17 Lull v. Clark, 20 Fed. 454; Wooster v. Gumbirnner, 20 Fed. 167; Third Nat. Bank of Philadelphia v. Nat. Bank of C. V., 86 Fed. 852.

18 Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476.

19 Southern Ry. Co. v. Simon, 184 Fed. 959.

§ 392. Master's report. The final decision of a master upon matters referred to him is embodied in his report to the court. He should not recite at length any part of any paper or deposition brought in or used before him.[1] He is, however, required to refer to and identify every state of facts, charge, affidavit, deposition, examination, or answer used before him, so as to inform the court concerning the pleadings and evidence which he considered in reaching the conclusions embodied in his report.[2] Unless required by the order of reference, it is not necessary for him to report all of the evidence taken before him.[3]

It is the better practice for a master before making his report to prepare and serve on the parties a draft of the same, with notice of a time and place when and where he will hear their objections thereto.[4] At the appointed time, counsel should appear, make their objections to the proposed report, and see that these objections are noted in writing and filed with the master.[5] This is the practice in the Second Circuit.[6] The practice is, however, in some circuits very loose in this respect.[7] The objections made to the draft should not be included in the report when made.[8]

A report was sent back to the master, when he had refused to permit new testimony to be taken after his draft had been served and it appeared that a party had been misled as to the effect to be given to evidence already in the case.[9]

It has been said that the master may embody his conclusions in separately numbered findings if he chooses, but that it is the better practice to write the report as a narrative without such interruptions,[10] and that he should not rule on requests

§ 392. 1 Eq. Rules, 61. Rollman Mfg. Co. v. Universal Hardware Works, 229 Fed. 579.

2 Equity Rule 61. See *Re* Thomas, 35 Fed. 337, 339.

3 Weiss v. Haight & Freese Co., 148 Fed. 399; aff'd on appeal Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328; certiorari denied, 207 U. S. 594, 52 L. ed. 356.

4 Fischer v. Hayes, 16 Fed. 469; Jennings v. Dolan, 29 Fed. 861; Bliss v. Anaconda Copper Min. Co., 156 Fed. 309.

5 Fischer v. Hayes, 16 Fed. 469; Story v. Livingston, 13 Pet. 359, 10 L. ed. 200.

6 Fischer v. Hayes, 16 Fed. 469; Jennings v. Dolan, 29 Fed. 861.

7 Hatch v. Indianapolis & S. R. Co., 9 Fed. 856.

8 Ommen v. Talcott, 175 Fed. 261, 270.

9 Westlake v. Marvin, 176 Fed. 742.

10 Ommen v. Talcott, 175 Fed. 261, 270. But it has been said that the master should make findings

to find, nor incorporate such rulings in his report.[11] It has been said to be improper for the master to report the entire evidence taken before him unless there is an order from the court to that effect, or to report such portions of the evidence as relate to the exceptions without a request from the party excepting.[12]

The report may be either general, covering all the matters referred; or special, confined to a part which can be conveniently severed from the rest, where it is for the interest of persons thereby affected not to delay till the whole case is determined.[13]

As soon as the report is ready, the master should file the same in the clerk's office; and the clerk should enter the day of the return in the order book.[14] If no exceptions are filed within one month from the time of filing, the report is considered as confirmed on the next rule day after the month has expired.[15]

Upon consent of the parties [16] or at the request of the master the court may allow the report to be withdrawn for the correction of a mistake by him; but in such case it is improper for him to reverse his rulings upon the law or the evidence, except upon notice to all parties affected, and after a hearing of any of them who wish to be heard.[17]

§ 393. Exceptions to masters' reports. Exceptions to the report of a master must be filed within twenty days from the filing of the report.[1] No exception will lie to a ruling before the report was made which was not objected to before the master.[2] In circuits where it is not the practice for masters to

of fact and adopt conclusions of law. Des Moines Water Co. v. City of Des Moines, 192 Fed. 193.

11 Ibid.

12 Massie Wireless Tel. Co. v. Enterprise Transp. Co., C. C. A., 175 Fed. 6, 10.

13 Daniell's Ch. Pr. (1st Am. ed.) 1475, 1476.

14 Eq. Rule 83.

15 Equity Rule 83; Burns v. Rosenstein, 135 U. S. 449, 455, 34 L. ed. 193, 195.

16 W. U. Tel. Co. v. Am. Bell Tel. Co., 50 Fed. 662.

17 National F. B. & P. Co. v. Dayton P. N. Co., 91 Fed. 822; Goldsmith Silver Co. v. Savage, C. C. A., 229 Fed. 623; Fleming v. Noble, C. C. A., 250 Fed. 733; Connor v. United States, C. C. A., 214 Fed. 522; *Re* Stafford, 226 Fed. 127; Spring Valley Water Co. v. City & County of San Francisco, 252 Fed. 979; Smith v. Seibel, 258 Fed. 454.

§ 393. 1 Equity Rule 66; Fidelity Ins. & S. D. Co. v. Shenandoah I. Co., 42 Fed. 372. But see Central T. Co. v. Wabash, St. L. & P. Ry. Co., 27 Fed. 175.

2 Troy I. & N. Factory v. Corn-

serve drafts of their reports, an exception to the report, but not an exception to a ruling on evidence, can be filed without a preliminary objection.[3] Such an exception has also been permitted after a draft of the report had been served, and no objection made thereto.[4] Objections in support of exceptions may be allowed to be filed *nunc pro tunc*.[5]

Where the master has submitted a draft of his report to counsel, who have filed objections to the same before it was finally made, it is a convenient practice to provide, by stipulation or order, that objections filed before the order shall stand as exceptions filed with the clerk.[6] Unless such provisions are made they will be disregarded by the court.[7]

In the absence of exceptions the master's findings of fact will be accepted as true,[8] but the court may review any erroneous deductions made therefrom in his conclusions.[9] It is a safer practice, however, to except specifically to all his conclusions of which a review is sought since the court in its discretion may otherwise refuse to review them.[10] Exceptions to the master's conclusions of law, do not open for review his findings of fact.[11]

Exceptions to a master's report are in the nature of a special demurrer.[12] They should specifically point out the errors of which they complain, and if they rely upon any part of the testimony, it is the safer practice to have them either state the same or refer thereto, so that the court can without difficulty find it.[13] An exception may be sustained upon a different

ing, 6 Blatchf. 328; Fischer v. Hayes, 16 Fed. 469; Story v. Livingston, 13 Pet. 359, 10 L. ed. 200; Ommen v. Talcott, 175 Fed. 261, 270. But see Hatch v. Indianapolis & S. R. Co., 9 Fed. 856; Jennings v. Dolan, 29 Fed. 861.

3 Hatch v. Indianapolis & S. R. Co., 9 Fed. 856; Fidelity I. & S. D. Co. v. Shenandoah I. Co., 42 Fed. 372. See Jennings v. Dolan, 29 Fed. 861.

4 Jennings v. Dolan, 29 Fed. 861.

5 Fischer v. Hayes, 16 Fed. 469.

6 Bliss v. Anaconda Copper Min. Co., 156 Fed. 309.

7 Decker v. Smith, 225 Fed. 776.

8 Fleming v. Noble, C. C. A., 250 Fed. 733.

9 Central Improvement Co. v. Cambria Steel Co., C. C. A., 210 Fed. 696.

10 Ibid.

11 Hattiesburg Lumber Co. v. Herrick, C. C. A., 212 Fed. 834.

12 General Fire Extinguisher Co. v. Lamar, C. C. A., 141 Fed. 353.

13 Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Foster v. Goddard, 1 Black, 506, 17 L. ed. 228; Greene v. Bishop, 1 Cliff. 186; Stanton v. Alabama & C. R. Co., 2

ground than that therein stated.[14] It has been held that the point that a statute is unconstitutional need not be specifically stated in the exception.[15]

Exceptions to the admission or exclusion of evidence, taken upon the hearing before the master, need not be restated in the exceptions filed to his report.[16] Where the findings were supported by the findings, exceptions as to the master's ruling concerning the burden of proof and the effect of part of the evidence were disregarded.[17] It has been held in the Second Circuit that if the master errs by an improper rejection of evidence, his error should be corrected by an immediate motion to compel him to receive the same, and is not the proper subject of an exception to his report.[18]

If the court is in session when exceptions are filed, they are argued at that session;[19] otherwise at the next session.[20]

Every presumption is in favor of the correctness of the decision of a master.[21] It has been said that this rule does not

Woods, 506; Cutting v. Florida Ry. & Nav. Co., 43 Fed. 743, 747; General Fire Extinguisher Co. v. Lamar, C. C. A., 141 Fed. 353; Sandford v. Embry, C. C. A., 151 Fed. 977; H. C. Cook Co. v. Little River Mfg. Co., 164 Fed. 1005. In Duden v. Maloy, 43 Fed. 407, the following exception was held to be insufficient according to the practice in the Second Circuit, and was consequently disregarded: "For that the master has found contrary to the preliminary requisitions and objections of defendant to his proposed draft report, and which requisitions and objections he here repeats, and contends that fresh evidence should be taken thereon." All that is necessary is that the exception should distinctly point out the finding and the conclusion of the master which it seeks to reverse. Foster v. Goddard, 1 Black, 506, 509, 17 L. ed. 228, 229, per Swayne, J. See Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 57 Fed. 441, 444. For a construction of exceptions, see People v. American Loan & Trust Co., 87 App. Div. (N. Y.), 139. See § 389a, *supra*.

14 Kansas City Ry. v. Guardian Trust Co., 240 U. S. 166, 178; Central Imp. Co. v. Cambria Steel Co., C. C. A., 210 Fed. 696, 700.

15 Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co., 42 Fed. 372, 374.

16 Marks v. Fox, 18 Fed. 713.

17 Adams v. Osley, 255 Fed. 117.

18 Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476, 478.

19 Equity Rule 83.

20 Equity Rule 83.

21 Medsker v. Bonebrake, 108 U. S. 66, 27 L. ed. 654; Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664; Callaghan v. Myers, 128 U. S. 617, 666, 32 L. ed. 547, 562; Kimberly v. Arms, 129 U. S. 512, 524, 32 L. ed. 764, 768; Sandford v. Embry, C. C. A., 151 Fed. 977; Houck v. Christy, C. C. A., 152 Fed. 612; McNulty v. Wiesen, 158 Fed. 221;

apply to a suit to enjoin the enforcement of a legislative or municipal regulation of the charges by a public service corporation.[22] If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors in law which affected the result.[23] Where the order directed the master to state the facts, his findings have as much weight as the verdict of a jury upon a feigned issue.[24] His findings of fact cannot be impeached in the absence from the record of his certificate or other competent proof either that the evidence presented to the court is the entire evidence before him or that it was all the evidence before him relative to the specific finding or findings challenged;[25] but where the order of reference required the master to report the testimony, it was presumed that the testimony attached to his report was all that

Blassengame v. Boyd, C. C. A., 178 Fed. 1; Peterson v. Mettler, 198 Fed. 938. This sentence was quoted with approval in Chandler v. Pomroy, 87 Fed. 262, 266.

22 San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County, 191 Fed. 87. *Contra,* Des Moines Gas Co. v. City of Des Moines, 199 Fed. 204.

23 Welling v. La Bau, 34 Fed. 40; Mason v. Crosby, 3 W. & M. 258; Gottfried v. Crescent Brg. Co., 22 Fed. 433; Jaffrey v. Brown, 29 Fed. 476; Central Tr. Co. v. T. & St. L. Ry. Co., 32 Fed. 448; Guarantee Gold Bond Loan & Sav. Co. v. Edwards, C. C. A., 164 Fed. 809; Curtice Bros. Co. v. Barnard, C. C. A., 209 Fed. 589. It has been said that the master's finding is not conclusive upon issues not raised by the pleadings or other papers before him. Boisot v. Amarillo St. Ry. Co., 244 Fed. 838. But it is the duty of the court to weigh the evidence and find its own facts, although the testimony is conflicting, whenever either party excepts to the master's report. Southern Ry. Co. v. Simon, 184 Fed. 959, 960; Hattiesburg Lumber Co. v. Herrick, C. C. A., 212 Fed. 838.

24 Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289. But see Hapgood v. Berry, C. C. A., 157 Fed. 807; *Re* Senoia Duck Mills, 193 Fed. 711; *supra,* § 389a.

25 Wheeler v. Abilene Nat. Bank Bldg. Co., C. C. A., 16 L.R.A. (N. S.) 892, 159 Fed. 391, 393, 14 Ann. Cas. 917; Guarantee Gold Bond Loan & Sav. Co. v. Edwards, C. C. A., 164 Fed. 809; Stromberg-Carlson Telephone Mfg. Co. v. Simmons, 199 Fed. 256. In Jefferson Hotel Co. v. Brumbagh, C. C. A., 168 Fed. 867, held that a prayer that the other parties prove their accounts and their respective priorities before one of the masters of the court, did not bind the pleader to abide the master's judgment upon the facts or law; but that the master's findings and conclusions should be followed, unless some obvious error had intervened in the application of the law or some serious mistake had been made in the consideration of the evidence.

was taken before him.[26] Where the issues are by stipulation tried before a master, only questions of law can be reviewed,[27] but not when the master is directed to report the testimony with his findings and conclusions.[28] Manifest errors in such a report can always be corrected.[29]

Exceptions to a master's report are only proper when he has made an erroneous decision upon the matters referred to him.[30] An irregularity in his appointment cannot thus be questioned.[31] The remedy for an irregularity in his proceeding, or for his neglect to report upon all the matters referred to him, is a motion to set aside the report, or to refer the same back to the master.[32]

It is not usual to recommit a report for further testimony and a revision of the master's conclusions, when full opportunity to offer evidence has been given to the parties;[33] but where it appeared that the parties did not fully understand their rights and necessities, the report was sent back to the master to give them an opportunity to supply their omission to take evidence.[34] When there has been no irregularity in the master's proceedings, a report will rarely be recommitted for the taking of further testimony upon the motion of a party who has filed no exceptions.[35]

A report of a master may be corrected without a re-reference, from facts appearing in the case aside from the evidence taken before him.[36]

Where after a master's report had been filed a judgment finding facts opposite to those found by the master had been

26 Guarantee Gold Bond Loan & Sav. Co. v. Edwards, C. C. A., 164 Fed. 809, 811.

27 Shipman v. Ohio Coal Exchange, C. C. A., 70 Fed. 652; Farrar v. Bernheim, C. C. A., 75 Fed. 136.

28 City of Denver v. Denver Union Water Co., 246 U. S. 178; Bates v. Dresser, 229 Fed. 772.

29 Central Improvement Co. v. Cambria Steel Co., C. C. A., 201 Fed. 811.

30 Taylor v. Robertson, 27 Fed. 537.

31 Seaman v. N. W. M. L. Ins. Co., 86 Fed. 439, 497; N. Y. M. L. Ins. Co. v. Seaman, 80 Fed. 357.

32 Tyler v. Simmons, 6 Paige Ch. (N. Y.) 127.

33 Empire Trust Co. v. Egypt Ry. Co., 182 Fed. 100.

34 Westlake v. Marrin, 176 Fed. 742; *supra*, § 391.

35 Empire Trust Co. v. Egypt Ry. Co., 182 Fed. 100.

36 Witters v. Soule, 43 Fed. 405; Kelsey v. Hobby, 16 Pet. 269, 10 L. ed. 961; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54.

entered in a State court, in a suit between the same parties, it was held that the judgment of the State court must be followed on the hearing of the exceptions to the report of the master,[37] but in the hearing of the exceptions the former rulings of the court will almost invariably be followed.[38]

Where exceptions to the report of a master are sustained, the court has discretionary power to order a re-reference for further testimony or to enter a final decree upon the facts appearing in the case; and an appellate court will not ordinarily interfere with the exercise of such discretion.[39]

The party who files exceptions is obliged to pay five dollars costs for each exception overruled, and is entitled to these costs for each exception allowed.[40]

By leave of the court exceptions may be amended.[41] It has been held that objections to the report which are not discussed in the brief of the objectors will be presumed to be waived.[42] An objection to a master's report not raised below will ordinarily not be considered upon an appeal.[43] The review of a master's report upon a receiver's account is described in a preceding section.[44]

§ 394. Judicial sales by masters and other officers. Sales under the direction of a court of equity are usually made by masters, by either one of the general masters or a special master appointed by the court.[1] A receiver in equity may be authorized to sell property without the intervention of a master.[2] A receiver,[3] or trustee in bankruptcy, has also the same powers.[4] But ordinarily when receivers have been appointed by a court of equity, public sales of property in their possession are made by a master.

A sale of real estate beyond the jurisdiction of the court is

37 Duden v. Maloy, 43 Fed. 407.

38 Moore v. Clymer-Jones Lithograph Co., 223 Fed. 877.

39 Mosher v. Joyce, 51 Fed. 441.

40 Equity Rule 67.

41 Jones v. Lamar, 39 Fed. 585.

42 Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

43 Topliff v. Topliff, 145 U. S. 156, 173, 36 L. ed. 658, 665.

44 *Supra*, § 319.

§ 394. 1 Guaranty Tr. Co. v. Metropolitan St. Ry. Co., C. C. A., 168 Fed. 937, 177 Fed. 925.

2 Horner v. Continental & Commercial Trust & Savings Bank, C. C. A., 198 Fed. 832.

3 *Re* Becker, 98 Fed. 407.

4 *Re* Britannia Mining Co., 197 Fed. 459. Chapter on Bankruptcy, *infra*.

void unless confirmed by the owner.[5] Where all parties in interest were before the court and could be compelled by its order to confirm the sale, sales of land beyond the outside of the jurisdiction were allowed.[6]

The fact that the title to land is being litigated in another court is not an insuperable objection to its judicial sale.[7]

A foreclosure sale should not be ordered until the amount due from the mortgagor has been judicially determined so that he and junior incumbrancers may be able intelligently to decide whether to redeem.[8] A substantial error in such an adjudication will necessitate a reversal of the decree.[9] It is customary to order a reference to a master to determine the amount due, but the court may make the computation without a master's aid.[10] In a proper case, a court of equity having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory decree or order for the sale of the property by a master before the rights of the parties under the several mortgages have been fully ascertained and deter-

5 James v. Milwaukee & M. R. Co., 6 Wall. 752, 18 L. ed. 885; Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47; Alabama & G. M. Ry. Co. v. Robinson, C. C. A., 56 Fed. 690; Grape C. C. Co. v. Farmers' L. & Tr. Co., C. C. A., 63 Fed. 891.

6 § 64 *supra*, § 398, *infra*.

7 Fidelity I., Tr. & S. D. Co. v. Roanoke Iron Co., 84 Fed. 752. *Cf. supra*, § 52.

8 Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47. It has been said that a decree is not defective where it fails to adjudicate before the sale the amount of costs, counsel fees and compensation to the trustee which it requires the mortgagor to pay in order to redeem the property. Grape C. C. Co. v. Farmers' L. & Tr. Co., C. C. A., 72 Fed. 708, 712.

The trustee cannot foreclose the mortgage for a greater amount of bonds than have been actually sold or pledged although more have been certified. Equitable Trust Co. v. Great Shoshone & Twin Falls Water Co., 228 Fed. 516. The burden is upon the trustee to show how many bonds have thus been issued. Ibid. Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co., 228 Fed. 516. Upon distribution of the proceeds the holder of bonds as collateral security for a debt of the mortgagor cannot collect more than the actual indebtedness due him. Ibid. A provision which gives the holders of the majority in interest of the bonds secured by the mortgage, the option to declare the principle due upon a default in interest does not prevent a foreclosure for default in interest. Ibid. See *infra*, § 401.

9 James v. Milwaukee & M. R. Co., 6 Wall. 752.

10 Brown v. Grove, C. C. A., 80 Fed. 564.

mined.[11] When there was no doubt as to the insolvency of the mortgagor and no defense to the foreclosure, the decision of the questions whether the holders of the bonds were the absolute owners thereof or held them as collateral [12] and whether a majority of the bonds were issued without consideration [13] has been reserved until the distribution of the proceeds of the sale.

Where all the lienors are before it, the court of equity may order a sale of the property which is the subject-matter of the action, without settling the respective rights and priorities of the parties, and will then transfer their respective liens to the proceeds.[14] This has been done in a suit in equity by an assignee in bankruptcy,[15] and the same power is exercised by courts of bankruptcy in bankruptcy proceedings.[16] It has been held that this can be done in the case of maritime liens when the lienors have voluntarily submitted themselves to the jurisdiction of the court of equity.[17] A court of equity will not make an interlocutory order for an immediate sale of mortgaged

11 Pennsylvania R. Co. v. Allegheny V. R. Co., 42 Fed. 82, 85; First Nat. Bank v. Schedd, 121 U. S. 74, 30 L. ed. 877.

12 Fidelity Trust Co. v. Washington Oregon Corp., 217 Fed. 588, 602. See Central Tr. Co. v. California & N. R. Co., 110 Fed. 79; Land Title & Trust Co. v. Tatanall, C. C. A., 132 Fed. 305, 65; Merc. Trust Co. v. U. S. Shipbuilding Co., 130 Fed. 725; Central Trust Co. v. Cincinnati, H. & D. Ry., 169 Fed. 466; Trust Co. of Am. v. Norfolk, etc. R. R. Co., 174 Fed. 269.

13 Equitable Trust Co. v. Great Shoshone & T. F. W. P. Co., 228 Fed. 516.

14 McGraw v. Mott, C. C. A., 179 Fed. 646; Bowling Green Trust Co. v. Virginia P. & P. Co., 164 Fed. 753; Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937, aff'd, C. C. A., 177 Fed. 925; Continental & C. T. & S. Bank v. North Platte Val. Irr. Co., 219 Fed. 438.

15 *Re* Mead, 58 Fed. 312.

16 *Re* Keet, 128 Fed. 651. See Chapter on Bankruptcy, *infra*.

A provision which gave the majority the right to prevent a foreclosure would be void if construed so as to prevent a bond holder from bringing a foreclosure suit where the majority had conspired with the mortgagor to defraud the minority. Brown v. Denver Omnibus Co., C. C. A., 254 Fed. 560. In the absence of provision therefor in the mortgage it is a breach of duty to permit a committee not representing all the bondholders to control foreclosure proceedings and select counsel to foreclose. United States & M. T. Co. v. United States & M. T. Co., C. C. A., 250 Fed. 377.

17 Hudson v. N. Y. & Albany Transp. Co., C. C. A., 180 Fed. 973.

property upon terms discharging the lien of a mortgage not yet due, unless it clearly appears that in the end there must be not only a sale of the property, but a sale upon those terms.[18]

In determining when a sale should be made, the court may consider a plan of reorganization which has been proposed by interested parties.[19] Ordinarily the objections made to a plan of reorganization should be heard and disposed of before the sale.[20]

Where the property is perishable, a sale should be ordered immediately;[21] and in such a case the purchaser acquires a good title against all the world, which will not be affected by a subsequent adjudication of bankruptcy that invalidates the lien, in proceedings to enforce which the sale was made.[22]

An appeal may be taken at once from the order for the sale, provided the sale is to take place immediately;[23] but not if any subsequent proceedings and order must precede it.[24] Pending an appeal, the court which ordered the sale may postpone the same, although no *supersedeas* has been obtained and the term at which the decree was entered has expired.[25]

When property is ordered to be sold by a master, it must be sold at public auction, unless the court otherwise directs.[26] Such a sale is conducted under the superintendence of the solicitor for the party at whose prayer the sale is made, and in all questions which subsequently arise between the buyer and the seller it has been said that he is considered as the agent of all the parties to the suit.[27] The particulars, conditions and notices of the sale

18 Pennsylvania R. Co. v. Allegheny V. R. Co., 42 Fed. 82, 86.

19 Bowling Green Tr. Co. v. Virginia Passenger & Power Co., 164 Fed. 753; Gay v. Hudson River El. Power Co., C. C. A., 169 Fed. 1020.

20 U. S. & M. T. Co. v. U. S. & M. T. Co., 250 Fed. 378. See *supra*, § 310a.

21 Jones v. Springer, 226 U. S. 148, 57 L. ed. 161.

22 Ibid.

23 First Nat. Bank v. Shedd, 121 U. S. 74, 30 L. ed. 877.

24 Burlington, C. R. & N. Ry. Co. v. Simmons, 123 U. S. 52, 55, 31 L. ed. 73, 74.

25 Bound v. South Carolina Ry. Co., 55 Fed. 186. As to laches which will defeat an application for an injunction to stay a sale, see Duncan v. Atlantic M. & O. R. Co., 88 Fed. R. 840; Foley v. Guaranty Tr. & S. D. Co., C. C. A., 74 Fed. 759.

26 Daniell's Ch. Pr., ch. xxvi; Hutson v. Sadler, 31 W. Va. 358; Bound v. South Carolina Ry. Co., 46 Fed. 315.

27 Dalby v. Pullen, 1 R. & M. 296. But see Blossom v. Railroad Co., 3 Wall. 196, 207, 18 L. ed. 43, 46.

are prepared by him, subject to the approval of the master, when not prescribed in the order for the sale.[28] They should be entitled in the cause, and should contain a general description of the nature and situation of the property; and if land is sold, the notices should state in whose possession it is or has lately been.[29] In a foreclosure suit the description of the property given in the mortgage is usually sufficient.[30]

In the case of a sale of a large and complicated system of street railroads operated by receivers, it was held that a provision for a minute inventory covering the amount of fuel, supplies and material for repairs, which were of a value not in excess of $100 each, was not necessary nor practicable.[31]

28 Daniell's Ch. Pr., ch. xxvi.

29 Ibid.

30 Norma Mining Co. v. Mackay, C. C. A., 258 Fed. 914.

31 Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937, aff'd C. C. A., 177 Fed. 925; Lacombe, J. (938): "In the operation of a large and complicated system like this, the items of personal property required for operation, repair, and construction are constantly fluctuating. At whatever time an inventory might be made, it would be found a few weeks later to inaccurately represent then existing conditions. Such an inventory is not necessary. The cars will be listed, described, and identified by numbers, and so will the larger units of machinery. The annual inventory and the books of the receivers will be open to bidders, who will also be given access to all power houses, shops, cars, and storage barns. Certainly no one will bid for this railroad property without the advice of skilled and experienced engineers, whose inspection of the property and what may be found on it, coupled with the list of cars, etc., provided for in the decree, will give all the information needed for the exercise of an intelligent judgment." This decree was modified in this respect upon appeal by the following provision (177 Fed. 926): "That an inventory shall be prepared by the special master and by him left with the clerk of this court when and as directed by this court. This inventory will enumerate the rolling stock of the road in the possession of the receivers, stating the type and character of each item and giving its number. This inventory will also state the number and location of the various dynamos, transformers, and converters, and the number of horses. The inventory shall include such other articles of personal property in the possession of the receivers as in their opinion are of a value in excess of one hundred dollars each, and such additional articles as the special master shall think it wise to include. Such inventory and valuation shall be advisory only, and shall not, with respect to value or title or any other matter, be construed as a warranty, but all purchases shall be deemed to be made in reliance upon the purchaser's own knowledge or information as to the property purchased. The property, both real and per-

A decree of foreclosure, which orders a sale of all the property of the mortgagor, is not construed as directing a sale of money collected by a receiver of his property, unless it expressly so directs.[32] A sale by a receiver is not invalidated by his announcement at the sale that the purchaser will have the option also to buy other property not covered by the order of sale but acquired by him in the due course of his receivership.[33] Where property, not embraced in a decree of foreclosure, is seized for sale by the master, he is liable to the owner in trespass; but an application to recover the possession of the property can only be made to the court that appointed him.[34] An obscurity in the description may be a ground for refusing to confirm the sale;[35] but it would rarely be a reason for setting aside a sale after its confirmation.[36] Where the State statute requires an appraisal before a sale it should usually be followed,[37] but a failure to do so does not make the sale void for want of jurisdiction or subject to collateral attack.[38]

The conditions of the sale should be in general similar to those annexed to ordinary sales of similar property in the vicinity.[39] The sale should be advertised at least twice and the advertisement should give such a description of the property as clearly to indicate and identify it.[40] The Act of March 3, 1893 provides: "Sec. 3. That hereafter no sale of real estate under any order, judgment, or decree of any United States Court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at

sonal, hereby directed to be sold, may be inspected by intending bidders at the sale hereunder, subject to such reasonable regulations as the receivers may prescribe."

32 Washington Irr. Co. v. California S. D. & Tr. Co., C. C. A., 115 Fed. 20.

33 Lake S. I. Co. v. Brown, Bonnell & Co., 44 Fed. 539.

34 Perry v. Tacoma Mill Co., C. C. A., 152 Fed. 115.

35 In Re Cheatham, 210 Fed. 370, 373.

36 *Re* Burr Mfg. & Supply Co., 217 Fed. 16.

37 *Re* Irvine, 255 Fed. 168.

38 South Dakota C. Ry. Co. v. Continental & C. T. & S. Bank, C. C. A., 255 Fed. 941.

39 Ibid. See Bacon v. N. W. M. L. I. Co., 131 U. S. 258, 33 L. ed. 128; Treadwell v. United V. C. Co., 47 App. Div. (N. Y.) 613.

40 Kauffman v. Walker, 9 Md. 229; Merwin v. Smith, 1 Green Ch. (N. J.) 182; Daniell's Ch. Pr., ch. xxvi. See Ray v. Oliver, 6 Paige (N. Y.), 489; Treadwell v. United V. C. Co., 47 App. Div. (N. Y.) 613.

least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice herein provided for, to be made in such other paper as may seem proper.''[41] This statute is mandatory.[42] It has been held that a purchaser, even after confirmation, can reject the title because of a failure to comply with the act.[43] It is the safer practice for trustees and

[41] 27 St. at L. 751, 3 Fed. St. Ann. 54, Comp. St. § 1642. In the district of Arizona where the statute directed that sales of real property at execution be sold ''between the hours of ten o'clock A. M. and four o'clock P. M.'' (Arizona R. S. 1901, § 2570) it was held that a notice of sale ''between the legal hours of sale'' on a specified day at the door of the county court house which was specified, was sufficient. ''Persons who see the advertisement and desire to attend the sale can easily ascertain the hour by inquiring of the parties about to make the sale. If unwilling to wait at the appointed place, and if deceived by them and prevented from making the desired bid, the sale might be set aside. To require the advertisement to name the precise hour would lead to much practical inconvenience, and often necessitate a postponement of the sale. It is sometimes very desirable for the interests of the debtor to delay a sale for two or three hours in order to wait the arrival of persons expected to bid; or, in consequence of a storm or some other unforeseen emergency. Moreover, if a particular hour were named in all cases, the question whether the sale had been held at that hour named would be a fruitful source of litigation. The mode adopted in this case has been so generally in use as the most convenient mode, and has been so free from any evil consequences that we are not inclined to hold an advertisement in this form to be, of itself, a sufficient reason for setting aside a sale, the hours named being within the ordinary business hours of day.'' Norma Min. Co. v. Mackay, C. C. A., 258 Fed. 914, 916.

[42] Cumberland Lumber Co. v. Tunis Lumber Co., C. C. A., 171 Fed. 352.

[43] Cumberland Lumber Co. v. Tunis Lumber Co., C. C. A., 171 Fed. 352. But see Godchaux v. Morris, C. C. A., 121 Fed. 482. It has been held that a party, by not opposing a motion to confirm the sale, of which notice has been served upon his attorney in the suit, waives any objection founded upon a failure to comply with this stat-

receivers in bankruptcy to comply with the law [44] although there are rulings that it does not apply to sales in bankruptcy.[45] It applies to Federal courts subsequently created and it has been said to cover "any possible new forms of judicial sales under decrees then known as foreclosures, execution, partition sales." [46] It supersedes the provisions in any mortgage and trust deed and a foreclosure decree need not conform to the latter,[47] although it is the safer practice to comply with both the statute and the instrument. It has been held that such an advertisement once a week for only twenty-seven days before the sale is not a com-

ute. Nevada Nickel Syndicate v. National N. Co., 103 Fed. 391.

[44] *Re* Britannia Mining Co., C. C. A., 203 Fed. 450, reversing 197 Fed. 459.

[45] *Re* National Mining Exploration Co., D. Mass. 193 Fed. 232. It has been held, in bankruptcy, that an advertisement is sufficient when it requests bids to be submitted at a certain date, time and place, and calls a meeting of the creditors then and there to act upon any bid that may be submitted. *Re* Nevada-Utah Mines & Smelters Corporation, 198 Fed. 497. It has been held: that, in bankruptcy, the local rule requiring the sale by the official auctioneer and a conspicuous notice in front of the premises two days before, may be disregarded; and that it is sufficient if bidders are requested and permitted to make their bids at a creditors' meeting. A public sale was thus defined: "That all persons shall have the right to come in and bid, that the bids shall not be held open, except with the bidders' consent, and that notice shall be given publicly at which all bids are invited." The court said however: "This proceeding should certainly not be taken as a precedent for any other. The only justification for it was that the pledgee was threatening a sale of an important part of the property, and there was every reason to suppose that the usual time for advertisement of the property could not safely take place after the order of the referee for a sale. That justified and required in this instance a somewhat anomalous procedure." *Re* Nevada-Utah Mines & Smelters Corporation, 198 Fed. 497, 499, per Learned Hand, J. Definition disapproved; s. c., C. C. A., 202 Fed. 126. In Florida real property must be sold under executors, at the door of the county where the land is situated.

[46] *Re* Nevada-Utah Mines & Smelters Corp., 198 Fed. 497.

[47] Provident Life & Trust Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854. It has been held that a foreclosure sale cannot be collaterally attacked in another suit filed by creditors against the mortgagees and others because of the failure of the decree to comply with a State statute regulating the time allowed for a redemption before a sale. Andrews v. National F. & P. Works, C. C. A., 36 L.R.A. 153, 77 Fed. 774.

pliance with the statute.[48] Where a sale was cried substantially at the hour advertised, and no objection because of the delay was then made, it was not invalidated because efforts made to enjoin the sale had caused a slight delay.[49] The master has power to adjourn the sale, even after the auction has begun and bids have been made.[50] A State court has held that, where a sale is adjourned, no advertisement of the adjournment is required.[51]

The same statute further provides: "That all real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the Courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct."[52] "That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner."[53] A decree, merely directing the commissioner to sell the property "in the city of Grafton," to the highest and best bidder, is not erroneous, since it will be presumed that the commissioner will advertise and sell the property in pursuance of the federal statute.[54] An omission to comply with this statute does not make the sale void; nor, it has been held, is it a ground for refusing confirmation, since the decree, although erroneous, is binding, unless reversed upon appeal.[55] It has been held not to apply to sales by a trustee in bankruptcy.[56]

In the case of a sale by trustees in bankruptcy of land situated in another and distant district, it was held they need not be present, but might employ an auctioneer and leave the con-

48 Wilson v. N. Y. Mut. L. I. Co., 65 Fed. 38.

49 Etna Coal & Iron Co. v. Marting Iron & Steel Co., C. C. A., 127 Fed. 32.

50 Blossom v. Railroad Co., 3 Wall. 196, 18 L. ed. 43. As to resales see Miller v. Owens, C. C. A., 203 Fed. 648.

51 White v. Zust, 28 N. J. Eq. 107.

52 27 St. at L. 751, 3 Fed. St. Ann. 54, Comp. St. 710, § 1, Pierce's Fed. Code, § 7682.

53 Ibid.

54 Grafton Hotel Co. v. Walsh, C. C. A., 228 Fed. 5.

55 Godchaux v. Morris, C. C. A., 121 Fed. 482.

56 *Re* La France Copper Co., 205 Fed. 207.

duct of the sale to him, the deposit required of bidders and the balance of the purchase money being paid directly to them.[57] The decree for the sale need not name the master who is to conduct it; and in case of such an omission the sale can be conducted by any master in whose lands plaintiff places a certified copy of the decree.[58]

The sale is conducted in substantially the following manner: The master, his clerk, or a person appointed by him, is present with a paper upon which the biddings for the different lots are to be marked.[59] The lots are successively put up at a price offered by any person present; such person, according to the English practice, signing his name to the sum which he offers on the paper.[60]

In a proper case the court may direct that the property be sold as a whole and not in parcels.[61]

If the property to be sold consists of a railroad and its appurtenances, it is usually sold as a single thing.[62] The same rule has been applied to a complicated street railway system [63]

57 *Re* National Mining Exploration Co., 193 Fed. 232.

58 Seaman v. N. W. M. L. I. Co., 86 Fed. 493, 497.

59 Daniell's Ch. Pr., ch. xxvi.

60 Daniell's Ch. Pr. ch. xxvi. "A bid for property of a bankrupt means what is commonly understood as a bid; that is to say, the purchaser is to pay something to the receiver for the property purchased, and the receiver distributes the proceeds among the creditors." It was there held that "a proposition to have a new corporation take over all the assets of the bankrupt, except a few contracts, and then have the creditors of the bankrupt directly accept, in place of their claims against the bankrupt, unsecured obligations of the new corporation, payable at different dates in the future, running from 9 to 27 months," was not a bid. *Re* J. B. & J. M. Cornell Co., 186 Fed. 859, 860.

61 *Re* Haywood Wagon Co., 219 Fed. 655.

62 Bound v. South Carolina Ry. Co., 46 Fed. 315; Compton v. Jesup, C. C. A., 68 Fed. 263. This was done where a mortgage secured three series of bonds, each of which had a prior lien upon one of three divisions of the railroad and a subordinate lien upon the other two. Farmers' L. & Tr. Co. v. Cape F. & V. V. Ry. Co., 82 Fed. 344.

63 Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937, aff'd C. C. A., 177 Fed. 925. Where a part of a street railroad system covered by a first mortgage could not be successfully operated, without connection with the remainder covered by another mortgage, which was also a second mortgage upon such part, and no bids were received on the sale of the part, the sale of the same was adjourned to the same date as the sale of that covered by the second mortgage. Morton Trust

and to the plant and connections of a water company.[64]

The master may be directed to offer the property first, in separate lots and then as an entirety, and to accept the highest bid made at both sales.[65] In the case of a railroad company, the decree may provide that the property shall be sold, first, in separate lots as junk and then the whole as a railroad in operation, and for the benefit of the public direct the acceptance of the highest bid upon the second offer, although this is less than what the property fetched in separate lots,[66] and a sale may be authorized for a less amount to a bidder who undertakes to continue the operation of the road.[67] The same practice is often followed in other appropriate cases. It has been said that railroad property cannot be thus sold piecemeal except by the consent of all the parties expressed in open court or in writing.[68]

Upon the foreclosure of divisional mortgages upon the property of a consolidated Railroad Company, a court of equity may consolidate the different foreclosure suits. In the separation of the system into parcels for sale, the court is not obliged to make the divisions so as to correspond exactly with the several divisional mortgages. The rights of the parties should be protected not overlooking the interest of the public in the continued benefit of the operation of the public highways. The severance from one division of a part necessary to its successful operation and not essential to the operation of another part, it has been said, cannot be justified on the ground of mortgage descriptions alone. If division must be made, it should be so far as it is reasonably possible into parts which will leave the various divisions as nearly as may be in situations to be operated as railroads.[69] Where part of the system covered by a divisional mortgage had been operated at a loss it was held that the mortgagee could not complain because of its severance

Co. v. Metropolitan St. Ry. Co., 179 Fed. 1010.

64 City of New Orleans v. Howard, C. C. A., 160 Fed. 393; Continental & C. T. & S. Bank v. North Platte Val. Irr. Co., 219 Fed. 438.

65 Bidwell v. Huff, 176 Fed. 174.

66 New York Trust Co. v. Portsmouth & Exeter St. Ry. Co., 192 Fed. 728.

67 Ibid.

68 Bound v. South Carolina Ry. Co., 46 Fed. 315, 316.

69 Metropolitan Trust Co. v. Chicago & E. I. R. Co., C. C. A., 253 Fed. 868, 880.

from the rest upon the sale.[70] Upon such a division the court sold with one of the parts the equipment used in its operation although it was not subject to the mortgage upon the latter, making a provision for the allowance of its appraised value to the holders of the mortgage covering such equipment, the expense of the appraisal being charged against the proceeds of the sale.[71] A direction by the plaintiff's attorney to a sheriff to sell property in one lot when if sold in separate parcels the judgment would have been satisfied with the proceeds of a part is a ground for setting aside a sale.[72] The ordinary rule that mortgaged premises must be sold in the inverse order of their alienation is not strictly applied when it would produce an inequitable result.[73]

An upset price may be fixed below which the property cannot be sold.[74] This, in the case of a railroad may be based on the present earning capacity of the road and the value of the property not used in its operation.[75] The court may make a condition of the sale that no bid shall be considered unless each bidder first deposit a specified sum in cash, or in check certified by a national or state bank or a trust company[76] or in bonds which are to share in the distribution,[77] in one instance $25,000,[78] in others $50,000,[79] in another $100,000,[80] and that no bid be considered unless it exceed a specified amount.[81]

[70] Metropolitan Trust Co. v. Chicago & E. I. R. Co., C. C. A., 253 Fed. 868, 880.

[71] Ibid., C. C. A., 253 Fed. 868, 882.

[72] Arnold v. Ness, 212 Fed. 290.

[73] Phila. M. & Tr. Co. v. Needham, 71 Fed. 597. See Riggs v. Clark, 71 Fed. 560; Central Tr. Co. v. Sheffield & B. C. I. & Ry. Co., 60 Fed. 1010.

[74] Provident Life & Trust Co., v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854; New York Trust Co. v. Portsmouth & Exeter St. Ry. Co., 192 Fed. 728; *Re* Williams, C. C. A., 197 Fed. 1; *ex parte* Equitable Trust Co., C. C. A., 231 Fed. 574.

[75] Equitable Trust Co. v. Western Pac. Ry. Co., 233 Fed. 335.

[76] Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203.

[77] Rospigliosi v. N. O. M. & C. R. Co., C. C. A., 239 Fed. 341.

[78] Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203.

[79] Turner v. I., B. & W. Ry. Co., 8 Biss. 315; Provident Life & Trust Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854.

[80] Guaranty Trust Co. v. Metropolitan St. Ry. Co., C. C. A., 177 Fed. 925, 929.

[81] Farmers' L. & Tr. Co. v. Houston & T. C. R. Co., Pardee and Sabin, JJ., May, 1888; Hervey v. Illinois Mid. Ry. Co., U. S. C. C. S. D. Ill., June 10, 1886; Roosevelt

Every subsequent bidder must do like the first until no person will advance on the last bid, when the last bidder is declared the purchaser;[82] unless there has been a reserved bidding fixed, when if the last bid does not reach the reserved one, the person conducting the sale declares that the lot has not been sold, but has been bought in by the persons interested in the estate.[83]

The court may authorize payment of a bid in bonds secured by the mortgage which is foreclosed.[84] This has been held not to give an unfair advantage to the holder of a majority of the bonds.[85] It seems that the court may direct that the sale be made for cash, in a suit under a railroad mortgage which provides that the purchase-money may be paid in bonds.[86]

In general, the courts are prone to construe provisions in a trust deed regulating the time and manner of the sale as applicable only to a sale under the power without an application to the court; and unless they create substantial rights they are not always followed in a judicial foreclosure sale.[87]

A bid may be revoked any time before the hammer falls.[88] A party to the suit who is not a trustee has the right to buy at the sale without express leave in the order or decree, although it is usual to grant such permission expressly.[89] Where the trust deed so provides, a trustee may be authorized to bid upon

v. Columbus, C. & I. C. Ry. Co., U. S. C. C., N. D. Ill., Drummond, J., Nov. 15, 1882; Jesup v. Wabash, St. L. & P. Ry. Co., U. S. C. C., N. D. Ill., Gresham and Jackson, JJ., 1889, and many other foreclosure cases.

82 Daniell's Ch. Pr., ch. xxvi.

83 Ibid.

84 Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868. As to payment in stock, see Treadwell v. United V. C. Co., 47 App. Div. 613, 619.

85 Rospigliosi v. N. O. M. & C. R. Co., C. C. A., 239 Fed. 341.

86 Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203; s. c., 6 Fed. 100.

87 Low v. Blackford, C. C. A., 87 Fed. 392; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. 168.

88 Blossom v. Railroad Co., 3 Wall. 196, 18 L. ed. 43. See Mayhew v. West Va. O. & O. L. Co., 24 Fed. 205, 215.

89 Smith v. Black, 115 U. S. 308, 29 L. ed. 398; Pewabic Mining Co. v. Mason, 145 U. S. 349, 363, 36 L. ed. 732, 736; Buehler v. Black, C. C. A., 226 Fed. 703. "Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others." Scholle v. Scholle, 101 N. Y. 167, 172.

the sale and to buy in the property, for the benefit of those whom he represents.[90]

Where a trustee has an interest which he wishes to protect by bidding at the sale, he may obtain leave to bid upon a special application to the court upon notice to all parties interested.[91]

Bidding by the trustees, which increased the purchase price and encouraged competition, was held not to invalidate the sale.[92]

A mortgagee may buy the property.[93] The attorney for the plaintiff may buy in the property; but in such a case his acts are subject to the closest scrutiny.[94]

A secret purchase by him through another,[95] or his concealment of the fact that he is bidding for a stranger to the suit,[96] may be a badge of fraud. A committee to reorganize the assets of the mortgagor may also be the purchasers.[97] A sale will not be set aside because of a combination of persons interested in the property to bid it in for the protection of their interests.[98] But the suppression of competition by the purchase of bonds from a syndicate at more than their market value[99] or otherwise, is a ground for refusing to confirm the sale. The waiver of the right to enter judgment for a deficiency against the debtor whose obligations were secured by the mortgage foreclosed was held to be no reason for setting aside the sale when such debtor was insolvent and it did not appear that its re-

90 Etna Coal & Iron Co. v. Marting Iron & Steel Co., C. C. A., 127 Fed. 32.

91 Scholle v. Scholle, 101 N. Y. 167, 172; Merkle's Estate, 182 Pa. St. 378. See also Cooley v. Cooley's Heirs (Tenn. Ch. App.), 37 S. W. 1028. For a case where the court refused, there being laches, to set aside a purchase by an officer of the mortgagor, see Buehler v. Black, C. C. A., 226 Fed. 703.

92 Etna Coal & Iron Co. v. Marting Iron & Steel Co., C. C. A., 127 Fed. 32.

93 Buehler v. Black, C. C. A., 226 Fed. 703.

94 Arnold v. Ness, 212 Fed. 290.

95 Ibid.

96 Layton v. Rhode Island Hospital Tr. Co., C. C. A., 205 Fed. 276.

97 Investment Registry Co. v. Chicago & M. El. Co., 213 Fed. 492; *infra*, § 394e; *supra*, § 310a.

98 Ibid, s. c., 206 Fed. 488.

99 Investment Registry v. Chicago & M. El. Co., C. C. A., 212 Fed. 594, affirming 206 Fed. 488; s. c., 213 Fed. 492.

ceiver or its reorganization committee would otherwise have been a bidder.[100]

The highest bidder for the property, who is willing and able to comply with the terms of sale, is entitled to have the bid accepted and reported for confirmation.[101]

Where a trustee in bankruptcy is directed to advertise for bids for certain assets, which bids are to be accompanied by a certified check for a certain amount and to be made on a specified date, the sale to be subject to confirmation by the court, with dates fixed for objections and a hearing; he is only authorized to receive bids and not to sell.[102] The highest bidder, who has been notified to that effect, has no right to complain because the bids are reopened and the property subsequently sold for a higher price.[103] It is the duty of the master to file a report of the sale, but his failure to report his costs and expenses does not affect the validity of the sale.[104]

§ 394a. Proceedings after a sale and before confirmation.

A judicial sale does not take effect until it has been confirmed by the court.[1] Before the confirmation any person may intervene and obtain an order establishing a lien upon the property.[2] It was formerly the rule that before the sale was

100 Simon v. New Orleans T. & M. R. Co., C. C. A., 242 Fed. 62.

101 *Re* Williams, C. C. A., 197 Fed. 1.

102 *Re* Chandler, C. C. A., 194 Fed. 944; *Re* Glas-Shipt Dairy Co., 239 Fed. 122.

103 Ibid.

104 Clark v. Iowa Fruit Co., 185 Fed. 604.

§ 394a. 1 Mayhew v. West Va. O. O. L. Co., 24 Fed. 205, 215; Pewabic M. Co. v. Mason, 145 U. S. 349, 364, 36 L. ed. 732, 737; Tennessee v. Quintard, C. C. A., 80 Fed. 829, 835. But, in Illinois, where the State practice did not require confirmation and a deed by a Federal master had been given, without the sale having been confirmed; it was held that this gave the purchaser possession of underlying strata of coal and constituted color of title to the same within the meaning of the State statute of limitations. Faulds v. Tilton, C. C. A., 192 Fed. 297.

2 Tennessee v. Quintard, C. C. A., 80 Fed. 829. It has been held that, after a decree of foreclosure, proceedings for an examination *pro interesse suo* may be instituted by the complainant against persons not parties to the action claiming some interest in the property, that in such a proceeding the court may determine the title to the property and award possession of the same, that if it adjudicates in favor of the complainant the claimant may be enjoined against further interference, and that even if no such injunction has been granted it is a contempt for the claimant to ap-

confirmed, any person interested, whether a party or a stranger, might intervene and have the sale set aside upon the offer of a sufficient advance in price and the payment of the purchaser's expenses,[3] but the law now seems to be otherwise.[4] The highest bidder may be allowed to increase his bid in order to increase the amount required to redeem the property.[5]

§ 394b. Practice upon the confirmation of a sale.

The proper practice in order to obtain a confirmation of a sale is to obtain an order *nisi*, unless cause to the contrary be shown within a specified time, that the sale shall be confirmed, and, after service of the same upon the parties to the cause or their solicitors, to apply to the court for an order of confirmation absolute upon the production of an affidavit of the service of the order *nisi* and proof that the cause has been shown.[1] It has been held that notice of application for the decree *nisi* must be given to the solicitors in the cause, and that proof of service thereof must be filed with the motion.[2] The usual time, specified in the decree *nisi*, is eight days, in the absence of a special rule,[3] or under extraordinary circumstances.

The omission of the order *nisi* is an irregularity which is no ground for setting aside the order of confirmation, unless it

pear at the auction sale and prevent the complainant by threats from selling the property. Westlake v. Marrin, C. C. D. Pa. October Session 1908, N. Y. L. J. July 7th 1910. See Westlake v. Marrin, 176 Fed. 742, *supra*, §§ 258d, 314.

3 Blackburn v. Selma R. Co., 3 Fed. 689; Central Tr. Co. v. Sheffield & B. C. I. & Ry. Co., 60 Fed. 9; Allgair v. Fisher & Co., C. C. A., 143 Fed. 962; s. c., as *Re* William F. Fisher & Co., 148 Fed. 907.

4 Ballentyne v. Smith, 205 U. S. 285, 290, 27 Sup. Ct. 527, 51 L. ed. 803; *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 21; see *infra*, § 394b.

5 Park v. Conley, 202 Fed. 415.

§ 394b. 1 Pewabic M. Co. v. Mason, 145 U. S. 349, 364, 36 L. ed. 732, 736, 737; Daniell's Ch. Pr. (1st Am. ed.) 1461. The English practice, which has been followed in the District of Michigan is to provide in the order *insi* that cause be shown within eight days. Ibid. In railroad foreclosure and other cases where the persons interested live at a distance from the place or sale, more time should be allowed. It has been held that creditors in bankruptcy are not entitled to notice of the motion. *Re* Nevada-Utah Mines & Smelters Corporation, 198 Fed. 497; Painter v. Union Tr. Co., C. C. A., 246 Fed. 240.

2 Coltrane v. Baltimore B'g & L. Ass'n, 126 Fed. 839.

3 Ibid.

prejudice the applicant[4] and the confirmation will be allowed to stand nevertheless, if there is no proof of the probability of an offer of a higher bid than that which was accepted, and the applicant had an opportunity to present his objections to the confirmation.[5]

The receiver, or an interested creditor, as well as the purchaser, may make the motion.[6] The purchaser may be granted leave to withdraw his application for confirmation.[7] This was allowed when the court in another district had refused to confirm a sale of the part of the railroad there situated.[8]

The court may confirm the sale in vacation as well as term time.[9] It is doubtful whether a court has power to confirm a sale that it has not previously ordered.[10] The highest bidder should usually be allowed a reasonable time within which to examine the title of the property before the sale is confirmed.[11]

Confirmation will be denied if the price for which the property was sold is grossly inadequate.[12] This was done when the property was worth seven times the amount of the bid accepted.[13] If the inadequacy is great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation.[14]

A sale may be confirmed before the whole purchase price is paid.[15] The court will not refuse to confirm a sale upon the ground that the purchaser has not made the full cash payment required, when he has paid a substantial sum, and there is no reason to suppose that he will not pay the balance upon the entry of the order of confirmation.[16]

4 Painter v. Union Trust Co., C. C. A., 246 Fed. 240.

5 Ibid.

6 Coltrane v. Baltimore B'g. & L. Ass'n, 126 Fed. 839.

7 Investment Registry v. Chicago & M. El. R. Co., 213 Fed. 492.

8 Ibid.

9 Central Tr. Co. of N. Y. v. Sheffield & B. C. I & Ry. Co., 60 Fed. 9.

10 Minnesota Co. v. St. Paul Co., 2 Wall. 609, 641, 17 L. ed. 886, 898.

11 Buell v. Kanawha Lumber Corporation, C. C. A., 185 Fed. 109.

12 Ballentyne v. Smith, 205 U. S. 285, 290, 27 Sup. Ct. 527, 51 L. ed. 803.

13 Ibid.

14 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 21.

15 *Re* National Mining Exploration Co., 193 Fed. 232.

16 Fidelity I., Tr. & S. D. Co. v. Roanoke Iron Co., 84 Fed. 752.

Objections to the confirmation may be made by a bondholder who has refused to accept a plan of reorganization in pursuance of which the sale was made.[17] The validity of the decree for a sale cannot be reviewed by objections to the confirmation of the same.[18] The buyer at a judicial sale and those who purchase from him take the property subject to the right of the court to modify the decree upon confirmation of the sale.[19]

The confirmation may be upon terms[20] or subject to such claim against the property as may thereafter be asserted.[21] A material change of the terms may be a ground of relief from the purchase.[22]

When confirmation is refused a new sale may be ordered to be made by the master or other officer who supervised the original sale, with an unset price directed at the amount offered by the party opposing the confirmation, or at which the property was originally knocked down.[23] Another course which has been followed and approved is to have the new sale conducted before the judge in court or chambers and allow further bids in excess of the highest bid at the original sale then to be received.[24] It is within the discretion of the court of original jurisdiction to determine which course to pursue.[25] If the latter is adopted it has been held that no new advertisement is required;[26] and that all bidders at the second sale waive the omission to readvertise.[27]

17 Investment Registry v. Chicago & M. El. Co., 213 Fed. 492, 503. But see Investment Registry v. Chicago & M. El. Co., C. C. A., 212 Fed. 594, 610.

18 Central Tr. Co. v. Peoria, D. & E. Ry. Co., C. C. A., 118 Fed. 30; Godchaux v. Morris, C. C. A., 121 Fed. 482.

19 Olcott v. Headrick, 141 U. S. 543, 547, 35 L. ed. 851, 853.

20 Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203; s. c., 6 Fed. 100; F. L. & Tr. Co. v. Central R. Co. of Iowa, 17 Fed. 758.

21 Tennessee v. Quintard, 80 Fed. 829.

22 Olcott v. Headrick, 141 U. S. 543, 547, 135 L. ed. 851, 853.

23 Investment Registry v. Chicago & M. El. Co., C. C. A., 212 Fed. 594, 612; Allgair v. Wm. F. Fisher & Co., C. C. A., 143 Fed. 962.

24 Blanks v. Farmers' Loan & Tr. Co., C. C. A., 122 Fed. 849, 852; approved, Investment Registry v. Chicago & M. El. Co., C. C. A., 212 Fed. 594, 612.

25 Investment Registry v. Chicago & M. El. Co., C. C. A., 212 Fed. 594, 612.

26 Blanks v. Farmers' Loan & Tr. Co., C. C. A., 122 Fed. 849, 852; Investment Registry v. Chicago & M. El. Co., C. C. A., 212 Fed. 594, 611.

27 Blanks v. Farmers' Loan & Tr. Co., C. C. A., 122 Fed. 849, 853.

When the first sale is finally set aside, the bidder to whom the property has been first knocked down is returned all the money which he has paid, and he is usually also compensated for any expense which he has incurred in consequence of the sale.[28] Where he has paid a lienor or a claimant of a lien he is subrogated to the rights of such claimant.[29] The review of the refusal by a master or referee to approve a sale, because of inadequacy of price, should be deferred until the resale, since if the bidder then buys for less than his former bid he is not injured.[30]

The court will refuse to confirm the sale if it was improperly conducted[31] or if it appears that the purchase was part of a scheme to use the property in an unlawful manner or for obnoxious purposes against public policy[32] or if the auctioneer made a mistake concerning the amount of prior liens.[33] A purchase from prospective bidders of their bonds at more than the market price and under their agreement to aid the purchasers in buying the property, was held to be a ground for refusing confirmation.[34]

§ 394c. Effect of confirmation of a sale.

The confirmation of a sale although it may not pass a legal title vests in the purchaser the full equitable title of the prop-

28 Hudson v. N. Y. & Albany Transp. Co., C. C. A., 188 Fed. 630. There, a year or more after boats had been sold, the sale was set aside because of erroneous statements made by the auctioneer; and it was held that the buyer was entitled to receive from the proceeds of the second sale, in addition to the amount paid on the bid, the full amount expended on the boats, which had increased their value, but not the amount of a prior lien which it had paid in reliance upon a report of the master sustaining the same, which was subsequently overruled by the court, and that it was not chargeable for the use of the boats from which it realized nothing. It was subrogated to the rights of the claimant of the lien as a general creditor for the amount thereof. See Allgair v. Fisher & Co., C. C. A., 14 Fed. 962; s. c., as *Re* William F. Fisher & Co., 148 Fed. 907.

29 Ibid.

30 *Re* Metallic Specialty Mfg. Co., 193 Fed. 300.

31 Investment Registry v. Chicago & M. E. R. Co., 206 Fed. 488, aff'd C. C. A., 212 Fed. 594; s. c., 213 Fed. 493.

32 Investment Registry v. Chicago & M. E. R. Co., 206 Fed. 488, aff'd C. C. A., 212 Fed. 594; s. c., 213 Fed. 493. *Contra*, Olmstead v. Distilling & C. F. Co., 73 Fed. 44.

33 Hudson v. N. Y. & Albany Transp. Co., C. C. A., 180 Fed. 973.

34 Ibid.

erty.[1] It cuts off the rights of contingent remainder men if they were properly brought before the court and given a hearing.[2]

When the marshal sold property not included in the decree of sale and the court's attention was not called thereto, it was held that a general order of confirmation did not ratify that of his sale.[3]

The order of confirmation gives to the sale the judicial sanction of the court. It relates back to the time of the sale and cures all defects and irregularities except those founded on want of jurisdiction, or fraud, accident or mistake with the sale connected.[4] It cures defects in the form of the original order of sale and indefiniteness in the proof of the notice of sale.[5] A party who has received notice of the affidavit for the confirmation cannot after the confirmation has been made, object otherwise than by an appeal, to a failure to comply with statutes,[6] regulating the notices, advertisements, and places of sales,[7] or that the confirmation was made before the statutory time for redemption had expired,[8] or as to the manner of the sale,[9] or any other objection which he then knew.[10] After a sale has been confirmed the court and the successful bidder are regarded as occupying the relation of vendor and buyer in an executed sale, and it has been said that nothing is sufficient to avoid it that would not set aside a sale of like character between private parties.[11]

Should the sale eventually be set aside, he or his assignee, is treated as a mortgagee in possession.[12]

§ 394d. Setting aside sale after confirmation.

It has been said that after a sale has been confirmed, the

§ 394c. 1 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 19, *per* Rogers, J.

2 Glover v. Bradley, C. C. A., 233 Fed. 721.

3 Minnesota Co. v. St. Paul Co., 2 Wall. 609, 641, 17 L. ed. 886, 898.

4 Morrison v. Burnette, C. C. A., 154 Fed. 617, 624; *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16.

5 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 20.

6 27 St. at L. 751, quoted *supra*.

7 Nevada Nickel Syndicate Co. v. Nickel Co., C. C. A., 103 Fed. 391.

8 Ibid.

9 Ibid.

10 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 20.

11 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 21.

12 Huguley Mfg. Co. v. Goleton Cotton Mills, 94 Fed. 269.

court and the successful bidder are regarded as occupying the relation of vendor and vendee in an executed sale, and that nothing is sufficient to avoid it, which would not set aside a sale of like character between private parties.[1] After confirmation a judicial sale may be set aside for fraud,[2] mistake,[3] accident,[4] or other unconscionable circumstances.[5] The suppression of the existence of agreements to satisfy apparent liens prior to that foreclosed was a ground for setting the sale aside.[6] It is no reason for vacating a judicial sale that two of the defendants have an undivided partial interest in the property and that it is impracticable to have their interest immediately adjusted.[7]

A sale will not be set aside after confirmation for inadequacy of price unless the inadequacy is so gross as to shock the conscience.[8] Perhaps a sale for a half or a third of the actual

§ 394d. 1 *Re* Burr Mfg. & Supply Co., 217 Fed. 16, 21; Rogers, J.: citing Morrison v. Burnett, C. C. A., 154 Fed. 617, 624.

2 Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130; James v. Milwaukee & M. R. Co., 6 Wall. 752, 18 L. ed. 885; *infra*, § 394e.

3 Whitney v. Nat. Ex. Bank, 84 Fed. 377.

4 Cowdin v. Wild Goose Min. & Trading Co., 193 Fed. 300.

5 Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721; Seamon v. Riggins, 2 N. J. Eq. 214, 34 Am. Dec. 200; Chamberlain v. Larned, 32 N. J. Eq. 295; Woodward v. Bullock, 27 N. J. Eq. 507; Wetzler v. Schaumann, 24 N. J. Eq. 60; Mut. Life Ins. Co. v. Goddard, 33 N. J. Eq. 482. See Gardner v. Schermerhorn, Clarke's Ch. (N. Y.) 101. *Re* Shea, C. C. A., 126 Fed. 153.

6 Brophy v. Kelly, C. C. A., 211 Fed. 22.

7 Bidwell v. Huff, 17 Fed. 174.

8 Fidelity I., Tr. & S. D. Co. v. Roanoke Iron Co., 84 Fed. 752; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839; Simmons v. Sharpe, 138 Ala. 451, 35 So. 415; *Re* Ethier, 118 Fed. 107; Cooper v. Galbraith, 3 Wash. C. C. 546; *Re* Metallic Specialty Mfg. Co., 193 Fed. 300. Sales were set aside where property worth $1,000, was sold for $6, Langford v. Jackson, 21 Ala. 650; where property worth $2,500 was sold for $50, Daly v. Ely, 51 N. J. Eq.; where land worth from $2 to $5 an acre was sold for 28 cents per acre, Hardin v. Smith, 49 Texas 420. $6,000,000 was held to be a fair price for a railroad about 900 miles in length which had failed to pay operating expenses and interest upon receiver's certificates on about $3,500,000. Simon v. New Orleans T. & M. R. Co., C. C. A., 242 Fed. 62. $181,000 where the property had been appraised at $240,653, but its operation could not be continued without the investment of at least $100,000, and ninety per cent. of the stockholders and creditors were satisfied. *Re* Peerless Finishing Co., 199 Fed. 350. $150,000,

value might be such gross inadequacy.[9] When a motion is made upon this ground, the affidavits must show the detailed facts upon which the opinions as to value rest.[10] Inadequacy of price may bolster up slight evidence of fraud so as to justify the setting aside of the sale.[11]

After confirmation a sale cannot be set aside by anyone who is not injuriously affected.[12] It cannot be set aside upon the petition of a person not a party to the suit, who claims an interest in the property,[13] unless one of the parties to the record has acted in violation of a trust of which the applicant should have been a beneficiary.[14]

No objections can then be raised which were known to the applicant before the confirmation unless he then had no opportunity to present them.[15] Nor, it has been held, an objection

where the mortgagor had spent $700,000 on the property but unless large sums were further expended it would have no more value than a farm. Beaton Seaboard Portland Cement Co., C. C. A., 211 Fed. 84. See § 258b, *supra*. It has been said that upon the determination of this question the amounts of the securities outstanding on the property and of those the purchasers proposed to have issued are not revelant. Rospigliosi v. New Orleans M. & C. R. Co., C. C. A., 237 Fed. 341. *Contra*, Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 508; *supra*, § 310a; *infra*, § 394e.

9 "Appellant, in the motion to set aside the last sale, sets forth that in June, 1918, when the sale was made, the United States government was endeavoring to sell bonds for war purposes, and that the condition of the money market made it difficult to interest people in the purchase of property, and that the price paid was grossly inadequate. The support for the alleged inadequacy of price is an affidavit made in 1916 by an experienced mining man who deposed that he knew the property, and that in his opinion in 1916 it had a value in excess of $100,000, and that since that time the value of mining machinery and silver mining property had greatly increased." Norma Mining Co. v. MacKay, C. C. A., 258 Fed. 914, 917. There the mine was sold for $27,574.28 in 1918.

10 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 21, *per* Rogers, J., citing Sinnett v. Cralle, 4 W. Va. 600.

11 Rospigliosi v. N. O. & C. R. Ry. Co., 237 Fed. 341, 344; *supra*, § 260.

12 Eayton v. Rhode Island Hospital Tr. Co., C. C. A., 205 Fed. 276.

13 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 19.

14 Englehard-Hitchkock Co. v. Southern Banking & Tr. Co., 162 Fed. 690.

15 *Re* Burr Mfg. & Supply Co., C. C. A., 217 Fed. 16, 20; Hewitt v. Great Western Beet Sugar Co., C. C. A., 230 Fed. 394.

previously made by him upon an application to stay or enjoin the sale which was denied.[16]

So long as the court keeps control of the case an application to set aside a judicial sale must be made in the suit in which it was directed, and an original bill for that purpose will be dismissed unless the circumstances are extraordinary.[17] How long after confirmation such relief can be granted upon motion is a matter which rests largely in the discretion of the court and depends upon the circumstances of the litigation.[18] Where the original suit has been finally determined without leave reserved to move at the foot of the decree, and the next term after the entry of the final decree has expired, relief can only be granted upon a bill.[19]

The court may impose as a condition for setting aside a sale that the moving parties first tender to the purchasers repayment of the purchase-money[20] or file a bond with a sufficient surety to pay the costs and expenses of the new sale.[21] Where it was conditioned upon the petitioner contracting with the trustees to bid a stated sum at a resale, and also enough to pay whatever sum should be awarded by the court to the purchaser for the improvements made by the latter, it was held that the petitioners must pay such award, although he bought the property at a price largely in excess of what the order required him to bid.[22]

§ 394e. Setting aside sales because of fraud in reorganizations.

The stockholders of a corporation hold their voting power and control over the officers subject to a *quasi*-trust for the benefit of its creditors. Consequently when they or their officers waive a defense or take other proceedings which shorten a foreclosure suit, an arrangement made orally or in writing

16 Miller v. Owens, C. C. A., 203 Fed. 648.

17 Sayre v. Elyton Land Co., 73 Ala. 87, 96.

18 Farmers' L. & Tr. Co. v. Bankers' & M. T. Co., 148 N. Y. 315; Brown v. Frost, 10 Paige (N. Y.) 243; Campbell v. Gardner, 11 N. J. Eq. 423.

19 Sayre v. Elyton Land Co., 73 Ala. 85, 96; *infra*, § 445.

20 Cunningham v. Macon & B. R. Co., 156 U. S. 400, 39 L. ed. 471.

21 Chase v. Driver, C. C. A., 92 Fed. 780.

22 *Re* William F. Fisher & Co., 148 Fed. 907.

before the sale under which the purchasers reorganize the assets and convey them to a new corporation, the bonds and stock of which are divided among the bond and stockholders of the mortgagor, excluding any other creditors from an interest therein, even when stockholders have to pay for the right to participate in the reorganization, is fraudulent, and for that reason the foreclosure will be set aside.[1] A reorganization, under which a majority of the stockholders acquire a greater proportion of the new securities than the minority are allowed upon the same terms, may also be a ground for setting the sale aside.[2] The rule applies whether the preference or unfair advantage is secured by stockholders through a private contract, or a consent decree, or a judicial sale, under the foreclosure of a mortgage or other lien, or otherwise.[3]

It has been held that the price at which the assets of corporation are sold under a plan of reorganization in a suit in equity establishes the value of the property as between a creditor and an endorser so that an endorser cannot claim that the new securities which the creditor thus acquires amount to a payment of the debt in excess of the cash dividend directed to be paid by the decree.[4] A court of bankruptcy confirmed a sale, although objections were made because the purchaser was a corporation organized for that purpose, in which one of the three

§ 394e. [1] Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130. This salutary decision of the Supreme Court, was severely criticised by Judge Wood in the same case, Farmers' L. & Tr. Co. v. Louisville, N. A. & C. Ry. Co., 103 Fed. 110, 129, 130, where he cites a number of authorities in support of the validity of such a re-organization. Wenger v. Chicago & E. R. Co., C. C. A., 114 Fed. 34; see Conley v. International Pump Co., 237 Fed. 286; Harvard Law Review, xxvii. It has been followed and will be a means of preventing many frauds. No. Pac. Ry. Co. v. Boyd, 228 U. S. 482; s. c., C. C. A., 177 Fed. 804. Kansas Southern Ry. Co. v. Guardian Tr. Co., 240 U. S. 166; s. c., as Central Improvement Co. v. Cambria Steel Co., C. C. A., 210 Fed. 696. See C., R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117, § 310a, *supra*.

[2] Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482. J. H. Lane & Co. v. Maple Cotton Mills, C. C. A., 226 Fed. 692; MacArthur v. Port of Havana Docks Co., 247 Fed. 984; Bogert v. Southern Pac. Co., 226 Fed. 500; s. c., C. C. A., 244 Fed. 61; s. c. 250 U. S. 483.

[3] Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 503.

[4] *Re* Howell, C. C. A., 215 Fed. 1, reversing 207 Fed. 973.

trustees of the bankrupt was a stockholder, director and treasurer, and the bid was made by a firm of lawyers employed for that purpose, who had previously acted as counsel for the bankrupt and the trustees in certain local matters; when a reorganization committee of the creditors had approved the purchase and the stockholders of the bankrupt had full opportunity to join in the reorganization.[5] A judgment of foreclosure is not collusive or fraudulent simply because the mortgagor who has no valid defense enters an appearance or files an answer failing to defend the suit before his time to appear expires.[6] Nor is it a ground for setting aside a foreclosure sale that the same persons were interested as officers of corporations or otherwise upon both sides of the suit, where there was no defense and there is no proof of fraud.[7]

The imposition of an assessment of thirty percent of the face value of the securities, as condition for sharing in the reorganization, is no valid objection when it is equally imposed upon all of the same class, and no other class is given an unfair advantage.[8] Nor is the purchase by the reorganization committee from the receiver of a small prior mortgage with the approval of the court.[9] Nor an agreement by the reorganization committee to forego a deficiency judgment against a company whose indebtedness was secured by the mortgage foreclosed, it not appearing that but for this agreement such debtor

5 *Re* National Mining Exploration Co., 193 Fed. 232.

Where, on the insolvency of a land company, a reorganization agreement was made, in which all creditors were entitled to participate, and a large part of the property was bought at an upset price, fixed in the decree of sale; it was held that, after confirmation, the creditors who did not join in the reorganization could not collaterally attack the sale because of inadequacy of the purchase price. McEwen v. Harriman Land Co., C. C. A., 138 Fed. 797; Schuler v. Woodward, 169 Fed. 1012; *Re* Pittsburg Dick Creek Mining Co., 197 Fed. 106.

6 Dickerman v. Northern Tr. Co., 176 U. S. 181, 44 L. ed. 423; Rospigliosi v. New Orleans, M. & C. R. Co., C. C. A., 237 Fed. 341. See § 258c, *supra*.

7 Leaverworth County v. Chicago, R. I. & P. R. Co., 134 U. S. 688, 33 L. ed. 1064.

8 Fearon Bankers Trust Co., C. C. A., 238 Fed. 83.

9 Beaton v. Seaboard Portland Cement Co., C. C. A., 211 Fed. 84.

which was in the hands of a receiver or its reorganization committee would have been a bidder at the sale.[10]

The refusal of a bond holder to join in a reorganization does not prevent his objecting to the sale.[11] The sale of bonds usually gives to the purchasers the right to receive the securities apportionable to them under a reorganization agreement made before their purchase.[12]

Under ordinary circumstances a holder of securities who has deposited them in pursuance of a reorganization agreement cannot withdraw them after the sale.[13] But where the plan as formulated did not show that stockholders were given an excessive proportion of the new securities such an assent will not prevent the creditor from obtaining a lien upon the property after the sale.[14]

In the absence of fraud or insolvency, it seems that the failure of the purchaser at a foreclosure sale to perform a promise to allow second-mortgage bondholders to participate in the reorganization is not a reason for setting aside the sale, but that the only remedy is a suit to enforce the agreement.[15]

Where fraud is charged, it must be specifically set forth.[16]

10 Simon v. New Orleans, T. & M. R. Co., C. C. A., 242 Fed. 62.

11 Investment Registry v. Chicago & M. E. R. Co., 213 Fed. 492.

12 Georgia S. & F. Ry. Co. v. Eintsein, C. C. A., 218 Fed. 55.

13 U. S. and Mexican Trust Co. v. U. S. M. T. Co., C. C. A., 250 Fed. 377.

14 Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 175; Central Improvement Co. v. Cambria Steel Co., C. C. A., 210 Fed. 696. In the former case it was held that complainant need not make a tender of the new securities.

15 Where a stockholder objected to the confirmation, on the ground that the purchaser bought for the holders of second mortgage bonds, instead of for a company, which, under a reorganization agreement, recognized the stockholders; but he failed to show that that fact resulted in less being obtained for the property, or that the value was less than the amount of the bid, or that, after payment of the first mortgage, any surplus would be left for the second mortgage bondholders, or that he himself had ever accepted the plan of reorganization; it was held that his objections were untenable. Robinson v. Iron R. Co., 135 U. S. 522, 34 L. ed. 276; Central Tr. Co. v. Peoria, D. & E. Ry. Co., C. C. A., 118 Fed. 30. For a case where a failure to assess the stock in order to prevent a foreclosure was held to be no ground for setting aside a foreclosure sale, see Symmes v. Union Tr. Co., 60 Fed. 830.

16 Hutchinson v. Philadelphia & V. S. S. Co., 216 Fed. 795. See *supra*, § 137.

An allegation that it was the petitioner's belief that the defendant combined to acquire the assets and business of the corporation at an inadequate price is insufficient.[17]

§ 394f. Collection of purchase money at a judicial sale.

It is usual to require the purchaser at a judicial sale to pay the whole or a part of his bid when the property is knocked down to him. Where the property sold is of great value the court may make a condition of the sale, that no bid shall be considered unless bidder first deposit a specified sum in cash or in a check certified by a national or a State bank or a trust company,[1] or in the bonds which are entitled to share in the proceeds of the sale.[2] Should the purchaser fail to pay any part of the amount promised, a resale will be ordered either before or after the confirmation of the original sale, provided that the rights of third persons have not intervened.[3] He may be compelled by attachment issued upon a rule, or order to show cause, without a new suit, to pay the difference between his bid and the amount realized from the second sale, even though the sale has not been confirmed.[4] The same remedy may be applied against the buyer at a private sale authorized by the court.[5]

Such a resale may be ordered by a summary proceeding upon the return of an order to show cause served upon the purchaser,[6] and upon the parties at whose suit the sale was made.[7] A party bidding at a foreclosure sale makes himself thereby a party to the suit, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase;[8] and it has been held, that he may be punished for contempt if he refuses to complete the purchase.[9]

17 Hutchinson v. Philadelphia & V. S. S. Co., 216 Fed. 795.

§ 394f. 1 Farmers' Loan & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203; *supra*, § 394.

2 Rospigliosi v. N. O. M. & C. R. Co., C. C. A., 239 Fed. 341; *supra*, § 394.

3 Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191.

4 Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191; Camden v. Mayhew, 129 U. S. 73, 32 L. ed. 608; Central Tr. Co. v. Cincinnati J. & M. R. Co., 58 Fed. 500.

5 *Re* J. Jungmarin, C. C. A., 186 Fed. 302.

6 Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191. See Jeffrey v. Brown, 29 Fed. 476.

7 Terbell v. Lee, 40 Fed. 40.

8 Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382; Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191.

9 Camden v. Mayhew, 129 U. S. 73, 32 L. ed. 608. See § 428, *infra*.

Where the sale is not set aside, the mortgagor is not entitled to have a profit subsequently made by the mortgagee credited on the judgment for the deficiency.[10] A purchaser who has delayed payment of his bid for some time after the confirmation of the sale will not be allowed the earnings of the property in the intervening time.[11]

In the absence of a provision in the decree to the contrary, the purchaser of railroad property at foreclosure sale takes subject to any existing defects in its title, and he cannot insist that claims for unpaid rights of way shall be paid from the proceeds of the sale.[12]

Where, at the sale, announcement is made of a lien claimed upon the property, the buyer is charged with notice of the same and takes subject thereto if it is otherwise valid.[13] A defect in the title of the property, which has not been referred to in the advertisement or terms of sale, or a misrepresentation concerning the amount of claims for prior liens made by the auctioneer, even if by inadvertence, is a sufficient reason for not enforcing the bid.[14] Where the buyer at a receiver's sale did not rely upon the inventory and appraisement, but before the sale examined the property; the rule of *caveat emptor* was applied and he was not allowed to an abatement of the price because of the inability of the receiver to deliver part of the property described in the inventory.[15]

It has been held that, even after confirmation, a bidder is not obliged to pay the promised amount when the sale was not made in compliance with the statute previously quoted.[16]

§ 394g. Claims and liens against purchaser and property sold at a judicial sale.

The buyer takes the property subject to all liens for taxes[1]

10 Ramsden v. Keene Five Cents Sav. Bank, C. C. A., 198 Fed. 807.

11 Boyle v. Farmers' L. & Tr. Co., C. C. A., 80 Fed. 930; U. S. & Mex. T. Co. v. Kansas City, M. & O. Ry. Co., 240 Fed. 521.

12 First Nat. Bank v. Ewing, 103 Fed. 168. See *infra*, § 404.

13 The Dana, 190 Fed. 650; Buell v. Kanawha Lumber Corporation, C. C. A., 185 Fed. 109.

14 Hudson v. N. Y. & Albany Transp. Co., C. C. A., 180 Fed. 973. See note 87, *supra*.

15 Horner v. Continental & Commercial Tr. & Sav. Bank, C. C. A., 198 Fed. 832.

16 Cumberland Lumber Co. v. Tunis Lumber Co., C. C. A., 171 Fed. 352; *supra*, § 394.

§ 394g. 1 Pennsylvania Steel Co.

unless the decree for the sale otherwise provides.[2] Where a purchaser agreed to provide for the release of the trust estate from the payment of "rent" after a sale, it was held that he was not entitled to a rebate because he was obliged to pay taxes previously accrued and water rents subsequently accruing.[3] Where the decree directed that the sale be made subject to the lien of taxes but also directed the payment of the receivers' obligations out of the proceeds, specifying among them an assigned tax lien; it was held that the property was bought free of any lien for taxes which accrued during the receivership.[4]

It has been held that a decree directing the sale of railroad property upon foreclosure, "subject only to the liens, in respect to the portions of property enumerated, to the burden of which such sales were specified herein directed to be made," by implication releases the purchaser from liability to pay taxes which accrued before or during the receivership; and that he can insist upon payment of such taxes from the earnings of the receivership or out of the purchase money.[5] The purchaser takes the property subject to the obligation whether contractual or statutory to maintain the shops and offices at a particular place, if under the decision of the State courts, such an obligation survives the foreclosure.[6] The court refused to charge the purchaser of all the property of a corporation with a deficiency upon the foreclosure of a mortgage upon the bonds of the latter which were issued at the request of the former, after its purchase.[7]

Where, at the sale, announcement is made of a lien claimed upon the property, the buyer is charged with notice of the same and takes subject thereto if it is otherwise valid.[8]

v. N. Y. City Ry. Co., C. C. A., 198 Fed. 768.

2 First Nat. Bank v. Ewing, 103 Fed. 168; U. S. & M. T. Co. v. Kansas City, M. & O. Ry. Co., 240 Fed. 505; Ellis v. Rafferty, C. C. A., 199 Fed. 80. See Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 768.

3 Ellis v. Rafferty, 199 Fed. 80.

4 Union Trust Co. v. Great Eastern Lumber Co., C. C. A., 248 Fed. 46.

5 First Nat. Bank v. Ewing, 103 Fed. 168. See *infra*, § 404.

6 Internat'l & G. N. Ry. Co. v. Anderson County, 246 U. S. 424.

7 Equitable Tr. Co. v. United Box Board & Paper Co., 220 Fed. 714.

8 The Dana, 190 Fed. 650; Buell v. Kanawha Lumber Corp., C. C. A., 185 Fed. 109.

As a condition of the confirmation of the sale, it may be made subject to such claims against the property as may thereafter be asserted.[9]

As a condition of the confirmation of the sale, the purchaser may be required to assume responsibility for obligations of the receiver or for the payment of claims entitled to a preference over the mortgage.[10] Such provisions in a decree for a sale or for a confirmation of a sale are considered to be equivalent to the reservation of a lien for the payment of purchase-money,[11] and they may be enforced by the court upon a summary application at any time.[12]

A limitation of the time for their presentment is usually inserted in the decree.[13] Such an order was construed as not applying to claims which were in suit before the same court at the time it was made.[14] Upon confirmation, the time to present such claims may be indefinitely extended;[15] but, in such a case, the purchaser might be relieved from his bid should he so request.[16]

Where an appeal has been taken from so much of a decree as grants a preference, the confirmation may be conditioned upon the payment to a surety upon a *supersedeas* bond of the amount paid by such surety to the preferred creditor upon an affirmance; or a lien upon the property may be given to such surety.[17]

Where a decree foreclosing two mortgages required the purchaser to pay all claims which should be adjudged "prior in lien to the mortgages foreclosed," and the proceeds paid the first mortgage in full; it was held that the purchaser must pay

9 Tennessee v. Quintard, 80 Fed. 829; Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937; aff'd. C. C. A., 177 Fed. 925; Morton Trust Co. v. Metropolitan St. Ry. Co., 170 Fed. 336; Pennsylvania Steel Co. v. New York City Ry. Co., 194 Fed. 546.

10 U. S. Trust Co. v. New Mexico, 183 U. S. 537, 46 L. ed. 316; Farmers' L. & Tr. Co. v. Central R. of Iowa, 17 Fed. 758.

11 Continental Tr. Co. v. American S. Co., C. C. A., 80 Fed. 180. See Dubuque & S. Co. v. Pierson, C. C. A., 70 Fed. 308.

12 Ibid.

13 U. S. Trust Co. v. New Mexico, 183 U. S. 535, 46 L. ed. 316.

14 Central Indiana Ry. Co. v. Grantham, C. C. A., 143 Fed. 43; Southern Ry. Co. v. Townsend, C. C. A., 161 Fed. 310.

15 Olcott v. Headrick, 141 U. S. 543, 547, 35 L. ed. 851, 853.

16 Ibid.

17 Continental Tr. Co. v. American Surety Co., C. C. A., 80 Fed. 180.

a claim duly filed, which was adjudged prior in lien to the second mortgage.[18]

When the purchase was made under a reorganization agreement which was unfair or fraudulent as regards the holders of securities who did not assent thereto, the purchaser takes the property subject to a lien to secure their rights.[19] The purchaser is not relieved by a provision in the reorganization agreement that no right is conferred nor liability or obligation created by the agreement or plan or thereunder assumed by or for any new company in the favor of any bond holder or any other creditor or any holder of any claims whatsoever against the insolvent company with respect to any property acquired by purchase at any foreclosure sale.[20] Where the decree provided that the purchaser should assume all incompleted contracts of the receivers but should not be personally liable for any unpaid indebtedness of the receivers, it was relieved from liability upon a contract for the payment of royalties to a patentee upon boxes placed in cars by receivers before the decree of foreclosure and sale.[21] Where the decree provided, that the purchaser should take subject to a lien to secure payment of liabilities incurred by the receivers, but free from all liens and claims of the mortgagor and persons claiming there under; the purchaser was obliged to pay the shippers all amounts previously collected in excess of the lawful rates for freight.[22] An unliquidated and disputed claim against the mortgagor for damages for taking coal and timber from the claimant's land was held not to be an indebtedness within the meaning of a reorganization agreement by which the bond holders consented to the issue of preferred bonds for the purpose of paying the company's indebtedness not otherwise provided for.[23] Where a decree of sale directs that the purchaser pay certain preferential claims, he cannot upon such payment be subrogated to the rights of the original claimants and prove the claims against the fund

18 Central Indiana Ry. Co. v. Stranthem, C. C. A., 143 Fed. 43.

19 Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 175 affirming; Central Trust Company v. Cambria Steel Co., C. C. A., 201 Fed. 811. See *supra*, §§ 310a, 394c.

20 Ibid.

21 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 204 Fed. 136.

22 U. S. & Mexican Tr. Co. v. Kansas City, 240 Fed. 504.

23 Henriehs v. Mississippi Valley Trust Co., C. C. A., 223 Fed. 995.

in the hands of the receiver for distribution.[24] It has been said that the assignee of a purchaser cannot set up against such claims a title acquired at a subsequent sale by another court.[25]

Such provision was held to be no bar to the issue of an execution against the property by a judgment creditor with a prior lien, who had failed to file his claim in accordance with the decree.[26]

When such claims are dependent upon the liability of the receiver at the common law, they may be enforced by an action at law,[27] but they are usually enforced by application to the court which made the sale.[28]

When the rights of the claimants are not adjudicated in the decree of sale, which directs that the purchaser pay all receiver's debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage, he can contest the rights of such claimants, provided that they have not been previously adjudicated; and he can appeal from the order directing him to pay such a claim.[29]

In the case of a fraudulent reorganization where the sale is not set aside, the party injured may sue the purchaser personally[30] or he may enforce a lien against the property for the amount due him under the circumstances.[31]

The prosecution in another court of a claim against the purchaser at a foreclosure sale upon a promise made or liability incurred to pay the debts of the mortgagor cannot be enjoined by the court which entered the decree of foreclosure.[32]

§ 394h. Remedies of the purchaser upon a judicial sale. The purchaser at a judicial sale has the right to apply to the

24 Morgan's L. & T. R. & S. S. Co. v. Moran, 91 Fed. 22. *Cf.* Southern Ry. Co. v. Bouknight, 70 Fed. 442.

25 Baltimore Tr. & G. Co. v. Hofstetter, C. C. A., 85 Fed.

26 Trust Co. of America v. Norfolk & S. Ry. Co., 183 Fed. 803.

27 Chicago Great Western R. Co. v. Herlbert, C. C. A., 205 Fed. 248. Also Hanlon v. Smith, 175 Fed. 192.

28 Ibid.

29 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458; Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co., 176 U. S. 298, 44 L. ed. 475; *infra*, § 404.

30 Hanlon v. Smith, 175 Fed. 192.

31 Kansas City So. Ry. Co. v. Guardian Tr. Co., 240 U. S. 166, 175; Chicago Great Western R. Co. v. Herlbert, C. C. A., 205 Fed. 248.

32 Western Union Telegraph Co. v. United States & M. T. Co., 221 Fed. 545.

court for the enforcement of such of the terms of sale as are in his favor,[1] and to be heard on all questions thereafter arising affecting his bid,[2] which are not foreclosed by the terms of the decree of sale, or expressly reserved to him by such decree.[3] Thus, when the rights of the claimants are not adjudicated in the decree of sale, which directs that the purchaser pay all receiver's debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage, he can contest the rights of such claimants, provided that they have not been previously adjudicated; and he can appeal from the order directing him to pay such a claim.[4] Where not concluded by the terms of the decree, any subsequent proceedings to determine in what securities, of diverse value his bid shall be made good are matters affecting his interests on which he has the right to be heard.[5]

From the rulings thereupon, and upon all matters whereby his interests are injuriously affected, he has the right to appeal after the final decree;[6] and he is estopped by them in collateral litigation.[7] He cannot appeal from so much of the decree under which he bought as provides that he shall pay a specified claim to which a preference is then or has been subsequently awarded.[8]

§ 394h. 1 *Re* Two Rivers Woodenware Co., C. C. A., 199 Fed. 877. Where a purchaser agreed to provide for the release of the trust estate from the payment of "rent" after a sale, it is held that he was not entitled to a rebate because he was obliged to pay taxes previously accrued and water rent subsequently accruing. Ellis v. Rafferty, C. C. A., 199 Fed. 80. See Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed, 768.

2 Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559; *Re* Williams, C. C. A., 197 Fed. 1.

3 Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382; Swann v. Wright's Ex'rs, 110 U. S. 590, 28 L. ed. 252.

4 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458; Lackawanna I. & S. Co. v. Farmers' L. & Tr. Co., 176 U. S. 298, 44 L. ed. 475; *infra*, § 404.

5 Kneeland v. Ab. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382.

6 Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382. Blossom v. Milwaukee & C. R. Co., 1 Wall. 655, 17 L. ed. 673; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559.

7 Grape Cr. C. Co. v. Farmers' L. & Tr. Co., 80 Fed. 200. See also State of Tennessee v. Quintard, 80 Fed. 829, 835.

8 Swann v. Wright's Ex'rs, 110 U. S. 590, 28 L. ed. 252; St. Louis S. W. Ry. Co. v. Stark, 55 Fed. 758. See *supra*, § 305.

§ 394i. Effect upon judicial sale of reversal of decree.

Where no supersedeas has been obtained, the reversal of the decree by an appellate court subsequent to the confirmation does not affect the validity of the sale.[1] But, where the decree is reversed upon appeal subsequent to the sale, even although no *supersedeas* has been obtained, the court may order restitution by the purchaser or his assignee,[2] who is treated as a mortgagor in possession. [3] It has been held that after a decree has been reversed by a court of review for want of jurisdiction and the Court of first instance has been directed to remand the cause, the latter court cannot confirm a sale previously made under its orders by a receiver.[4]

§ 395. Compensation of masters. The Equity Rules provide: "The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court."[1] It has been said that the compensation of the master should be measured by the standard of judicial salaries.[2] Much larger amounts have, however, frequently been granted.[3]

§ 394i. [1] Gray v. Brignardello, 1 Wall. 627, 634, 17 L. ed. 692; the John Twohy, Jr., 189 Fed. 965.

[2] Robinson v. Alabama & G. Mfg. Co., 67 Fed. 189; s. c., 72 Fed. 708; s. c., as Huguley Mfg. Co. v. Galeton Cotton Mills, 94 Fed. 269. In that case the court overruled the contention that certain action of the counsel for the mortgagor at the sale estopped his client. But see Phelps v. Elliott, 35 Fed. 455, 460; Schultz v. Sanders, 38 N. J. Eq. 154; Watson v. Ulrich, 18 Neb. 186; Dickinson v. City of Trenton, 33 N. J. Eq. 63; Bailey v. Fanning Orphan School (Ky.), 14 S. W. 908. For the measure of damages where the purchaser so far destroyed the property that it could not be returned, see Central Tr. Co. v. Hubinger, 87 Fed. 3.

[3] Huguley Mfg. Co. v. Galeton Cotton Mills, 94 Fed. 269.

[4] Colburn v. Hill, C. C. A., 103 Fed. 340. For sales in bankruptcy see chapter xxxiv, *infra*.

§ 395. [1] Eq. Rule 68.

[2] Middleton v. Bankers' & Merchants' Tel. Co., 32 Fed. 524. In

The court may modify an order fixing the annual compen-

the District of Massachusetts, $25 a day is usually allowed a master upon a patent accounting. Houghton v. Whitin Machine Works, 163 Fed. 311. See Brown v. King, C. C. A., 62 Fed. 529, where $12,500 for work during two years was held to be excessive. In Finance Committee v. Warren, C. C. A., 82 Fed. 525, it was held that an allowance of $4,000 to a master for the sale of a railroad one hundred and twelve miles long was excessive, and that $2,500 was ample compensation. Byler v. Sun Co., 235 Fed. 1021, 1022, *per* Dickonson, J., "The services actually rendered by the master in this case, viewed from the standpoint of their value, were such as would command the highest rate of compensation had they been rendered as professional services. Such admeasurement, however, could be made only by the parties themselves. We have clung to the hope that the compensation of the master in this case would be fixed by agreement. It is apparent that this will not be done. The compensation must therefore be fixed by the court by virtue of the directions of Rule 68 (198 Fed. xxxviii, 115 C. C. A. xxxviii). In so fixing it, we are fixing costs and must be governed by some rule of compensation which applies to other items of cost. The reasons for this are obvious. The only rule of measurement with which we are by analogy supplied is that of the time employed. This is the rule applied by all rules of court and statutes fixing the compensation. This is because of necessity. As a rule of general application, as all true rules are, it is the best to be had, if not always satisfactory. The further attempt which is sometimes written into rules and statutes to fix a common rate of compensation for services of an entirely different character is the feature which often results in what is recognized as grossly excessive or inadequate compensation. Rule 68 avoids this by permitting of a time measurement based upon a rate of compensation fixed in the language of the rule in view of all the circumstances of the case.

"Adopting and adhering to the rule of compensation suggested, we have, as accurately as the record of the case enables us to do, found the time employed by the master in the performance of his duties, and, allowing as large a per diem rate as would be just, and having regard to the circumstance that a part of the inquiries of the master involved him in expense, the compensation of the master (including this expense) is fixed at $6,000, charged upon and to be borne by the defendant. Viewed from the standpoint of costs to be paid by the unsuccessful party and taxed by what the record discloses was the time consumed, this is the compensation which Rule 68 contemplates. It is by no means intended to measure the value of the work which the master put into this case. The duration and intensity of effort put into such work and the value of the service rendered is one thing. It varies often in accordance with the experience and training of the servitor and the facility with which he performs his task. The taxation of the compensation as costs to be paid by a litigant is another thing. This must be based upon a rule of general application.

sation of a master, although the service has been performed.[4]

An agreement between the parties as to the compensation of master, when made before[5] or after[6] his appointment, was said to be against public policy and not enforced. In any event such a stipulation should be in writing, submitted for approval or disapproval to the judge before any of the services are rendered.[7]

When the reference is lengthy, the parties may be required to advance the master's fees pending the hearing and to leave the matter of adjustment between them for future determination.[8]

The fees cannot be apportioned until after the hearing upon the report,[9] and ordinarily the amount thereof can better be fixed at that time.[10] It seems, that payment pending a suit can only be compelled on the applicant of the master or his representative, not at the request of a party.[11]

The court may disallow or reduce the fee of the master for misconduct such as absence when testimony is taken.[12]

The order adjusting a master's compensation should name the party who is required to pay it, and a time within which payment is to be made. The master's compensation upon an accounting is usually imposed, in the first instance, upon the accounting party.[13] When the fees are paid before the taxation of costs, each party should pay for the expense, including the stenographer's fees, of taking his own examinations, both direct and cross, and for adjournments taken at his request, when a charge is properly made for the same. Where a session is partly taken up with direct and partly with cross-examination, or partly by argument, the expense must be equally divided. Charges for time occupied in the consideration and

The one indicated is the only one with which we have been provided.''

3 See Erie R. Co. v. Heath, 10 Blatchf. 214, Fed. Cas. No. 4,516.

4 Pleasants v. Southern Ry. Co., C. C. A., 93 Fed. 93.

5 Finance Committee v. Warren, C. C. A., 82 Fed. 525.

6 *Re* Berkeley, C. C. A., 203 Fed. 7.

7 Byerly v. Sun Co., 235 Fed. 1021.

8 *In re* Growe Const. Co., 253 Fed. 981.

9 Harrington v. Atlantic & P. Tel. Co., 170 Fed. 1022.

10 Ibid.

11 Ibid.

12 Mallory Mfg. Co. v. Fox, 20 Fed. 409.

13 *Re* Nubin & Lipman, 215 Fed. 669.

decision of questions involved and in the preparation of the report must be equally divided.[14] The compensation of a master appointed to determine claims against property in the custody of the courts is usually paid from the proceeds of such property, and he usually has a preference above all liens upon the same.[15] In an extraordinary case, the Circuit Court of Appeals may review the order fixing a master's compensation.[16]

[14] Urner v. Kayton, 17 Fed. 539, s. c., 17 Fed. 845; Brickill v. Mayor, etc., of N. Y., 55 Fed. 565; Fenno v. Primrose, C. C. A., 119 Fed. 801.

[15] Pennsylvania Co. v. Jacksonville T. & K. W. R. Co., 93 Fed. 60.

[16] Brown v. King, C. C. A., 62 Fed. 529; Finance Committee v. Warren, C. C. A., 82 Fed. 525.

CHAPTER XXVI.

DECREES.

§ 396. Definition and classification of decrees. A decree is a sentence or order of a court of equity pronounced after a hearing of the points of issue, and corresponds to a judgment of a court of law. A decree should be distinguished from a decretal order. A decretal order is an order in the nature of a decree, made upon motion or petition, either before or after the hearing, or in an independent proceeding.[1] According to the different standpoint from which they may be regarded, decrees are classified, as final or interlocutory; as *in personam* or *in rem;* as absolute, conditional, decrees *nisi*, or decrees in the nature of decrees *nisi*. A decree made *pro forma* without an examination into the merits is not favored by the Supreme Court.[2]

§ 397. Final and interlocutory decrees. Decrees are either final or interlocutory. These terms are used with different meanings in the English practice and in the courts of the United States.

A final decree in the English Chancery was a complete determination of every question arising in a cause.[1] An interlocutory decree was one which reserved the further hearing.[2] In strictness, moreover, every decree was said to be interlocutory until it was signed and enrolled.[3] In England, an appeal lay from an interlocutory as well as from a final decree;[4] but, under

§ 396. [1] Barb. Ch. Pr. 337.

[2] William Cramp & Sons Ship & Engine B. Co. v. International Curtis Co. Marine Turbine Co., 228 U. S. 645, 649, 33 Sup. Ct. 722, 57 L. ed. 1003. Firestone Tire & Rubber Co. v. Seiberling, C. C. A., 245 Fed. 937.

§ 397. [1] Seton's Decrees (4th ed.), 2.

[2] Seton's Decrees (4th ed.) 2; Richmond v. Atwood, C. C. A., 17 L. R. A. 615, 52 Fed. 10, 21.

[3] Forum Romanum, 183; Seton's Decrees (4th ed.), 2.

[4] Forgay v. Conrad, 6 How. 201, 205, 12 L. ed. 404, 406.

the Judiciary Acts, before that of March 3, 1891, only final decrees of a Federal court could be brought to a court of appeal for revision.[5]

On account of the inconvenience which would have followed, had the old definition been applied to the term in this statute, the Federal courts have refused to follow the English Chancery in this respect. As far as appeals are concerned, a decree is considered final which decides the right to property, and orders that it be sold or delivered to a party; or creates a lien upon property by the issue of receiver's certificates or otherwise; or directs a specific sum of money to be paid to a party either by another person or out of a fund in court, provided that the successful party is entitled to compel its immediate execution,[6] even though the consideration of other matters arising upon the pleadings is reserved "for further consideration" in it.[7] A decree is final which settles all the rights of the parties involved in the pleadings, though it gives leave to either one of them to apply at the foot of the decree "in relation to any matter not finally determined by it."[8] An interlocutory, is merged in the final decree.[9] A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judg-

5 U. S. R. S., §§ 631, 692.

6 Taney, C. J., in Forgay v. Conrad, 6 How. 201, 204, 12 L. ed. 404, 405; Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Whiting v. Bank U. S., 13 Pet. 6, 10 L. ed. 33; Wabash & E. C. Co. v. Beers, 1 Black, 54, 17 L. ed. 41; Bronson v. Railroad Co., 2 Black, 524, 17 L. ed. 347; Milwuakee & M. R. Co. v. Soutter, 2 Wall. 440, 17 L. ed. 860; Thomson v. Dean, 7 Wall. 342, 19 L. ed. 94; Railroad Co. v. Bradleys, 7 Wall. 575, 19 L. ed. 274; Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036; French v. Shoemaker, 12 Wall. 86; 20 L. ed. 270; Marin v. Lalley, 17 Wall. 14, 21 L. ed. 596; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Farmers' L. & Tr. Co., Petitioner, 129 U. S. 206, 32 L. ed. 656; Lewisburg Bank v. Sheffey, 140 U. S. 445, 35 L. ed. 493. So is a decree directing the payment of a claim out of the proceeds of a future sale. Central Tr. Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97. See final chapter on Writs of Error and Appeals.

7 St. Louis, I. M. & S. R. Co. v. Southern Ex. Co., 108 U. S. 24, 27 L. ed. 638; Mo., K. & T. R. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640; Lewisburg Bank v. Sheffey, 140 U. S. 445, 35 L. ed. 493.

8 Raper Corporation v. Stafford Co., C. C. A., 255 Fed. 554.

9 French v. Shoemaker, 12 Wall. 86, 20 L. ed. 270. For a further reservation that was held not to make the decree interlocutory, see Chamberlain v. Peoria, D. & E. Ry. Co., C. C. A., 118 Fed. 32.

ment for the costs was subsequently entered after their taxation.[10] A decree dismissing a bill as to all matters except one severable from the rest was held to be a final decree as regards the matter which it then determined.[11]

All other decrees which reserve any question for the court's further decision, even though they direct money to be paid into court,[12] or property to be delivered to a new trustee appointed by the court,[12a] or dissolve an injunction,[13] or punish a party for a civil contempt,[14] or direct a sale, but do not sufficiently specifically determine the property to be sold to warrant an immediate sale,[15] or direct a sale, but do not appoint the time of sale,[16] or confirm a report of commissioners to locate boundaries and direct them to determine and make the boundary lines in accordance with such report and then to make a further report of their findings,[17] or confirm and adopt a report of commissioners recommending a conveyance, to certain parties, of part of the land affected by a partition suit, and a sale of the residue and distribution of the proceeds, as thereafter ordered, when the sale should be confirmed,[18] are, it seems, interlocutory decrees from which no appeal can be taken under the Judiciary Acts;

10 Fowler v. Hamill, 139 U. S. 549, 35 L. ed. 266.

11 Hill v. Chicago & E. R. Co., 140 U. S. 52, 35 L. ed. 331. But see Keystone Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275.

12 Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Beebe v. Russell, 19 How. 283, 15 L. ed. 668; Louisiana Bank v. Whitney, 121 U. S. 284, 30 L. ed. 961. But see Wabash & E. C. Co. v. Beers, 1 Black, 54, 17 L. ed. 41.

12a Pulliam v. Christian, 6 How. 209, 12 L. ed. 408. As to receiverships before 31 St. at L. 660, see Tornanses v. Melsing, C. C. A., 106 Fed. 775; *Re* McKenzie, 180 U. S. 536, 45 L. ed. 657; Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Beebe v. Russell, 19 How. 283, 15 L. ed. 668; Hentig v. Page, 102 U. S. 219, 26 L. ed. 159; but see Wabash & E. C. Co. v. Beers, 1 Black, 54, 17 L. ed. 41.

13 Young v. Grundy, 6 Cranch, 51, 3 L. ed. 149; Moses v. Mayor, 15 Wall. 387, 21 L. ed. 176; Verden v. Coleman, 18 How. 86, 15 L. ed. 272; Knox County v. Harshman, 132 U. S. 14, 33 L. ed. 249.

14 Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95.

15 Railroad Co. v. Swasey, 23 Wall. 405, 23 L. ed. 136; Royal Tr. Co. v. Washburn, B. & I. R. Ry. Co., 113 Fed. 531. See McGourkey v. Toledo & I. C. Ry. Co., 146 U. S. 536, 36 L. ed. 1079.

16 Parsons v. Robinson, 122 U. S. 112, 30 L. ed. 1122; Burlington, C. R. & N. Ry. Co. v. Simmons, 123 U. S. 52, 31 L. ed. 73.

17 Iowa v. Illinois, 151 U. S. 238, 38 L. ed. 145.

18 Clark v. Roller, 199 U. S. 541,

although, if the decision of the court in making them was erroneous, the final decree may be reversed on that ground upon an appeal by a party who was thereby injured,[19] or on the entry of the final decree the court which made them may correct the error.[20] It has been held that the Federal court should not enjoin from acting under or otherwise interfere with the interlocutory decree of another court, and that the proper remedy is an application to the court which made the decree for a modification of the same,[21] at least when such decree is not a contempt of the Federal court.

§ 398. Decrees in personam. Decrees are either *in personam* or *in rem*. Decrees *in personam* are those which contain a command to one of the parties to a suit in equity. Decrees *in rem* are such as, without containing a command to either of the parties, transfer the title to property. Decrees *in personam* may direct the performance of, or the abstention from, an act or acts.

The ordinary decree of a court of equity is a decree *in personam*. Such a decree may be made even though it directs the performance of or abstention from an act, or directs a transfer, or otherwise affects the title to property beyond the jurisdiction of the court,[1] or grants an injunction against an act in one State, such as in interference with a water flow, which injuriously affects lands in another State.[2] Where in order to obtain the relief sought it would be necessary for the court to take possession by its officers of land beyond its territorial jurisdiction, it has been said that such a decree should not be granted.[3] Thus, it seems that the court would not decree a partition of land beyond the jurisdiction, since no commission appointed by it could have authority to act there;[4] and it cannot adjudge that a

50 L. ed. 300. See Dangerfield v. Caldwell, C. C. A., 151 Fed. 554.

19 Buckingham v. McLean, 13 How. 150, 14 L. ed. 90.

20 Iowa v. Illinois, 151 U. S. 238, 38 L. ed. 145; *infra*, § 443.

21 Furnald v. Glenn, C. C. A., 64 Fed. 49.

§ 398. 1 See § 64, *supra*.

2 Morris v. Bean, 146 Fed. 423; § 6, *supra*. See Brady v. Smith Shore Traction Co., 197 Fed. 69.

3 Muller v. Dows, 94 U. S. 444, 449, 24 L. ed. 207, 209; Maegregor v. Maegregor, 9 Iowa 65; Glen v. Gibson, 9 Barb. (N. Y.) 634; Story's Eq. Jur. § 1292; 2 Spence 8, n. (d); Smith's Eq. 30; Bispham's Eq., § 7.

4 2 Spence 8, n. (d); Story's Eq.

deed of land in another State is void;[5] but where the defendant is within its jurisdiction it may decree specific performance of a contract,[6] or the administration of a trust,[7] or the cancellation of a conveyance.[8] It has been said that a court cannot foreclose a mortgage or other lien upon land outside the jurisdiction,[9] except where it consists of a railroad or other property, which cannot be sold in parts without destroying its value.[10] It seems that it cannot direct a sale in another State.[11] It has been held in England that the court will make no decree in a suit between two foreigners not residents of the country concerning a contract made or land situated elsewhere.[12] And a Georgia case holds that a court of equity will not compel a corporation to perform a contract to open ditches and keep fences in repair in a State where it has no corporate existence.[13]

It often happens, however, that the court can do a thing itself more easily and effectively than it can compel it to be done by the party concerned, as, for example, when it wishes to sell property or to cancel an instrument in writing, and it then will perform that duty by means of a master or receiver,[14] or by the clerk or marshal.[15] When all the defendants are within the ju-

Jur., § 1292; Smith's Eq. 39; Bispham's Eq., § 47.

5 Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640.

6 Western Union Tel. Co. v. Pittsburg, C., C. & St. L. Ry. Co., 137 Fed. 435; Roblin v. Long, 60 How. Pr. (N. Y.) 200.

7 Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96, 108, affecting land situated outside the jurisdiction; Dunlap v. Byers, 110 Mich. 109, a decree directing the conveyance of land upon the winding up of a corporation.

8 Jones v. Byrne, 149 Fed. 457, 469.

9 Jones v. Byrne, 149 Fed. 457, 469. See Penn. v. Lord Baltimore, 1 Ves. Sen. 444; Massie v. Watts, 6 Cranch 148, 3 L. ed. 181.

10 Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; McElrath v. Pittsburg & S. R. Co., 5 Pa. St. 189; Jones v. Byrne, 149 Fed. 457, 469.

11 Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993; Farmers' L. & Tr. Co. v. Postal Tel. Co., 55 Conn. 334; s. c., 11 Atl. 184; Carpenter v. Strange, 141 U. S. 87, 106, 35 L. ed. 640, 647; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; *Re* Anderson, 94 Fed. 487; York County Sav. Bank v. Abbot, 139 Fed. 988; *supra*, § 394, *infra*, § 441.

12 Matthaei v. Galitzin, L. R. 18 Eq. 340; Blake v. Blake, 18 W. 944.

13 Port Royal R. Co. v. Hammond, 58 Ga. 523.

14 Deck v. Whitman, 96 Fed. 873; Langdell's Eq. Pl., § 44. See *infra*, § 441.

15 General Chemical Co. v. Blackmore, N. Y. L. J., November, 1907. See s. c., 156 Fed. 968.

risdiction, such a decree is usually accompanied by a command to them to confirm the sale or other action of the court, or to assist in the transfer directed by the decree. When a defendant is beyond the jurisdiction, the court sometimes acts by a decree *in rem*. The equity rules provide: "If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."[16] It has been held that, in the absence of statutory authority, a decree in a suit *in personam* against the heirs of a decedent without a statement of their names in the complaint or a warning order, is void.[17]

§ 399. Decrees in rem. A decree *in rem* in a court of equity is one that determines the title to or an interest in real or personal property within the territorial jurisdiction of the court, without having any other effect upon a defendant who dwells beyond that jurisdiction and has not been served with process within it. Such an equitable decree must be distinguished from the decrees *in rem* of a court of admiralty, which establishes a title conclusively against all the world: whereas it is only binding upon the parties to the action in which it is rendered. Such decrees were formerly very rare.[1] In the Federal courts of equity they are purely statutory, and the power of those courts to make them depends entirely upon a strict compliance with the provisions of the statute.[2] Whether or not, under this statute or otherwise, a decree can be made and enforced which requires the specific performance of a contract for the conveyance of property within the court's jurisdiction against a person not served there with process, has never been decided.[3]

16 Eq. Rule 8.

17 Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley, C. C. A., 164 Fed. 963.

§ 399. 1 But see Anon., 1 Atk. 18.

2 U. S. R. S., § 738; Act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472). See Grove v. Grove, 93 Fed. 855; *supra*, § 166.

3 See Ward v. Arrendondo, Hopk. Ch. (N. Y.) 213; Anon., 1 Atk. 18; Rourke v. McLaughlin, 38 Cal. 196; Matteson v. Seofield, 27 Wis. 671; Story's Eq. Jr., § 744, n. 3.

Where the State statute authorized such a decree it was followed by the Federal court.[4]

§ 400. Absolute and conditional decrees. Decrees are either absolute, conditional, *nisi*, or in the nature of decrees *nisi*. An absolute decree is one that takes effect immediately upon its entry and is dependent for its enforcement upon no condition, and is not subject to be defeated by the occurrence of any subsequent event. A conditional decree is one that by its terms is not to take effect unless something shall be done by the party to whom relief is given by it, or which provides that it shall be void if something is done by one of the parties within a time therein specified.[1] The court may thus compel the plaintiff to pay a just claim which in equity and good conscience he ought to pay although because of the statute of limitations, or for some technical reason, such claim could not otherwise be enforced.[2] Under the present state of the authorities, it would be rash to attempt to lay down a rule as to when a conditional decree will be granted, and when the plaintiff will be denied relief unless he has made a specific offer or waiver in his bill.[3] The following are a few of the cases where a conditional decree has been granted. An express company has been granted a decree compelling a railroad company to carry freight for it, upon condition that it should give the latter a bond to pay such charges as the court should subsequently consider reasonable.[4] A decree for the redemption of a mortgage is upon condition that the plaintiff pay the balance reported due from him within six months, which it seems must be lunar or calendar months, after the report, in default whereof the plaintiff's bill against the defendant is from thence forth to stand dismissed out of court with costs.[5] Upon default, a final order, which

[4] Single v. Scott P. Mfg. Co., 55 Fed. 553.

§ 400. [1] Moore Printing Typewriter Co. v. National Sav. & Tr. Co., 218 U. S. 422, 427, 51 L. ed. 1093, 1095, note.

[2] Central Improvement Co. v. Cambria Steel Co., C. C. A., 201 Fed. 811, 824.

[3] See Moore v. Crawford, 130 U. S. 122, 140, 32 L. ed. 878, 884; *supra*, §§ 153, 364.

[4] Southern Exp. Co. v. St. Louis, I. M. & S. R. Co., 10 Fed. 210; reversed Express Cases, 117 U. S. 1, 29 L. ed. 791.

[5] Seton on Decrees, 140; Waller v. Harris, 7 Paige (N. Y.) 167. The holder of bonds accrued by a railway mortgage has no right to re-

will be granted as of course, is necessary to dismiss the bill.[6] A decree allowing a junior incumbrancer to redeem may be upon condition that he pay off a prior incumbrance, and repay to its holder money paid by him in discharging still prior incumbrances, and for taxes, repairs, and insurance upon the mortgaged premises.[7]

Similarly, a decree upon a bill by a purchaser for the specific performance of an agreement for the sale of an estate may appoint a time and place for the payment of the purchase-money, and direct that in default of payment, with interest if any be due, the bill be dismissed with costs.[8] In a suit by a water and electric company to compel specific performance by a city of a contract for light and water during an unexpired term of several years, the court may impose slight modifications of the contract necessitated by changed conditions, such as a relocation of lights and hydrants; but not, it has been held, a reduction in their number or in the prices to be paid.[9]

deem from a foreclosure sale. Provident Life & Tr. Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854.

6 Seton on Decrees, 178. A decree for the cancellation of a conveyance made by an Indian in violation of a statutory prohibition, may be conditioned upon the return of the consideration. Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820.

7 McCormick v. Knox, 105 U. S. 122, 26 L. ed. 940. See Farmers' L. & Tr. Co. v. Denver, L. & G. R. Co., C. C. A., 126 Fed. 46; Lynch v. Burt, C. C. A., 132 Fed. 417.

8 Lowther v. Andover, 1 Bro. C. C. 396.

9 City of La Follette v. La Follette Water, L. & Tel. Co., C. C. A., 252 Fed. 762, per Sandford, J., in T. C.

"I do not think that specific performance of the city's contract should be denied by reason of the alleged hardship to the defendant arising out of the fact that the city revenues have materially decreased since the ordinance was passed, owing to loss of revenues from saloons. This was a contingency which should have been contemplated by the parties. Nor do I think it would be just for the court to fix as an equitable condition that the plaintiff should consent to a reduction in either the number of hydrants and lights or the prices to be paid therefor; the plaintiff's plants having been erected and extended on the faith of the city's contracts calling for this number of hydrants and lights at the stipulated prices. And as such prices do not yield more than a fair return on its investment when all the circumstances are considered, it would, in my opinion, be unjust to require a modification of the contract which would seriously impair its earning capacity, as well as impair its ability to make such further improvements as may be from time to time needed in the water, as disclosed by advancing science, and would otherwise

In a suit by the United States for cancellation of a patent, such relief may be conditional upon the return by the Government of money paid for the patent.[10]

A decree dismissing a cross-bill to set aside a compromise required the defendant thereto to comply with the agreement within a specified time after the filing by the cross-complainant of notice of her assent.[11] A decree for an accounting should always contain a submission by the plaintiff to account.[12] A decree for an injunction against the collection of an illegal tax may be conditioned upon the payment of the taxes, to which the complainant would legally be subjected, with interest at six

tend to impair its ability to carry out in full its contract with the city. I am opinion, however, from the proof that it is fair and just to require as a condition of granting the plaintiff the equitable relief of specific performance that it assent to the following conditions:

"(a) That it forthwith install and thereafter maintain the horse drinking fountain provided for in the contract; the installation of which does not appear from the proof to have been formally waived for a valuable consideration.

"(b) That it agree to open each of the City hydrants for a reasonable time at reasonable intervals for the purpose of allowing any sediment to escape and keeping the hydrants in good conditon for use in case of fire.

"(c) That the term 'dark hours,' as used in the contract as hours which the City lights are to be kept burning be definitely defined by the decree.

"(d) That equitable modifications be made in the contract as to the re-location of certain hydrants and electric lights.

"(e) It should further, in my judgment, be an equitable provision of the decree for specific performance that the plaintiff consent that this cause shall be retained on the docket to the end that if at any time the plaintiff shall fail to perform its part of the contract or advancement in science shall disclose new methods of improving the water, which can be installed at a reasonable expense and which can reasonably be required of the plaintiff in a water works sytem of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises as a condition of keeping the decree for specific performance in full force and effect. See as to such supplemental proceedings, Joy v. St. Louis, 138 U. S. 1, 47, 11 Sup. Ct. 243, 34 L. ed. 843."

10 U. S. v. Debell, C. C. A., 227 Fed. 771.

11 Bunel v. O'Day, 125 Fed. 303, 316.

12 Fowler v. Wyatt, 24 Beav. 232; Seton on Decrees (4th ed.), 775.

per cent., upon the amount thereof.[13] It has been made a condition precedent to the entry of a decree to enjoin the infringement of a patent, that the complainant first file in the Patent Office a disclaimer of those of the claims in the patent to which he is not entitled.[14] For conditions of sale in suits to foreclose railway mortgages see the preceding section on Judicial Sales.[15]

It has been held that in a suit in equity to secure a set-off of judgments at common law the court cannot require a reduction of the complainant's judgment as a condition to the relief.[16] A conditional decree should not be imposed upon the dismissal of a bill when the evidence clearly shows that the complainant is not entitled to the relief sought.[17]

§ 401. Decrees nisi. A decree *nisi* is one giving a defendant a certain specified time within which to show cause against a decree or to perform some other act in relation thereto, in default whereof it shall be absolute against him. Such a decree is made against an infant or a mortgagor, or the latter's assigns.

According to the English rule, every decree against an infant defendant which requires some act to be performed by him,[1] or which directs a conveyance or a foreclosure of his interest in any real estate, must contain a clause giving him an opportunity to show cause against it after he has come of age.[2] Where a sale of land is directed by such a decree, it usually contains a direction that, in the mean time, a purchaser under the sale shall

13 Central R. Co. of New Jersey v. Jersey City, 199 Fed. 237, 246. See § 152, *supra*.

14 Sessions v. Romadka, 21 Fed. 124, 133; Hake v. Brown, 37 Fed. 783; Electrical Acc. Co. v. Julien El. Co., 38 Fed. 117; *supra*, § 147.

15 *Supra*, § 394.

16 J. L. Owens Co. v. Officer, C. C. A., 244 Fed. 47.

17 Columbus v. Mercantile Trust & Deposit Co., 218 U. S. 645, 54 L. ed. 1193. The terms there held to have been improperly imposed were a requirement that a city purchase part of the complainant's waterworks and the city had filed a cross-bill for defensive relief. *Contra*, Davey Tree Expert Co. v. Van Billiard, C. C. A., 255 Fed. 781, reversing 248 Fed. 718.

§ 401. 1 Walsh v. Trevannion, 16 Simons, 178; Eyre v. Countess of Shaftsbury, 2 P. Wms. 102; Sheffield v. Duchess of Buckingham, 1 West, 682; Thornton v. Blackborne, 2 W. Kel. 7; Seton on Decrees (4th ed.), 712, 713.

2 Williamson v. Gordon, 19 Ves. 114; Mallack v. Galton, 3 P. Wms. 352; Newbury v. Marten, 15 Jur. 166; Mills v. Dennis, 3 J. Ch. (N. Y.) 367; Seton on Decrees (4th ed.), 714. But see Croxon v. Lever, 12 W. R. 237.

hold and enjoy the estate against the infant until he attains full age;[3] and the court so far protects a purchaser that it will not permit his title to be affected by a mere irregularity in the decree.[4] Where a decree directed a conveyance by both adult and infant parties, as in a partition suit, by the English practice it would not direct a conveyance by any till the infant was of age and had had an opportunity to show cause against the decree, and, in the mean time, the decree would only extend so far as to give possession in accordance with the court's decision, and to order enjoyment accordingly until effectual conveyances could be made.[5] It seems that in no other instances will a decree *nisi* be entered against an infant defendant, although there is some doubt upon this point.[6] In a few exceptional cases, when an infant plaintiff in his bill exercised an election between two conflicting claims, the court has allowed him a day after he became of age in which to show cause against it.[7] The usual form of the *nisi* clause in such a decree is as follows: "And this decree is to be binding on the defendant, the infant, unless on being served, after he shall have attained the age of twenty-one years, with subpœna to show cause against this decree, he shall within six months from the service of such subpœna show unto this court good cause to the contrary."[8] Such a clause should be inserted in the order for making a decree of foreclosure absolute, as well as in the decree.[9] The omission of a similar clause in such a decree is error.[10] The six months after the service of process within which cause must be shown must be, it seems, lunar not calendar months.[11] At the expira-

3 Powell v. Powell, Mad. & Geld. 53.

4 Bennett v. Hamill, 2 Sch. & Lef. 566.

5 Agar v. Fairfax, 17 Ves. 533, 554; Atty. Gen. v. Hamilton, 1 Madd. 214.

6 Seton on Decrees (4th ed.), 714; Eyre v. Countess of Shaftsbury, 2 P. Wms. 102; Sheffield v. Duchess of Buckingham, 1 West, 682. See Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047.

7 Gregory v. Molesworth, 3 Atk. 626; Sir John Napier v. Lady Effingham, 2 P. Wms. 401; Lord Brook v. Lord Hertford, 2 P. Wms. 518; Taylor v. Phillips, 2 Ves. Sen. 23.

8 Seton on Decrees (4th ed.), 711.

9 Williamson v. Gordon, 19 Ves. 114.

10 Coffin v. Heatte, 6 Met. (Mass.) 76.

11 Seton on Decrees (4th ed.), 711.

tion of them and upon proof of the requisite facts, an order making the original decree absolute should be entered.[12]

A decree for a foreclosure should also be *nisi,* providing for either a strict foreclosure or a foreclosure sale, unless the whole amount due shall be paid within a reasonable time, usually six lunar months, from the time of the conclusion of the accounting and the certificate of what is due under the mortgage.[13] An omission of such clause is error.[14] At the expiration of the alloted time, if the debt be still unpaid, the plaintiff should obtain an order confirming the foreclosure or directing the sale.[15] The time for payment may always, even after a peremptory order for a sale,[16] be enlarged upon terms, which usually are that the defendant give good security to pay the amount due, with interest and costs in full.[17] A decree of foreclosure absolute may also be reopened;[18] but it has been said that this can only be done when it has been obtained by fraud or under circumstances of oppression.[19] The Supreme Court has held that "what is indispensable to such a decree is, that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further

12 Ibid.

13 Clark v. Reyburn, 8 Wall. 318, 19 L. ed. 354; Howell v. Western R. Co., 94 U. S. 463, 24 L. ed. 254; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47; Perine v. Dunn, 4 J. Ch. (N. Y.) 140. Twenty days has been held insufficient. Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47. In one case it was held that eighteen months should be allowed. American L. & Tr. Co. v. Union Depot Co., 80 Fed. 36. In another, four months was held to be sufficient. Columbia F. & Tr. Co. v. Kentucky Union Ry. Co., C. C. A., 60 Fed. 794.

14 Clark v. Reyburn, 8 Wall. 318, 19 L. ed. 354; Savannah & N. W. Ry. v. Union Trust Co., C. C. A., 236 Fed. 1021.

15 Seton on Decrees (4th ed.), 1091; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 71, 27 L. ed. 47, 55; Sheriff v. Sparks, West, 130; Senhouse v. Earl, 2 Ves. Sen. 450; Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33.

16 Edwards v. Cunliffe, 1 Madd. 287; Seton on Decrees (4th ed.), 1088.

17 Monkhouse v. Corp. of Bedford, 17 Ves. 380; Geldard v. Hornby, 1 Hare, 251; Holford v. Yate, 1 K. & J. 677; Coombe v. Stewart, 13 Beav. 11.

18 Campbell v. Holyland, L. R. 7 Ch. D. 166; Seton on Decrees (4th ed.), 1088.

19 Patch v. Ward, L. R. 3 Ch. 203, 212; Seton on Decrees (4th ed.), 1098.

sums subsequently accruing, and having become due, according to the terms of the security, the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which if not paid, a sale of the mortgaged premises is directed.[20]

By rule, "in suits in equity for the foreclosure of mortgages or for the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8, when the decree is solely for the payment of money."[21] A deficiency decree is not essential, after a foreclosure sale, to entitle the mortgagee to the payments of the balance due him from the earnings of the receivership;[22] even when the trustee has, in his possession, a fund deposited to secure the payment of interest, and the stockholders of the mortgagor are liable for unpaid instalments of their subscriptions.[23] It has been held that this rule obviates the necessity of a prayer in the bill for such relief, although it is the better practice to pray for it specifically.[24]

20 Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 70, 27 L. ed. 47, 55; per Matthews, J. But see Grape C. C. Co. v. Farmers' L. & Tr. Co., 63 Fed. 893, 986; *supra*, § 394.

21 Equity Rule 10, condensing Eq. Rule 92 of 1842; Northwestern M. L. I. Co. v. Keith, C. C. A., 77 Fed. 374.

22 Boyce v. Continental Wire Co., 125 Fed. 740.

23 Land Title & Trust Co. v. Asphalt Co., C. C. A., 127 Fed. 1.

24 Seattle, L. S. & E. Ry. Co. v. Union Tr. Co., C. C. A., 79 Fed. 179. The court may, however, where the mortgage does not provide that the principal shall become due upon a default in interest, direct that the property be sold as an entirety and that the principal as well as the interest be paid out of the proceeds. In such a case it is a fatal error to declare in the decree of foreclosure that the whole debt is due. The power to treat the principal as due upon a default in interest is not implied by a provision giving the trustee the right to take possession upon such a default, to apply the income on account of principal after payment of overdue interest, and to cause the property to be sold as an entirety; where the mortgage also provides for the surrender by the trustee of possession upon payment of arrears of interest, costs and expenses at any time before the sale. Grape C. C. Co. v. Farmers' L. & Tr. Co., C. C. A., 63 Fed. 891. A mortgage and the bonds secured thereby are to be construed together, and a provision in a mortgage concerning the method of distribution in case of a foreclosure, which is not contained in the bonds, will control. Low v. Blackford, C. C. A., 87 Fed. 392. It has been said that if the trustee improvidently declares the principal due, the court may set that

The rule does not authorize the entry of a decree for the balance of principal not due on the foreclosure of a mortgage for the failure to pay interest, unless the mortgage so provides.[25]

A State statute giving a mortgagor a right of redemption within a certain time after a mortgage sale, will in all cases be followed by the Federal courts, since it establishes a rule of property.[26] In the absence of such a statute there is no right of redemption after the sale under a decree of foreclosure which has been confirmed.[27]

§ 402. Decrees in the nature of decrees nisi. Decrees in the nature of decrees *nisi* are decrees taking a bill against a defendant as confessed, and decrees under the statute affecting property within, and against a defendant without, the jurisdiction of the court. Decrees taking bills as confessed are described in chapter VIII. The cases where a decree against a defendant not served with process can be entered under the act of March 3, 1875, have been already described.[1] Any defendant or de-

declaration aside. Mercantile T. Co. v. Baltimore & O. R. Co., 89 Fed. 606, 610. A decree directing that the surplus upon a foreclosure sale after payment of preferential claims should be divided equally among the bondholders was held not to deprive the coupon holders of a preference given them in the mortgage. Burke v. Short, 79 Fed. 6. A provision that the mortgagor shall remain in possession for six months after default in interest was held not to preclude the trustee from bringing a foreclosure suit immediately upon the default. Farmers' L. & Tr. Co. v. Winona S. W. Ry. Co., 59 Fed. 957. Such and similar provisions are usually construed as cumulative to the ordinary remedy of a foreclosure suit upon a breach of the condition of the trust deed or mortgage. Central Tr. Co. v. Worcester C. Mfg. Co., C. C. A., 93 Fed. 712; Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 61 Fed. 543; Mercantile Tr. Co. v. Chicago, P. & St. L. Ry. Co., 61 Fed. 372; Pennsylvania Co. for Ins., etc., v. Philadelphia & R. R. Co., 69 Fed. 482. It has been held that the acceptance by the mortgagee of interest paid by the receiver of the property appointed in his suit for foreclosure is not a waiver of his right to continue the suit when other installments of interest remain due and unpaid. American L. & Tr. Co. v. Union Depot Co., 80 Fed. 36.

25 Ohio Cent. R. Co. v. Central Tr. Co., 133 U. S. 83, 33 L. ed. 561.

26 Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Orvis v. Powell, 98 U. S. 176, 25 L. ed. 238; Hammock v. Farmers' L. & Tr. Co., 105 U. S. 77, 26 L. ed. 1111; Mason v. N. W. Ins. Co., 106 U. S. 163, 27 L. ed. 129; Conn. Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648.

27 Parker v. Dacres, 130 U. S. 43, 32 L. ed. 848.

§ 402. 1 *Supra*, § 166.

fendants to such a statutory decree "not actually personally notified" of the suit, in accordance with the provisions of the statute, may, at any time within one year after final decree, enter his appearance in said suit, and thereupon the court must make an order setting aside the decree therein, and permitting such defendant to plead on payment of such costs as the court shall deem just; and thereupon the suit is proceeded with to final judgment according to law.[2]

§ 403. Time of entry of decree. A decree can regularly be entered only during a term of the court.[1] The court has power to allow a decree to be entered even in vacation as of a previous term, *nunc pro tunc*.[2] Such leave will always be granted when the delay was caused by the action of the court.[3]

§ 404. Frame of decree. Decrees originally always consisted of three, and sometimes of four, parts. These were: the date and title; the recitals; the declaratory part, if that were required; and the ordering part.[1]

A decree usually begins with a recital of the day of the month and year when it was pronounced,[2] and of the title of the cause, in which the parties should have the same designations that were given them in the bill.[3] Next always followed, formerly, a recital of the pleadings, evidence, and former proceedings in the cause.[4] The equity rules, however, provide that "in drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.' "[5]

[2] U. S. R. S., § 738; 18 St. at L. 472.

§ 403. [1] Griswold v. Hill, 1 Paine, 483.

[2] Gray v. Brignardello, 1 Wall. 627, 17 L. ed. 693; Griswold v. Hill, 1 Paine, 483.

[3] Gray v. Brignardello, 1 Wall. 627, 17 L. ed. 693.

§ 404. [1] Daniell's Ch. Pr., ch. xxv.

[2] Whitney v. Belden, 4 Paige (N. Y.), 140; Barclay v. Brown, 7 Paige (N. Y.), 245.

[3] Daniell's Ch. Pr., ch. xxv.

[4] Seton on Decrees (4th ed.), 9-19.

[5] Rule 71.

The recitals in a decree of facts which supported the jurisdiction, import verity and sufficiency to support the decree against collateral attacks.[6] It has been so held of a recital as to personal service of process.[7] It has been said that it should appear affirmatively upon the face of the decree, that the defendant was properly served with process.[8]

Next when a decree is entered by consent, the fact that consent was given. A recital to that effect is conclusive of the fact, unless evidence to the contrary is presented.[9] The proper place for such a statement is ordinarily in the recitals, unless consent be only given to certain directions, when the statement of the consent should immediately precede such directions.[10]

The declaratory part of a decree, which if desired at all should be next inserted, contains a declaration of matters of fact, or of the rights of one or more of the parties to the cause, or a statement of the reason for the decree or any part thereof. This statement of reasons is not necessary[11] nor usual,[12] although its utility has been noticed[13] and it is sometimes adopted.[14]

6 United States v. Hiawassee Lumber Co., C. C. A., 202 Fed. 35.

7 Ibid. Johnson v. North Star Lumber Co., C. C. A., 206 Fed. 624. A recital in an order for service on a defendant by publication that "it appearing to the satisfaction of the court" that the defendant cannot be found within the state is not an adjudication or finding that it has been shown to the satisfaction of the court by affidavit that the "defendant after due diligence cannot be found within the state" which, under B. & C. Comp. Or. § 56, is essential to the acquiring of jurisdiction by such service which will sustain a judgment. Starks v. Sims, C. C. A., 230 Fed. 115.

8 Allen v. Blunt, 1 Blatchf., C. C. 480.

9 Lay v. Olstan, C. C. A., 172 Fed. 90; Tarret & Co. v. Sweet Valley Wine Co., 251 Fed. 371. As to the effect of a consent decree upon an infant, see Glover v. Bradley, C. C. A., 233 Fed. 721, *supra*, § 106.

10 Seton on Decrees (4th ed.), 1535; Bartlett v. Wood, 9 W. R. 817.

11 Allen v. Blunt, 1 Blatchf., C. C. 480; Liebing v. Matthews, C. C. A., 216 Fed. 1; Linde Air Products Co. v. Morse Dry Dock & Repair Co., C. C. A., 239 Fed. 909.

12 *Ex parte* Earl of Ilchester, 7 Ves. 348, 373; Seton on Decrees (4th ed.), 19.

13 Bax v. Whitbread, 16 Ves. 15, 24; Gordon v. Gordon, 3 Swanst. 400, 478. Recitals in a decree of foreclosure of previous proceedings in the suit are sufficient *prima facie* evidence of such proceedings. Koons v. Beyson, C. C. A., 69 Fed. 297.

14 Gordon v. Gordon, 3 Swanst.

Such a declaration is useful in order to establish the right to costs when the complainants' right to relief has expired pending the suit.[15] It is improper to include in a decree dismissing a bill, findings upon issues decided in favor of the complainant.[16] In decrees of punishment for contempt recitals of the facts are customary if not indispensable.[17] There is no necessity of any finding of facts unless in the absence of such a finding it would be impossible to know what the decree actually meant.[18] Instances of declarations of matters of fact are the existence and validity of a will or other instrument,[19] and the validity of a patent.[20] It has been said that a patent is sufficiently identified in a decree by giving its number and the patentee's name, and that the decree is not rendered void for uncertainty because the description of the invention is not given in the language of the title head of the patent.[21] So, whenever there are interfering patents, and a suit is brought by any person interested in any one of them, or in the working of any one of them, to obtain relief against the interfering patentee, the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented; but no such judgment or adjudication can affect the right of any person, except the parties to the suit and those deriving title under them subsequent to the rendition of such decree.[22] Where a party establishes his right

400, 478; Jenour v. Jenour, 10 Ves. 573; Atty. Gen. v. Clapham, 4 De G. M. & G. 591, 607; Austin v. Austin, 11 Jur. (N. S.) 536.

15 Smith v. Ingersoll-Sergeant Rock Drill Co., 7 Misc. (N. Y.), 374, 377; Williams v. United Wireless Tel. Co. (N. Y. Sup. Ct., per Bischoff, J.), N Y. L. J., April 24, 1912, in which the writer was counsel.

16 Linde Air Products Co. v. Morse Dry Dock & Repair Co., C. C. A., 239 Fed. 909.

17 Fischer v. Hayes, 6 Fed. 63; *infra*, § 430.

18 Liebing v. Matthews, C. C. A., 216 Fed. 1.

19 Seton on Decrees (4th Ed.), 19, 20.

20 Union S. R. v. Mathiesson, 3 Cliff. 146.

21 Maginn v. Standard Equipment Co., C. C. A., 150 Fed. 139.

22 U. S. R. S., § 4918. See Foster v. Lindsay, 3 Dill. 126; Pentlarge v. Pentlarge, 19 Fed. 817; s. c., 22 Fed. 412; *supra*, § 147.

to property, the direction to transfer it to him is often preceded by a declaration of his title.[23]

The court will not thus decide rights as between codefendants unless a cross-bill or counter-claim has been filed for that purpose,[24] or it be necessary in order to determine the rights of the plaintiff, or possibly when the evidence is clear and the case between them ripe for decision;[25] and language in a decree broad enough to determine such rights will usually be construed as merely determining rights as between the plaintiff and the defendants, if no controversy between the defendants appears upon the pleadings.[26]

It has been held that in a suit on behalf of a class a decree beyond the issues, and not prayed in the bill, is void as against members of the class who do not intervene.[27]

The court will not make a declaration of mere future rights,[28] nor as to the rights of parties upon a contingency that has not happened,[29] nor, it was formerly held, as to mere legal rights;[30] unless such a determination is indispensable to the declaration of the present equities of the parties. A declaration, that a deed to property beyond the jurisdiction of the court is fraudulent and void, is of no effect unless accompanied by a direction that a party to the suit execute a reconveyance or deliver up the deed for cancellation, and compliance is made with such direction.[31] It seems that the court should not make a declaration of the rights of the parties in a hearing.[32]

The conclusion of a decree is its ordering or mandatory part,

23 Jenour v. Jenour, 10 Ves. 562; Seton on Decrees (4th ed.), 20.

24 Thomas v. Lloyd, 25 Beav. 620; Graham v. Railroad Co., 3 Wall. 704; Seton on Decrees (4th ed.), 20. *Supra*, §§ 197, 200.

25 Jolly v. Arbuthnot, 4 De G. & J. 224, 245; Gresley v. Mousley, 4 De G. & J. 78, 99; Cottingham v. Earl of Shrewsbury, 3 Hare. 627; Seton on Decrees (4th ed.), 20.

26 Graham v. Railroad Co., 3 Wall. 704, 18 L. ed. 247.

27 Clark v. Arizona Mut. Savings & Loan Ass'n, 217 Fed. 640.

28 Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515; Lady Langdale v. Briggs, 4 W. R. 703; Fletcher v. Bealey, 33 W. R. 745; City Ry. Co. v. Citizens' Street R. Co., 166 U. S. 557, 570, 41 L. ed. 1114, 1118; Seton on Decrees (4th ed.), 20.

29 Dowling v. Dowling, L. R. 1 Ch. 612; Seton on Decrees (4th ed.), 20.

30 Birkenhead Docks v. Laird, 4 De G. M. & G. 732; Webb v. Byng, 8 De G. M. & G. 633; Seton on Decrees (4th ed.), 20.

31 Carpenter v. Strange, 141 U. S. 87, 106, 35 L. ed. 640, 648; *supra*, § 398.

32 Jennings v. Simpson, 1 Keen, 404.

which contains the specific directions of the court upon the matter before it.[33] As these directions vary according to the nature of the case before the court, it would be impossible to lay down any definite rule concerning them. Nothing is more elastic and less arbitrary than this part of a decree in equity. The directions to the different parties may be separate, reciprocal, direct, or inverted, as long as they are not inconsistent.[34] If there be several plaintiffs suing jointly, the decree may be joint or several, in conformity with their respective rights, as finally determined; and if a number of defendants, a single direction may be given to all, or a separate direction, or even a separate decree against each.[35]

Certain general rules governing particular kinds of decrees may, however be stated. If the decree be for the performance of any specific act except the payment of money, as, for example, for the execution of a conveyance of land or the delivery of deeds or other documents, the decree must prescribe the time within which the act must be done.[36]

Decrees for an account should always specify the time from which the account is to be taken.[37] By the Equity Rules "Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct."[38]

The old form of a decree to set aside a forged instrument was that the document "be cut, damned, and canceled."[39] It is now usual to direct that the instrument be delivered to the clerk of the court for cancellation.[40]

By statute, when a Federal court of equity awards an in-

33 Daniell's Ch. Pr., ch. XXV.

34 Lingan v. Henderson, 1 Bland (Md.) 236, 275; Hodges v. Mullikin, 1 Bland (Md.) 503, 507; Owings' Case, 1 Bland (Md.) 370, 404, 17 Am. Dec. 311.

35 Lingan v. Henderson, 1 Bland (Md.) 236, 256; Hodges v. Mullikin, 1 Bland (Md.) 503, 507; Quarles v. Quarles, 2 Mumford (Va.) 321; Elliott v. Pell, 1 Paige (N. Y.) 263; Barnes v. Midland R. R. Terminal Co., 218 N. Y. 91.

36 Eq. Rule 8.

37 Cummings v. Adams, 2 Irish Eq. 393.

38 Eq. Rule 73 of 1842.

39 Bishop of Winchester v. Fournier, 2 Ves. Sen. 445; Fitton v. Earl of Macclesfield, 1 Ves. 287, 292; Seton on Decrees (4th ed.), 1346.

40 General Chemical Co. v. Blackmore, 156 Fed. 968.

junction against the infringement of a patent,[41] copyright[42] or trade mark,[43] it may assess the damages the complainant has sustained by the injunction, as well as compel an account of the profits, and it has the power to award treble damages, but not to award treble profits.[44] It was formerly held that, in a suit in equity for the infringement of a copyright, there could be no recovery by way of damages, beyond the profits made by the defendant.[45] A court of equity when granting an injunction has no jurisdiction to include in the decree an award of statutory penalties for previous acts similar to those enjoined.[45a] When granting specific performance, it may award damages for previous delay.[45b] In suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the complaint over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the eighth equity rule.[46] Upon the foreclosure of a railroad mortgage in a Federal court it is customary to insert in the decree a direction that the purchaser pay all valid claims against the receiver and such indebtedness of the mortgagor as has a preference over the mortgage debt.[47] It has been held that such claims cannot be enforced by the State courts against the purchaser,[48] but that suits upon them must be prosecuted in the Federal court upon the common law or equity side,

41 U. S. R. S., § 4921, as amended, 29 St. at L. 692, § 615 Fed. St. Ann. 577, Pierce Fed. Code, 968; *supra*, § 389e.

42 35 St. at L. 1081; 37 St. at L. 489; *supra*, § 389h.

43 Act of Feb. 4, 1887, 24 St. at L. 387, 5 Fed. St. Ann. 603, Comp. St. 3398; *supra*, § 389i.

44 Ibid., U. S. R. S., §§ 4917, 4921; Livingston v. Woodworth, 15 How. 546, 14 L. ed. 809; Zive v. Peck, 13 Fed. 475; Lyon v. Donaldson, 34 Fed. 789; Welling v. La Bau, 35 Fed. 302; Guyon v. Serrell, 1 Blatchf. 244; Peck v. Frame, 9 Blatchf. 194; Sounders v. Logan, 2 Fish. 167; Schwanzel v. Holenshade, 3 Fish. 196; Brodie v. Ophir Silver Mining Co., 4 Fish. 37; *supra*, §§ 389a, g, h, i.

45 Covert v. Sargent, 42 Fed. 298; Campbell v. James, 5 Fed. 807.

45a U. S. v. Ash Sheep Co., 229 Fed. 479.

45b Chicago, M. & St. P. Ry. Co. v. U. S., C. C. A., 218 Fed. 288. See *supra*, § 377.

46 Equity Rule 10; Northwestern M. L. I. Co. v. Keith, C. C. A., 77 Fed. 374; *supra*, § 402; *infra*, § 427.

47 Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. 663; Thompson v. Northern Pac. Ry. Co., 93 Fed. 384, 388. *Supra*, § 394.

48 Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. 663; Stewart v. Wisconsin Cent. Ry. Co., 117 Fed. 782.

as the nature of the case requires.[49] The creditor must bring his judgment into the foreclosure suit, where it will be enforced as a lien upon the property in the hands of the purchaser.[50]

Where Bradley was trustee under two deeds of trust, a decree appointing Johnson a trustee in his place "in the deed of trust," without specifying which deed of trust was held void for uncertainty.[51]

In a decree restraining unfair competition, it is proper to include a description of the work and advertisements which may be used by the defendant.[52]

The mandatory part is essential to a decree.[53]

A decree must be complete in itself so far as the ordering part thereof is concerned.[54] The statement that the plaintiff is entitled to a specified sum of money and that the defendant "be ordered to pay" this is sufficient.[55] A finding of facts is not a decree.[56]

An order directing the defendant to do something "as decreed by this Court on" the date of the findings does not make the former a decree.[57]

An order entered on the minutes, on motion of defendant, that the court "does now dismiss this bill for want of prosecution," is in effect a final decree, binding on defendant.[58] An entry on the docket of the court of first instance that the case had been decided in favor of a party, specifying the amount of costs and damages and appeal granted, which was followed by an entry on the docket of the court of review that the decision below was confirmed was held to prove that the action had proceeded to final judgment.[59]

49 Thompson v. Northern Pac. Ry. Co., 93 Fed. 384.

50 Thompson v. Northern Pac. Ry. Co., 93 Fed. 384, 388; *supra*, § 394. Where it was claimed that a fund due from a defendant had been assigned and notices of attachment had been served, it was held that the decree should provide for the payment of the fund into court, and that the defendant might protect itself by bringing in the parties claimant. Mundy v. Louisville & N. Ry. Co., C. C. A., 67 Fed. 633.

51 Shepherd v. Pepper, 133 U. S. 626, 33 L. ed. 706.

52 Coca-Cola Co. v. Gay-ola Co., C. C. A., 211 Fed. 942.

53 Oklahoma City v. McMaster, 196 U. S. 529, 533, 49 L. ed. 587.

54 Ibid.

55 Smith v. Smith, C. C. A., 247 Fed. 461.

56 Oklahoma City v. McMaster, 196 U. S. 529, 532; 49 L. ed. 587.

57 Ibid.

58 Westinghouse Tr. Brake Co. v. Orr, C. C. A., 252 Fed. 392. See *supra*, § 1861.

59 Holford v. James, 136 Fed. 533. See § 1861, *supra*.

The decree is final although it leaves the amount of costs in blank to be noted by the clerk.[60]

A decree for the payment of money is not invalid because it does not in terms direct the issue of an execution.[61] An execution will issue notwithstanding under the equity rules which make all such decrees thus enforceable.[62]

§ 405. Motions at the foot of a decree. It is usual where a suit involves the distribution of a fund in court, or otherwise affects the rights of numerous persons, to add a clause to the decree giving the right to the parties to apply to the court for other orders or direct "at the foot of the decree."[1] Under such a clause, the court will usually listen to no further application, except as to matters concerning which directions were contained in the first decree first entered. Thus, it has been held: that it will not, under such a clause, entertain an application to set aside a sale made under a decree;[2] that this gives no right to move to set aside a sale which has been confirmed; but that it is limited to applications for such orders as may be necessary in the distribution of the funds concerning which there is a dispute between different persons, both claiming under the decree or for the delivery of the possession of the property affected,[3] that a similar reservation, in a decree of foreclosure and sale, does not authorize the inclusion, in the order confirming the sale, of an injunction against all parties to the suit and all persons claiming under them, and their attorneys and solicitors "from setting up any pretended or alleged title against the title purchasers."[4] A decree foreclosing a mortgage, payable in instalments, may contain a clause authorizing the complainants on petition to have an order

60 Smith v. Smith, C. C. A., 247 Fed. 461; *supra*, § 186b.

61 Richards v. Harrison, 218 Fed. 134. See Pearse v. Rathburn-Jones, Eng. Co., 243 U. S. 273.

62 Ibid.

§ 405. 1 Wetmore v. St. Paul & P. Ry. Co., 3 Fed. 177. It was held that a decree granting a perpetual injunction against the diversion of water from a stream, which allowed the defendants to apply for a vacation of the same upon establishing in other proceedings their right to the water, was erroneous as inconsistent and not determinative of the question at issue. Pacific Live Stock Co. v. Silvies River Irr. Co., C. C. A., 200 Fed. 487.

2 Wetmore v. St. Paul & P. Ry. Co., 3 Fed. 177.

3 Lewis v. Peck, C. C. A., 154 Fed. 273.

4 Fleming v. Soulter, 6 Wall. 747, 18 L. ed. 847.

of sale in case of default as to any future instalment;[5] and upon a bill compelling a specific performance of a contract for the payment of money in instalments, the decree may contain a clause providing that, in case of subsequent defaults, a motion may be made at the foot of the decree for judgments for such instalments as are then unpaid, with interest and costs.[6]

§ 406. Enrollment of decree. By the former chancery practice, a decree did not, strictly speaking, become a record of the court until it had been enrolled; and although the court, after it had been entered, treated it as a foundation for ulterior proceedings, it was not considered to be of a nature sufficiently permanent to be entitled in other courts to the same attention that is paid by one court of record to the records of other courts of the same nature.[1] Until the enrollment the decree was considered to be entered provisional and interlocutory, so that it could be altered by the court itself at a rehearing;[2] but it seems that an appeal to the House of Lords lay before the enrollment.[3] A decree could be enrolled by a defendant as well as by a plaintiff, and at any time, notwithstanding an abatement of the suit.[4] An enrollment could be vacated for irregularity[5] or for surprise, mistake, fraud, or excusable neglect.[6] After the decree had been enrolled, it could only be altered by a bill of review or an appeal to the House of Lords.[7]

5 Libby v. Rosekrans, 55 Barbour (N. Y.) 202, 215, 239.

6 In Dancel v. Goodwear Shoe Machinery Co., 137 Fed. 157; s. c., C. C. A., 144 Fed. 679; *certiorari* denied 202 U. S. 619, 50 L. ed. 1174; in which the author was counsel; such a decree was entered, but an objection to it upon that ground was not taken upon the appeal.

§ 406. 1 Daniell's Ch. Pr. (1st Am. ed.) 1220, 1221. Although a decree which had not been signed and enrolled could not be pleaded in bar, it was held in New York that it could be set up by answer. Davoue v. Fanning, 4 J. Ch. (N. Y.) 199; Lyon v. Talmage, 14 J. (N. Y.), 501.

2 Daniell's Ch. Pr. (1st Am. ed.) 1221*m*, 1222, 1224, criticized the *dictum* of Lord Brougham in Parker v. Downing, 1 M. & K. 634; *infra*, § 445.

3 Gartside v. Isherwood, 2 Dick. 612; Sheffield v. Duchess of Buckingham, Amb. 586; s. c., West R. 673; Daniell's Ch. Pr. (1st Am. ed.) 1225.

4 Barnes v. Wilson, 1 R. & M. 486.

5 Daniell's Ch. Pr. (1st Am. ed.) 1230, 1232.

6 Kemp v. Squires, 1 Ves. Sr. 205; Millspaugh v. McBride, 7 Paige (N. Y.), 509, 34 Am. Dec. 360; Tripp v. Vincent, 8 Paige (N. Y.), 176; Daniell's Ch. Pr. (1st. Am. ed.) 1230, 1232.

7 Daniell's Ch. Pr. (1st Am. ed.)

The enrollment was made after the Lord Chancellor had signed the docket, by the engrossment of an exact copy upon the parchment rolls, which together with the docket were carried into the record room of the record and writ clerk's office and deposited with the record keeper for safe custody. Thereupon the enrollment was complete.[8]

In the Federal courts there is no formal enrollment such as was made in chancery; but the statute requires that a final record be made up by the clerk, and that "in equity and admiralty cases, only the process, pleadings, decrees, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings shall be entered upon the final record."[9] By the equity rules the clerk must "keep an Equity Journal in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time."[10] This record has been said to correspond in some respects to the enrollment in chancery; but what effect it has upon the rights of the parties seems never to have been decided.[11]

1232; Gore v. Purdon, 1 Sch. & Lef. 234. See *infra*, § 447.

8 Daniell's Ch. Pr. (1st Am. ed.) 1227, 1228.

9 U. S. R. S., § 750.

10 Eq. Rule 3.

11 Consolidated Store S. Co. v. Dettenthaler, 93 Fed. 307. See *infra*, ch. XXIX.

CHAPTER XXVII.

COSTS.

§ 407. Costs in general. Costs is the term given to the sum of money which is paid to the successful party to a litigation, to reimburse him for his expense and trouble.[1]

The costs of an action at common law are governed by fixed and arbitrary rules.[2] In equity,[3] and admiralty the award or denial of costs is always in the discretion of the court;[4] and so very frequently is their amount when awarded.[5] When, however, it is said, as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that courts of equity are governed by no fixed principles in their decisions relative to the costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonable definite rules, the enforcement of which is not dependent upon the caprice of the judge by whom each cause happens to be heard, but is often a ground of review by an appellate tribunal.[6]

§ 408. Costs at common law. Unless otherwise provided by statute the successful party in an action at common law is awarded costs [1] the costs cannot be apportioned.[1a]

§ 407. [1] Provident Chemical Works v. Hygienic Chemical Co., 170 Fed. 523.

[2] Hathaway v. Roach, 2 W. & M. 63.

[3] The Starke, 182 Fed. 498; The Eva D. Rose, C. C. A., 166 Fed. 101.

[4] Riddle v. Manderville, 6 Cranch, 86, 3 L. ed. 161.

[5] Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

[6] Brooks v. Byam, 2 Story, 553; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

§ 408. [1] Hathaway v. Roach, 2 W. & M. 63; Trinidad Paving Co. v. Robinson, C. C. A., 52 Fed. 347; Sears, Roebuck & Co. v. Pearce, C. C. A., 253 Fed. 960.

[1a] *Re* Peterson, S. C. U. S., June 1, 1920.

The prevailing party is the one in whose favor the decision or verdict is rendered and judgment entered.[2]

Where the State statute provided that in certain cases, if the plaintiff recovered less than a specified amount of damages his costs should not exceed his damages, it was held that the statute should be applied by the Federal Courts after a removal.[3]

By statute when in a District Court a plaintiff in an action at law originally brought there, or a petitioner in equity other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute exclusive of costs exceed said sum or value, he shall not be allowed costs, and the court may in its discretion award costs against him.[4] This statute applies where by the allowance of a counterclaim the amount recovered by the plaintiff is reduced to less than five hundred dollars.[5] It does not apply to a suit removed from a State court.[6] If the amount recovered is less than three thousand, but more than five hundred dollars, it does not apply, although the jurisdictional amount is now the former sum.[7] If there was, when the suit was brought, a reasonable expectation of the recovery of more than five hundred dollars, costs will not be awarded against the plaintiff.[8] It has been said that the plaintiff will not be mulcted with costs under this statute, except when facts arose

2 U. S. v. Minneapolis, St. P. & S. S. M. Ry. Co., 235 Fed. 951.

3 Reichter v. Magone, 47 Fed. 192. It has been held that the State practice should be followed at Common Law; that where this awards costs to "The successful party," the definition of that phrase in the State Statute must be followed and that where the case was dismissed, but defendant had paid a sum in full settlement of the claim, the complainant was the successful party and entitled to the costs. Scatcherd v. Love, C. C. A., 166 Fed. 53. For the rule under the practice at common law in Tennessee, see Johnson v. Mississippi & T. R. Co., 31 Fed. 551.

4 U. S. R. S., § 968. For a peculiar case, see National Steamship Co. v. Tugman, 67 Fed. 16. This applies to cases under the Interstate Commerce Act. Delaware, L. & W. R. Co. v. Lyne, C. C. A., 193 Fed. 984.

5 Hamilton v. Baldwin, 41 Fed. 429.

6 Field v. Schell, 4 Blatchf. 435; Ellis v. Jarvis, 3 Mason, 457; Kerager v. Judd, 5 Fed. 27.

7 Eastman v. Sherry, 37 Fed. 844; Johnson v. Watkins, 40 Fed. 187.

8 Gibson v. Memphis, &c., R. Co., 31 Fed. 553; McCarthy v. American Thread Co., 143 Fed. 678.

which would have authorized the court to dismiss the case as not properly within its jurisdiction.[9]

"If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court."[10]

Where a suit at law, equity or admiralty is dismissed in the court of first instance for want of jurisdiction over the person of defendant or over the subject-matter, or for a lack of the requisite difference of citizenship, no costs are allowed, provided that the complainant's plea does not allege the jurisdictional facts;[11] but where in such a case he has averred facts which would give jurisdiction, costs may be awarded against him.[12] When a case removed from a State court is remanded for want of jurisdiction in the District Court, the right to costs is secured by the bond filed with the petition for removal.[13] When cases were begun in State courts and afterwards removed, the costs accrued in the State court before the removal have been allowed.[14] A Federal court cannot award costs, when it dismisses an action because the State court, from which it was removed, had no jurisdiction.[15]

9 McCarthy v. American Thread Co., 143 Fed. 678; *supra*, § 363.

10 U. S. R. S., § 977, Comp. St. § 1618.

11 Burnham v. Rangeley, 2 W. & M. 417; Pentlarge v. Kirby, 20 Fed. 898; Reliance Lumber Co. v. Rothschild, 127 Fed. 745; Int. Wireless Tel. Co. v. Fessenden, 131 Fed. 493; U. S. Envelope Co. v. Transo Paper Co., 229 Fed. 576. But see U. S. v. Treadwell, 15 Fed. 532; Cooper v. N. H. S. Co., 18 Fed. 588.

12 The City of Florence, 56 Fed. 236; Lowe v. The Benjamin, 1 Wall. Jr. 187; Thomas v. White, 12 Mass. 367; Sawyer v. Williams, 72 Fed. 296.

13 See § 3 of Judiciary Act of 1875, as amended in 1887; 24 St. at L., ch. 373; Phoenix-Buttes Gold Mining Co. v. Winstead, 226 Fed. 863; Vaughan v. McArthur Bros. Co., C. C. A., 227 Fed. 364.

14 Wolf v. Insurance Co. (D. Mich.) 1 Flip. 377; Cleaver v. Traders' Ins. Co. (D. Md.), 40 Fed. 863. See Central T. Co. v. Central Iowa Ry. Co., 38 Fed. 889. *Contra* in the Second Circuit. Chadbourne v. German Am. Ins. Co., 31 Fed. 625; Clare v. National City Bank, 14 Blatchf. 445.

15 Parks Co. v. City of Decatur, C. C. A., 138 Fed. 550.

No costs were usually granted in a case in the Circuit Court where the judges were divided.[16]

The English rule seems to be, that it is beneath the dignity of a sovereign to demand costs, and that, therefore, when he is successful in a suit, his counsel will waive all claim for any.[17] In the Federal District Courts, however, costs are awarded to the United States in cases where an ordinary litigant would be entitled thereto, even when not specifically prayed in the bill.[18] The same rule prevails in the Supreme Court;[19] and there a State may also be awarded costs,[20] or directed to pay them.[21]

In suits in the Court of Claims, or District Courts to adjust claims against the United States, costs cannot be allowed unless the government puts in issue the right of the plaintiff to recover; and then only in the discretion of the court.[22] The court has power to allow them.[23] Costs in such a suit include only "what is actually incurred for witnesses and summoning the same, and fees paid to the clerk of the court."[24] No costs are allowed against the United States in admiralty[25] nor in a suit to recover a penalty or forfeiture accruing under any law providing for the internal revenue, when the suit was brought by the Government on information received from any person other than a collector, deputy collector, or inspector of internal revenue,[26] nor upon the dismissal of condemnation proceedings instituted by them.[27]

No costs are awarded for or against the United States in the Supreme Court, or in the Circuit Courts of Appeals,[28] but a Circuit Court of Appeals has awarded costs of the Circuit Court against them upon an appeal from the decision of a board of appraisers.[29]

It has been held that costs cannot be taxed against the peti-

16 Veazie v. Williams, 3 Story, 611, 632.

17 Emperor of Austria v. Day, 2 Giff. 628; s. c., 3 De G., F. & J. 217.

18 Oregon & Cal. R. R. Co. v. U. S., 243 U. S. 549; U. S. v. Southern Pac. Ry. Co., 56 Fed. 865.

19 U. S. v. Sanborn, 135 U. S. 271, 34 L. ed. 112.

20 Missouri v. Illinois, 202 U. S. 598, 50 L. ed. 1160.

21 Ibid.

22 24 St. at L. 508, § 15.

23 U. S. v. Cress, 243 U. S. 316.

24 24 St. at L. 508, § 15.

25 The Antelope, 12 Wheaton, 546, 6 L. ed. 723.

26 U. S. R. S., § 969.

27 Carlisle v. Cooper, 64 Fed. 472.

28 S. C. Rule 24; C. C. A. Rule 31.

29 U. S. v. Davis, C. C. A., 54 Fed. 147. *Contra*, Marine v. Lyon, C. C. A., 62 Fed. 153.

tioners, upon an application for the disbarment of an attorney;[30] and that a decree for costs against a complainant may be set aside, when the attorney had no authority to appear for him.[31]

The Revised Statutes provide: "If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase in civil cases costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased."[32] This does not authorize an increase of the costs against his client in an action at common law,[33] nor the allowance of costs or counsel fees not authorized by other statutory provisions.[34] An agreement between two parties to share in the payment of "the costs and expense" of a suit against one of them, includes the costs taxed against him.[35] Where one of several sureties for the same debt is sued and judgment entered against him for the amount due with costs, he is entitled to contribution on account of those costs[36] and the expenses of the litigation if his defence was not frivolous nor without reasonable hope of success.[37]

"When a suit for the recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector, or inspector of internal revenue, the United States shall not be subject to any costs of suit."[38]

"When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court

30 *Re* Watt & Dohan, 154 Fed. 678.

31 McGeorge v. Bigstone Gap Imp. Co., 88 Fed. 599.

32 U. S. R. S., § 982, 2 Fed. St. Ann. 291, Pierce Fed. Code, § 7670.

33 Bone v. Walsh Const. Co., 235 Fed. 901.

34 See Motion Picture Patents Co. v. Yankee Film Co., C. C. A., 201 Fed. 63, reversing 192 Fed. 134.

35 Provident Chemical Works v. Hygienic Chemical Co., 170 Fed. 523.

36 Toledo Metal Wheel Co. v. Foyer Bros. & Co., C. C. A., 223 Fed. 350.

37 U. S. Fidelity & Guarantee Co. v. Naylor, 237 Fed. 314.

38 U. S. R. S. § 969.

shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent." [39]

"If, in any suit against an officer or other person executing or aiding or assisting in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs." [40]

§ 408a. Costs in criminal proceedings. By the Revised Statutes, "When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution." [1]

"If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant." [2]

"If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be liable alone to the clerk, marshal, and attorney for the fees of such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees." [3]

39 U. S. R. S. § 970.

40 U. S. R. S. § 971.

§ 408a. 1 U. S. R. S. § 974, Comp. St., § 1615.

2 U. S. R. S. through § 975, Comp. St., § 1616.

3 U. S. R. S. § 976, Comp. St., §§ 1617, 1621.

It has been held that the costs for which a defendant to a criminal prosecution is charged do not include those of the preliminary examination,[4] since the statutes direct that the arrest, imprisonment and bailment for trial shall be "at the expense of the United States." [5]

Upon a suit for the forfeiture of liquors shipped without proper labels, the costs taxed against the defendant were the attorney's docket fee, the clerk's fees, and the marshal's fees and disbursements including keepers, storage, freight, railroad fares, hack fares, locks, carpenter's charge for fastening locks and staples, besides the fees and mileage of witnesses.[6]

In a suit for a penalty the Government was allowed besides the taxable costs the disbursements allowed by the State statutes.[7]

"When a district attorney prosecutes two or more indictments, suits, or proceedings, which should be joined, he shall be paid but one bill of costs for all of them." [8]

§ 409. Costs in equity. Courts of chancery in general follow the rule of the civil law, *victus victori in expensis condemnatus est*, and decree the payment of costs by the unsuccessful to the successful parties to a suit before it.[1a] It often happens, however, that they depart so far from this rule as to deny costs to the successful party, and, in certain classes of cases, they will even compel him to pay costs to those against whom he obtains decree.[2a]

In some cases the costs may be apportioned.[3a] This is often done in patent [4a] and admiralty [5a] cases.

[4] U. S. v. Smith, 240 Fed. 756; U. S. v. Briebach, 245 Fed. 204.

[5] U. S. R. S. § 1014, Comp. St., § 1674.

[6] Williams v. U. S., C. C. A., 254 Fed. 48.

[7] U. S. v. Minneapolis, St. P. & S. S. M. Ry. Co., 235 Fed. 951.

[8] U. S. R. S. § 980, Comp. St., § 1621.

§ 409. [1a] Wooster v. Handy, 23 Fed. 49; Am. D. R. Co. v. Sheldon, 28 Fed. 217; Vancouver v. Bliss, 11 Ves. 58; Staines v. Morris, 1 V. & B. —; Millington v. Fox, 3 M. & C. 338, 358; Hunter v. Town of Mariboro, 2 W. & M. 168; Hovey v. Stevens, 3 W. & M. 17.

[2a] Grattan v. Appleton, 3 Story, 755; Brooks v. Byam, 2 Story, 553; Scatcherd v. Love, C. C. A., 166 Fed. 53.

[3a] Farwell v. Kerr, 28 Fed. 345; Lippino v. Shaw C. Co., 34 Fed. 570; Am. B. M. Co. v. Crosman, 57 Fed. 1029; Heighington v. Grant, 1 Beav. 230; Seton on Decrees (4th ed.), vol. 1, p. 129; Tefft v. Stern, C. C. A., 74 Fed. 755; Davis v. Parkman, C. C. A., 71 Fed. 961; Beaubert v. Appleton, C. C. A., 67 Fed. 917; U. S. Sugar Refinery v.

By the Revised Statutes, when in a District Court, "a petitioner in equity, other than in the United States, recovers less than the sum or value of five hundred dollars exclusive of costs in a case which cannot be brought unless the amount in dispute, exclusive of costs, exceeds said sum or value," he is not allowed costs but at the discretion of the court he may be obliged to pay them.[6]

Where the Circuit Court of Appeals directed that the costs in the court, both below and above, be borne equally between the plaintiffs and the defendants, it was held that the expenses of a receivership were not included in the costs to be divided.[7] Where the line of a railroad company had been operated by a receiver of the corporation in possession thereof, it was held liable for a certain proportion of the costs of the receivership, although not a party to the suit in which the receiver was appointed, when it appeared simply for the purpose of contesting its liability for such costs.[8] Where a judgment debtor had not been the cause of delay in extended supplementary proceedings before a master; it was held that the expenses of a controversy maintained by his debtors to protect their individual interests should not be taxed against him, but that he was only liable for a portion of the costs with necessary disbursements in serving papers on him; all other costs and disbursements being chargeable to his debtors, whose obligations the creditor sought to reach in the proceedings.[9]

It has been said: that under no circumstances, will a court dismiss a plaintiff's bill and award him costs against a defendant,[10] although it might then allow the latter costs out of a fund in court.[11] If a plaintiff begins or continues a suit after he has

Providence S. & G. P. Co., C. C. A., 62 Fed. 375. As to apportionment of costs against defendants, see Vrooman v. Penhollow, C. C. A., 222 Fed. 894, 896.

4a *Infra*, § 410.

5a *Infra*, § 411.

6 U. S. R. G. § 968, Comp. St., § 1609.

7 Kell v. Trenchard, C. C. A., 146 Fed. 245.

8 Pennsylvania Co. for Insurance, etc. v. Jacksonville, T. & K. St. Ry. Co., C. C. A., 66 Fed. 421; Tesla El. Co. v. Scott, 101 Fed. 524.

9 *Re* Shepherd, 154 Fed. 957.

10 Barnes v. Omally, 4 McLean, 576; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940. But see Feehheimer v. Baum, 43 Fed. 719, 730, and *infra*, § 421.

11 Feehheimer v. Baum, 43 Fed. 719, 734; *infra*, § 421. But see Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940.

received formal notice of a full and unconditional offer of all that he is entitled to, he may be denied costs, not only of all the proceedings taken by him after such an offer,[12] but also of the whole suit.[13] This principle applies to bills for an accounting; where, although on account of the uncertain state of the account the defendant may not be obliged to make a tender of the balance due from him, and so omits it, yet if he has shown a willingness to account, the court may relieve him from paying costs.[14] If a plaintiff charge fraud which he fails to prove, although he establishes his case on other grounds,[15] or if he incurs needless expense,[16] in some cases, if he claims relief more extensive than that to which he is entitled,[17] or if, on account of public policy or otherwise, he is allowed to obtain relief in a matter wherein he himself acted unlawfully or dishonorably,[18] or if he have been guilty of laches,[19] which do not bar his claim entirely,—he will be denied costs.

A defendant will also be denied costs when successful under

12 Millington v. Fox, 3 M. & C. 338, 352; Loveridge v. Larned, 7 Fed. 294; Calkins v. Bertrand, 8 Fed. 755.

13 Millington v. Fox, 3 M. & C. 338, 352; Lowell Mfg. Co. v. Whittal, 71 Fed. 515.

14 Parrot v. Treby, Prec. in Ch. 254; Bennett v. Attkins, 1 Y. & C. 247; Ashburnham v. Thompson, 13 Ves. 402. But see Daniell's Ch. Pr. (5th Am. ed.), 1396, 1397.

15 Wright v. Howard, 1 Sim. & S. 190; Scott v. Dunbar, 1 Molloy, 442. See Fisher v. Boody, 1 Curt. 206, 223.

16 Brunswick-Balke-Collender Co. v. Klump, 131 Fed. 93; where plaintiff was denied all costs and disbursements after the time when the defendant offered to consent to a decree. Where the court of original jurisdiction denied the complainant's application for a mandatory injunction to compel the removal of a dam, but offered him the right to prove and recover the damages, which he refused to do; he took an appeal, and upon the appeal the denial of the injunction was approved, but the decree was reversed in order that he might recover his damages; he was disallowed the costs incurred prior to the time when, after the filing of the mandate, he availed himself of this right, and he was also disallowed interest upon his damages. Andrus v. Berkshire Power Co., 169 Fed. 732; s. c., 107 Fed. 1016. But see Inhabitants of N. B. Tp. v. Halsey, 117 U. S. 336, 29 L. ed. 904.

17 Baldwin v. Ely, 9 How. 580. But see Consol. Cal. & Va. Min. Co. v. Baker, 131 Fed. 989.

18 Debenham v. Ox, 1 Ves. Sen. 276; Davis v. Symonds, 1 Cox Eq. 402.

19 Anon., 2 Atk. 14; Lee v. Brown, 4 Ves. 362.

similar circumstances;[20] for instance, when the plaintiff's bill is clearly bad and he answers instead of moving to dismiss.[21]

Instances where costs have not been given to a successful party, because the situation of his adversary appealed to the sympathy of the court, were: where the decision of the cases involved the decision of difficult and doubtful questions of law,[22] especially in suits brought for the specific performance of contracts affecting the sale of land.[23] Where the court enforced a contract made upon a very inadequate consideration.[24] Where the defendant's conduct had been grossly unfair and unequitable.[25] Where the case was dismissed for want of prosecution and the parties had been guilty of equal laches,[26] and other cases of peculiar hardship.[27] Where the defendant claims equitable relief by counterclaim or otherwise and fails to obtain it, he is liable for costs as if he were a complainant.[28]

A change of the law by a ruling of the Supreme Court subsequent to the filing of the bill has been held to be no ground for refusing the defendant costs.[29]

The successful party to a suit may also be obliged to pay costs to an opponent who has not acted unconscientiously, in three classes of cases: when the successful party has acted unconscientiously in the suit or in the matters which gave rise to it;[30]

20 Atty. Gen. v. Brewers' Co., 1 P. Wms. 376; Bunker v. Stevens, 26 Fed. 245.

21 Brooks v. Byam, 2 Story, 553; Harland v. Bankers' & M. Tel. Co., 32 Fed. 305. Marthinson v. King, C. C. A., 150 Fed. 48. Where a bill filed by trustees was dismissed upon appeal for failure to plead the jurisdictional facts to which no objection had been made, it was held that the costs should be taxed against the complainants as trustees only and not against them individually. Tug R. C. & S. Co. v. Brigel, C. C. A., 70 Fed. 647.

22 Grattan v. Appleton, 3 Story, 755; Rose v. Calland, 5 Ves. 186; Huff v. Bidwell, C. C. A., 218 Fed. 6.

23 Rose v. Calland, 5 Ves. 186; White v. Foljambe, 11 Ves. 337; Wilcox v. Bellaers, T. & R. 491.

24 Burrowes v. Lock, 10 Ves. 470.

25 Hiner v. C. G. Aldrich Co., 255 Fed. 785.

26 E. G. Staude Mfg. Co. v. La Bombardi, C. C. A., 243 Fed. 362.

27 Lillia v. Airey, 1 Ves. Jr. 277; Shales v. Barrington, 1 P. Wms. 481; Drybutter v. Bartolomew, 2 P. Wms. 127.

28 Eastern Oregon Land Co. v. Deschutes R. Co., C. C. A., 246 Fed. 400.

29 Fargo v. South Eastern Ry. Co., 28 Fed. 906.

30 Wright v. Howard, 1 Sim. & S. 190; Dowse v. Hammond, C. C. A., 130 Fed. 103. For example, where the complainant obtains only a small part of the relief which he

when a defendant has been necessarily made a party to a suit in which he has no direct personal interest,—for example, an heir-at-law, who is a passive defendant to a suit to prove a will;[31] and when a bill is filed to redeem a pledge or relieve an estate from the burden of a mortgage or other incumbrance.[32]

Where in a suit against a homestead settler in aid of an adverse claim to prevent the issue of a patent, neither party establishes the right to the land, neither is allowed costs.[33]

In suits of interpleader against claimants to life insurance, the complainant can only receive the "actual court costs."[34]

The Equity Rules provide: "Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct."[35]

Costs for an infraction of the rules concerning the contents of transcripts upon appeals may be imposed upon the offending parties or solicitors.[36]

In cases where the finally successful party is obliged without his fault to pay costs to one of the others, if the suit was made necessary by the misconduct of one of the defendants, the latter

prayed and the greater part of the expense of the litigation was caused by his unsuccessful claims. Thomson-Houston El. Co. v. Elmira & H. R. Co., 71 Fed. 886. See also Ecaubert v. Appleton, C. C. A., 67 Fed. 917. Where it was held that a party had improperly filed a cross-bill, but relief was given him upon the theory that his cross-bill should be considered as a petition of intervention, he was required to pay the costs upon the cross-bill in the original court and the court of review. Gregory v. Pyke, 67 Fed. 837. The cost of taking testimony as to irrelevant matter may be taxed against the party who takes the same. Terry v. Naylor, 125 Fed. 804.

31 Crew v. Joliff, Prec. in Ch. 93; Luxton v. Stephens, 3 P. Wms. 373.

32 Taner v. Ivie, 2 Ves. Sen. 466, 468.

33 Hinchman v. Ripinsky, C. C. A., 202 Fed. 624.

34 39 St. at L. 929; *supra*, §§ 5, 157.

35 Eq. Rule 40.

36 Eq. Rule 76.

is obliged to repay the amount of those costs to the winner.[37] Thus, the costs paid out of the fund to the plaintiff in a suit of interpleader are usually decreed to be repaid by the unsuccessful defendant.[38]

"By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter, or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the courts shall find that the refusal or neglect was reasonable." [39]

§ 410. Costs in patent, copyright and trade-mark cases. Costs in actions at common law founded upon patents, copyrights, and trade-marks are regulated by the rules that apply in other cases.[1] Where the plaintiff recovers damages exceeding $500.00 he may tax his costs although he sued upon two patents and failed as to one of them.[2] Costs are usually included in a decree for a perpetual injunction against the infringement of a patent,[3] or trade-mark,[4] when the infringement was made or threatened before the suit was brought, although it was previously discontinued, or even when it was never committed;[5] and in the case of a trade-mark, when no demand to cease using it was previously made.[6] All of several joint wrongdoers are usually muleted, unless one of them has participated to a trivial extent only or there are equitable circumstances in his favor.[7]

Where the complainant was entitled to an injunction at the time the bill was filed but he is denied one because of the sub-

37 Martinius v. Helmuth, 2 V. & B. 412, note. See Brodie v. St. Paul, 1 Ves. Jr. 326; Badeau v. Rogers, 2 Paige Ch. (N. Y.) 209.

38 Martinius v. Helmuth, 2 V. & B. 412, note; Badeau v. Rogers, 2 Paige Ch. (N. Y.) 209. But see Ferguson v. Dent, 46 Fed. 88; *infra*, § 422.

39 Eq. Rule 58, see Wagner v. Meccano, C. C. A., 246 Fed. 603, where $470.26 was allowed for the costs of proving certain documents by two depositions.

§ 410. 1 Sears, Roebuck & Co. v. Pearce, C. C. A., 253 Fed. 960.

2 Sears, Roebuck & Co. v. Pearce, C. C. A., 253 Fed. 960.

3 Vrooman v. Penhollow, C. C. A., 186 Fed. 495; Luten v. Rhoads & Knisely, 194 Fed. 169.

4 Sawyer v. Kellogg, 9 Fed. 601.

5 Luten v. Rhoads & Knisely, 194 Fed. 169.

6 Sawyer v. Kellogg, 9 Fed. 601.

7 Vrooman v. Penhollow, C. C. A., 186 Fed. 495.

sequent expiration of the patent, he is entitled to costs even if he recovers no damages.[8]

Where a bill to enjoin the infringement of a patent by a corporation and its officers was dismissed as against the officers, but sustained against the company, it was held that the individual defendants must pay their own costs and such as were incurred in bringing them into the suit, but not a docket fee.[9]

The allowance of costs upon an accounting of profits by an infringement are not governed by fixed rules but depend upon the circumstances of each case.[10] This is so when upon a reference the master reports in favor of the plaintiff for nominal damages of the court.[11] Where the complainant is awarded only nominal damages and there are no special equities in his favor, he may be taxed with the costs of the accounting including those of the hearing upon the exceptions to the report.[12] Where the master awarded to the complainant substantial damages, and the decree confirmed the award with the costs and disbursements of the accounting, but on appeal the damages were reduced to a nominal sum because they could not be computed with reasonable accuracy, the mandate allowing the costs of appeal, but being silent as to the costs below; the trial court in entering the decree upon the mandate refused to change its prior decree as to the costs.[13] Where, upon an appeal by both parties, a second accounting was directed upon which the complainant failed to improve his position and the amount awarded was substantially the same as before, the costs subsequent to the decree, were assessed against both parties.[14]

[8] Am. Caramel Co. v. White, C. C. A., 234 Fed. 328.

[9] National F. B. & P. Co. v. Dayton P. N. Co., 97 Fed. 331, 333. See also Consolidated B. S. Co. v. Chicago, P. & St. L. Ry. Co., 69 Fed. 412.

[10] Individual Drinking Cup Co. v. Public Service Cup Co., C. C. A., 250 Fed. 620; Vrooman v. Penhollow, C. C. A., 222 Fed. 894, 900.

[11] Calkins v. Bertrand, 8 Fed. 755; Everest v. Buffalo Lubricating Oil Co., 31 Fed. 742; Hill v. Smith, 32 Fed. 753; Kirk v. DuBois, 46 Fed. 486; Ommen v. Talcott, 175 Fed. 261.

[12] Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. et al., 183 Fed. 314; Delaware L. & W. R. Co. v. Lyne, C. C. A., 193 Fed. 984.

[13] Westinghouse Air Brake Co. v. New York Air Brake Co., 140 Fed. 144.

[14] Westinghouse El. & Mfg. Co. v. Wagner E. Mfg. Co., 248 Fed. 508, 513.

In suits founded upon letters-patent for inventions, when the patentee has claimed in his specifications that he was the original inventor of more than he did first invent, he cannot recover costs unless he has filed a proper disclaimer in the Patent Office before the commencement of the suit.[15] It has been held that this statutory rule does not apply to the costs of an appeal.[16] Where the suit for an infringement is dismissed for want of jurisdiction no costs can be taxed.[17]

Where, in a suit for an infringement, the complainant recovers some, but not all, of several patents,[18] or claims of copyrights,[19] or of claims under a single patent,[20] the costs may be equitably proportioned. The successful party was allowed to recover only two-thirds of the costs where one out of three patents was sustained.[21] But where the defendant succeeds upon one defense to the bill, he is not precluded from recovering costs because he has pleaded other defenses which were without merit.[22] Where the party extends the cross-examination of an adversary's witnesses beyond the legitimate limits, the court may reduce the costs allowed him for taking testimony or depositions[23] and apportion the costs.[24] Where the complainant

15 U. S. R. S., § 4922; Proctor v. Brill, 16 Fed. 791; General Electric Co. v. Crouse-Hinds Electric Co., 147 Fed. 718; Novelty Glass Mfg. Co. v. Brookfield, C. C. A., 172 Fed. 221. The statute does not entitle the defendant to recover costs in such a case, nor does it deprive the plaintiff of his right to an account of profits and damages. Novelty Glass Mfg. Co. v. Brookfield, C. C. A., 172 Fed. 221. See § 277a *supra*.

16 Kahn v. Starrels, C. C. A., 136 Fed. 597; Johnson v. Foos Mfg. Co., C. C. A., 141 Fed. 73. *Contra*, Novelty Glass Mfg. Co. v. Brookfield, C. C. A., 172 Fed. 221.

17 Parker v. Stebler, C. C. A., 241 Fed. 589; Christensen v. Gen. El. Co., 248 Fed. 284.

18 Draper Co. v. Am. Loom Co., 161 Fed. 728; Roth v. Harris, C. C. A., 168 Fed. 279.

19 M. Witmark & Sons v. Standard Music Roll Co., 221 Fed. 376.

20 Ide v. Trorlicht, D. & R. Carpet Co., C. C. A., 115 Fed. 137, 150, and citations; Am. Bank Protection Co. v. El. P. Co., 181 Fed. 350.

21 Tesla El. Co. v. Scott, 101 Fed. 524. See Marthinson v. King, C. C. A., 150 Fed. 48. Where a complainant alleged infringement by a number of devices made by defendant, but succeeded as to one only, a division of the costs was made proportionate to the final result. Perkins Electric S. Mfg. Co. v. Yost E. Mfg. Co., 189 Fed. 625; Gold v. Gold, C. C. A., 187 Fed. 273.

22 U. S. R. S., § 4915, 5 Fed. St. Ann. 507, Pierces Fed. Code, § 8780.

23 National Cash Register Co. v. Gratigny, C. C. A., 213 Fed. 463.

24 Royal Metal Mfg. Co. v. Art Metal Works, C. C. A., 130 Fed. 778.

recovered from the manufacturer full damages for all sales, he was not allowed costs in suits against customers of the manufacturer brought while the suit against the manufacturer was pending.[25]

In suits for unfair competition where the disputed questions were honest trade differences and there are no damages, the complainants will not be allowed costs although they succeed.[26] In suits for breach of copyright, where there are striking similarities between the two works, the complainant may not be obliged to pay costs upon the dismissal of his bill.[27]

In suits to compel the issue of patents, all costs must be paid by the complainant, whether the final decision is in his favor or not;[28] unless an individual opposes the suit, in which case, if the opposition is unsuccessful, costs may be taxed against such opponent.[29]

§ 411. Costs in admiralty. In admiralty causes costs are subject to the same rules as in equity causes in the Federal courts.[1]

"When proceedings are had before a court of the United States or of the Territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned. But allowance may be made on one libel or information for the costs incidental to several claims."[2]

"When judgment is rendered in favor of the claimant of any vessel or other property seized on behalf of the United States,

25 Pomona Fruit Growers' Exch. v. Stebler, C. C. A., 241 Fed. 123.

26 Champion Spark Plug Co. v. A. R. Mosler & Co., 233 Fed. 112.

27 Vernon v. Sam S. & Lee Shubert, 220 Fed. 694.

28 Butler v. Shaw, 21 Fed. 321.

29 Ibid.

§ 411. 1 The Starke, 182 Fed. 498; The Eva D. Rose, C. C. A., 166 Fed. 101.

2 U. S. R. S. § 978, Comp. St., § 1619.

and libeled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid."[3]

The prevailing party is usually entitled to costs;[4] but, in the discretion of the court, they may be allowed him, withheld from him, or divided, according to the equities of the case.[5] Where damages are apportioned, costs are likewise apportioned, each party taxing a full bill of costs, and the party whose bill of costs is the largest, usually recovering half the difference between the two bills as taxed.[6] It is so held in the Second Circuit; where the libellant's vessel alone has suffered damage, as well as where both vessels have been damaged.[7] But in such a case the libellant will be allowed the full costs and disbursements of a reference made necessary by the act of the defendant.[8] Where a libellant recovers part of his damages against one vessel and a part against another, he recovers costs against the vessels in similar proportions.[9] Where the claimant of a vessel libelled brings in a third party, which is held to be solely in fault,[10] the claimant may recover its costs from the libellant.[11] The same rule applies when the respondents to a suit *in personam* for a collision bring in a boat owned by strangers which is adjudged to be solely in fault.[12] Where the libel alleges that one or the other of several persons is liable and these respondents contest the question of

3 U. S. R. S. § 979, Comp. St., § 1620.

4 The Starke, 182 Fed. 498; The Eva D. Rose, C. C. A., 166 Fed. 101.

5 Ibid. The Scotland, 118 U. S. 507, 518, 30 L. ed. 153, 155, a proceeding for the limitation of liability.

6 The America, 92 U. S. 432, 23 L. ed. 724; The Gladiator, 223 Fed. 381.

7 The Warren (Blatchford, J.), 25 Fed. 782. *Contra,* The Hercules, 20 Fed. 205. See also The Pennsylvania, 15 Fed. 814, where a different method of apportioning costs was adopted.

8 The Doris Eckhoff, 41 Fed. 156, 159.

9 The Alabama and Gamecock, 92 U. S. 695, 23 L. ed. 763.

10 The Starke, 182 Fed. 498.

11 O'Keefe v. Staple Coal Co., 201 Fed. 144, where the libellants were allowed to tax against the party held to be in fault all their costs except the clerk's and marshall's fees on the process sued against the original respondents and such respondents were allowed to tax proctors' fees against the libellants and the remaining fees against the guilty party.

12 The Rose Reichert, 242 Fed. 170.

liability with each other those exonerated may recover costs from those held liable.[13]

It has been held that, when the costs in admiralty are divided, the respondent must contribute to the payment of the libellant's proctor's fees; but that the libellant need not pay any part of the respondent's proctor's fee.[14]

The claimant of a libelled vessel, who for his own protection brings in a third party by petition, where upon a hearing both the libel and petition are dismissed, is liable for the taxable costs and expenses of such new party's defense.[15]

Where the party who succeeds has acted unconscionably costs may be apportioned.[16] If the defendant offers to allow the damages to be assessed at a certain sum, and the referee's report is for no greater sum, the libellant will be denied costs of a reference.[17] In a decree for salvage four-fifths of the costs were taxed against the successful claimant when he had libelled the vessel and cargo for more than fifteen times what he had demanded for his services and he was awarded less than his original demand.[18]

But salvagors do not lose their right to costs because they filed their libel and put the marshal in possession before attempting to ascertain the owners or negotiate with the insurers of the cargo as requested.[19]

A libellant who recovers on only one of two claims to collect which he sues, however, may be allowed costs where he establishes a prima facie case upon both.[20]

13 The Louise Rugge, C. C. A., 239 Fed. 458.

14 The L. F. Munson, 127 Fed. 767.

15 The Charles Tiberghein, 148 Fed. 1016.

16 The D. L. Co. No. xx, 205 Fed. 188.

17 S. D. N. Y. Adm. Rule 30. See *infra*, § 577. A claimant who makes a tender before suit, but fails to deposit in court the amount so tendered, is liable for full interest and costs, although the libellant fails to recover a more favorable decree. The Ponce, C. C. A., 178 Fed. 76. It is not necessary in the deposit to include the docket fee or fees for depositors. The Cloverburn, 148 Fed. 139. If upon the trial the offer is found to have been insufficient, the respondent is entitled to tax and such fees, together with the taxable disbursements and the taking of testimony used on the trial, even if such expense was incurred before the offer. Ibid.

18 The John Twohy, 243 Fed. 720.

19 The Henry R. Tilton, 214 Fed. 165.

20 Ibid.

In proceedings for a limitation of liability, costs are in the discretion of the court.[21] The costs of a contested issue usually fall on the losing party.[22] Where the rule requires appellant to pay all costs before he is delivered the record for an appeal,[23] the petitioner appellant may be required to advance them. In such a case the court may order that he be repaid by the claimants so much of the commissioner's fees as he has advanced to the commissioner for hearing their claims.[24] Where the claims appear to have a slender foundation or claimants go into unnecessary detail in the presentation of their case or in cross-examination the court may require them to give security for costs including their reasonable proportion of the commissioner's fees.[25]

Charges of a commissioner in taking proof of an uncontested claim should be paid from the fund, not by the petitioner.[26] It has been held that a petitioner is entitled to a docket fee out of the fund for each creditor who proves his claim, but that his costs are not preferred over those of such creditors,[27] and that where a stipulation for value is given, he is entitled to a single docket fee,[28] payable by the stipulators and not out of the fund.[29] Where the owner gives a stipulation for value, he must pay the taxable costs incident thereto, including the expense of the appraisal.[30] The expenses of administration, including the fees and other charges of the officers of the court and of the commissioner, should ordinarily be paid from the fund.[31]

Where a libel is dismissed for want of jurisdiction, no costs are allowed.[32] Where a libel is filed to enforce a maritime contract costs can be awarded upon its dismissal because there is no maritime lien.[33] Where the libel contains allegations of

21 The Scotland, 118 U. S. 507, 518, 30 L. ed. 153, 155; Closz & Howard Mfg. Co. v. J. I. Case Threshing Mach. Co., 216 Fed. 937.

22 The H. F. Dimock, C. C. A., 77 Fed. 226, 238. Such costs include proctors' fees. The W. A. Sherman, C. C. A., 167 Fed. 976.

23 Indra Line v. Palmetto Phosphate Co., C. C. A., 239 Fed. 94, 96.

24 Ibid.

25 Ibid.

26 The H. F. Dimock, C. C. A., 77 Fed. 226, 238.

27 *Re* Norwich & New York Transp. Co., 10 Benedict, 193, 18 Fed. Cas. No. 10,361.

28 *Re* Excelsior Coal Co., 136 Fed. 271; aff'd C. C. A., 142 Fed. 724, 74 C. C. A., 56.

29 Ibid.

30 The H. F. Dimock, C. C. A., 77 Fed. 226, 238.

31 Ibid.

32 The McDonald, 4 Blatchf. 477; Wenberg v. A. Cargo of Mineral Phosphate, 15 Fed. 285, 288.

33 The Francisco, 118 Fed. 112.

the facts which establish the jurisdiction and the evidence subsequently shows that there is none, costs can be awarded upon a dismissal.[34]

It seems that the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction.[35]

In a proceeding *in rem*, under section ten of the Pure Food and Drug Act, the court has power to render judgment for costs against the claimant, although no stipulation to pay costs has been made[36] and no costs can be recovered against the United States.[37]

Where a libellant upon his own appeal recovers less than three hundred dollars, exclusive of costs, he cannot recover costs, but, in the discretion of the court, may be adjudged to pay costs himself.[38] When both parties appeal, and the decree of the District court is not disturbed, it is not usual to allow costs to either party.[39] Where the mandate is silent, as to costs, their allowance remains discretionary with the District court.[40] Where the parties stipulate that a suit shall be discontinued and the libellant pay costs as taxed by the court, the court has no power to include damages for the fraud of libellant in filing the libel, nor for the detention of the vessel, nor for premiums paid for a stipulation for value, nor for surveyor's fees and expenses not incurred under its order.[41]

§ 412. Costs upon error and appeal. Upon a writ of error the successful party is entitled to the costs unless the reversal

34 Hazelwood Dock Co. v. Palmer, C. C. A., 228 Fed. 325.

35 Benedict's Admiralty, § 204; quoted without disapproval in Hipolite Egg. Co. v. U. S., 220 U. S. 45, 59, 55 L. ed. 364, 368.

36 Act of June 30, 1906, ch. 3915; 34 St. at L. 768.

37 Hipolite Egg. Co. v. U. S., 220 U. S. 45, 50, 60, 55 L. ed. 364, 369.

38 The Cassins, 41 Fed. 367; U. S. R. S., § 968, which, however, refers in terms only to the Circuit Court.

39 The William Cox, 9 Fed. 672; McKeen v. Morse, 1 U. S. App. 7. A court of admiralty has no power to allow costs other than those provided for by statute, unless for an expense incurred under its order, and, there being no statutory provision for the allowance of mileage to a proctor in attending on the taking of depositions, no such allowance can be taxed as costs. Pacific Mail S. S. Co. v. Iverson, C. C. A., 154 Fed. 450.

40 The Aida, C. C. A., 255 Fed. 50.

41 The Reliance, 189 Fed. 416.

is because of want of jurisdiction in the court below.[1] Upon appeal the award of the costs is discretionary with the appellate court.[2] In an appellate court, when a judgment or decree is reversed for want of jurisdiction in the court below, costs are usually imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.[3] But where the objection was not raised by the defendants either in the trial court or the court of review, the judgment may be reversed without costs of the appeal; and, in the absence of an amendment, the case may be dismissed without costs there.[4] When an appeal or writ of error is dismissed for want of jurisdiction, costs of the motion, including at least the clerk's fee for printing and supervising the record, may be taxed.[5]

The successful party is usually allowed the costs,[6] even when he does not wholly succeed, provided that his success is substantial.[7] When both parties appeal, and the decree is in all respects affirmed, usually no costs of the appeal are allowed.[8] Where both appeal and each succeeds the same rule usually applies.[9] Where the decree was affirmed, except as to a slight error of fact

§ 412. 1 Hinchman v. Ripinsky, C. C. A., 202 Fed. 625.

2 Frey & Son, Inc. v. Welch Grape Juice Co., 242 Fed. 1004.

3 Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435; Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623; King Bridge Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623; Peninsula Iron Co. v. Stone, 121 U. S. 631, 30 L. ed. 1020; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800. Devost v. Twin State Gas & Electric Co., C. C. A., 252 Fed. 125.

4 Newcomb v. Burbank, C. C. A., 181 Fed. 334. Where the defect in jurisdiction was raised by the appellant for the first time upon the appeal, it has been held that he could not recover his costs in the latter court, but that the costs below should be divided, Tug River C. & S. Co. v. Brigel, C. C. A., 67 Fed. 625; and in one such case the costs of the writ of error were imposed on the appellant. Hunt v Howes, C. C. A., 74 Fed. 657.

5 Bradstreet Co. v. Higgins, 114 U. S. 262, 29 L. ed. 176; Cir. Ct. of App. Rule 23; National Home for D. Volunteer Soldiers v. Parrish, C. C. A., 194 Fed. 940.

6 Bailey v. Mississippi Home Telephone Co., 254 Fed. 358; Stennick v. Jones, C. C. A., 256 Fed. 354.

7 Lehigh & Wilkes-Barre Coal Co. v. Hartford & N. Y. Transp. Co., C. C. A., 227 Fed. 1019.

8 The William Cox, 9 Fed. 672.

9 Standard Plunger Elevator Co. v. Stokes, C. C. A., 212 Fed. 892.

to which the attention of the court below had not been directed by a motion to correct the decree nor by the assignments of error, costs were awarded to the appellee.[10] In a case where the appellant succeeded only in modifying the decree, it was held that neither party should have the costs of the appeal.[11] When neither party succeeds, the costs upon an appeal may be apportioned.[12] An appointment may also be made when the successful party has needlessly amplified the record and the printed arguments.[13]

Where there was no appearance or brief filed by the appellees the court made the affirmance without costs.[14] A party who by stipulation took no part in an appeal is not entitled to any costs in the appellate court.[15] Where appellees severally interested recover costs in the Circuit Court of Appeals, separate costs are taxed for the several appellees who appear separately and file separate briefs.[16]

The fact that the decree is affirmed upon grounds not stated in the opinion of the court of first instance does not necessarily deprive the respondent of costs.[17]

Where a decree in equity is reversed or modified upon an appeal with costs, the costs of the appeal only are meant unless the mandate otherwise provides.[18] The application for the costs in the District Court must be made thereto.[19] The same rule prevails in admiralty.[20] The District Court cannot interfere with the taxation of the costs by the clerk of the court of review.[21] Where a decree for costs has been reversed after its collection the District Court upon receipt of the mandate may award resti-

10 Alaska Juneau Gold Min. Co., v. Ebner Gold Min. Co., C. C. A., 239 Fed. 639, 643.

11 New England R. Co. v. Carnegie Steel Co., C. C. A., 75 Fed. 54.

12 Kell v. Trenchard, C. C. A., 146 Fed. 245.

13 Ball & S. F. Co. v. Kraetzer, 150 U. S. 111, 37 L. ed. 1019, *infra*, § 419b.

14 Benedicta v. West India & Panama Telegraph Co., 256 Fed. 417.

15 Pollard v. Reardon, 65 Fed. 848.

16 Augusta Tr. Co. v. Federal Pr. Co., C. C. A., 153 Fed. 157.

17 Post v. Beacon V. P. & El. Co., 89 Fed. 1.

18 Romeike v. Romeike, C. C. A., 251 Fed. 273; Bailey v. Mississippi Home Tel. Co., 254 Fed. 358.

19 Ibid.

20 The Aida, C. C. A., 255 Fed. 50.

21 Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed. 568; Tompkins v. St. Regis Paper Co., 240 Fed. 838.

tution.[22] The costs of the transcript, if allowed, are taxed in the court below, not in the court of review.[23] The cost of printing the record is taxed in the higher court.[24]

Where upon a writ of error a judgment is reversed with costs and a final disposition of the case is made all the costs of the District Court, including those of all trials, are taxed in such court against the unsuccessful party.[25] When a new trial is ordered upon such a reversal the costs of the writ of error are taxable immediately and do not abide the event.[26]

Where the Supreme Court of the United States modified, with costs to the defendant, certain judgments of the State courts in favor of the plaintiff, and the State Court of Appeals remitted the case to the court of original jurisdiction, "without costs in this court," it was held that the defendant was entitled to recover only the costs in the Supreme Court of the United States, and that the plaintiff was still entitled to the costs which he was awarded by the original judgments.[27] Where the Supreme Court of the United States reversed the judgment of the State court with costs the plaintiff in error was allowed to tax the costs below.[28]

The court below has the right to construe the mandate of the court of review concerning costs,[29] subject to review by appeal[30] or mandamus,[31] as the case may be.

§ 413. Petitions for leave to sue in forma pauperis. The right to sue in forma pauperis originated in the statute of Hen. VII. This and the subsequent statute of Hen. VIII. are confined to actions in the courts of common law, and do not extend to defendants. The courts of equity have adopted the

22 Ibid.

23 Bailey v. Mississippi Home Tel. Co., 254 Fed. 358; Simons v. Cromwell, C. C. A., 2nd Circuit, Jan., 1920, in which the author was counsel; C. C. A. Rule 29.

24 Nichols Shepherd & Co. v. Marsh, 131 U. S. 401.

25 Bailey v. Mississippi Home Tel. Co., 254 Fed. 358.

26 Bailey v. Mississippi Home Tel. Co., 254 Fed. 358; Berthold v. Burton, 169 Fed. 495; Simons v. Cromwell, C. C. A., 2nd Circuit, Jan., 1920, in which the author was counsel.

27 Stevens v. Central Nat. Bank, 168 N. Y. 560.

28 Green v. Supreme Council of Royal Arcana, 91 Misc. 606.

29 Persons v. Wirgman, 140 Fed. 207.

30 Kell v. Trenchard, C. C. A., 146 Fed. 245.

31 *Infra*, § 457.

principle of these statutes, and, proceeding further, have extended the relief to the case of defendants.[1] Upon the proper showing being made, a person might prosecute an action *in forma pauperis,* and where he thus prosecuted the action, it was not necessary for him to pay the court expenses, nor could the costs be assessed against him if he failed in the action.[2]

"Any citizen of the United States, entitled to commence any suit or action in any civil or criminal, in any court of the United States, may upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."[3]

§ 413. [1] Lord Lyndhurst in Oldfield v. Cobbett, 1 Phil. 613, 615. See Ferguson v. Dent, 15 Fed. 771.

[2] 11 Hen. vii, ch. 12. "A Means to Help and Speed Poor Persons in Their Suits;" extended 23 Hen. viii, ch. 15. See Martin v. Superior Court (Cal.), 168 Pac. 135, L.R.A. 1918 B 313.

[3] Act of July 20, 1892, 27 St. at L. 252; as amended June 25, 1910, 36 St. at L. 866. Before this act, the Federal courts followed the English practice in equity, Ferguson v. Dent, 15 Fed. 771; not at common law, Roy v. Louisville, N. O. & T. R. Co., 34 Fed. 276; *contra,* Bristol v. U. S., C. C. A., 129 Fed. 87, 88; nor where there was a State statute, which they followed, Heckman v. Mackey, 32 Fed. 57. Before the amendment it was held, that the statute did not apply to appellate proceedings, whether civil, Bradford v. Southern Ry. Co., 195 U. S. 243, 251, 49 L. ed. 178, 181; The Presto, C. C. A., 93 Fed. 522; In re Bradford's Petition, C. C. A., 139 Fed. 518; *contra,* Fuller v. Montague, C. C. A., 53 Fed. 206; Columb v. Webster Mfg. Co., 76 Fed. 198; Reed v. Pennsylvania Co., C. C. A., 111 Fed. 714, 49 C. C. A., 572; see Wickerman v. A. B. Dick Co., C. C. A., 85 Fed. 851; Brinkley v. Louisville & N. R. Co., 95 Fed. 345,

The application cannot be made by anyone who is not a citizen of the United States.[4] The statute applies to applications for the writ of habeas corpus[5] and to proceedings in admiralty.[6] The writ may be filed simultaneously with the affidavit.[7]

"The officers of the court shall issue, serve all process, and perform all duties in such cases, and the witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases."[8]

"The court may request any attorney of the court to represent such poor person if it deems the cause worthy of trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."[9]

"Judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided that the United States shall not be liable for any of the costs incurred."[10]

The English practice required that such an application be made by a petition containing a short statement of his case or defense, and when filed by a complainant that it should be accompanied by a certificate signed by counsel, "that he conceives the plaintiff has just cause to be relieved touching the matter of the petition for which he has exhibited his bill;" and also in all cases by the affidavit of the party himself "that he is not worth in all the world the sum of 5£ after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted."[11] It seems, that, under the statute of the United States, the application may be made upon

where there is a learned and instructive opinion by Judge Hammond upon the whole subject of this section; or criminal, Bristol v. U. S., C. C. A., 129 Fed. 87. In the Second Circuit, however, the Circuit Court of Appeals has relieved from printing the record, a petitioner, for the review of an order of a District Court in Bankruptcy. This was done in In re Friedman, C. C. A., 161 Fed. 260, 262.

4 Ibid.

5 In re Mills, 135 U. S. 263.

6 See O'Flaherty v. Hamburg-American Packet Co., 168 Fed. 411.

7 Ibid.; O'Connell v. Mason, 127 Fed. 435.

8 27 St. at L. 252.

9 27 St. at L. 252. See O'Connell v. Mason, 127 Fed. 435.

10 St. at L. 252.

11 Daniell's Ch. Pr. (2d Am. ed.) 46; Wilkinson v. Belsher, 2 Brown, Ch. C. 272.

a motion and affidavit without a petition or a certificate of counsel, although a prudent practitioner should not omit them.

The affidavit, when filed by the plaintiff, should show that he is a citizen, and that there is no person interested who is liable to pay or secure the costs.[12] When it was made to appear to the court that a pauper had sold or contracted for the benefit of his suit, or any part thereof, while the same was depending, his suit was dismissed absolutely.[13] Where the plaintiff sued in a representative capacity, it was held that he must show that those whom he represented were unable to pay the costs.[14] According to the English practice, a person suing or being sued in a representative capacity could not obtain an order of this character.[15] The defendant can dispute the truth of the affidavit of poverty by a motion to dismiss the cause;[16] not by a motion for security for costs.[17] After one affidavit of property has been adjudged insufficient, a second may be filed.[18]

The allowance of the right to take an appeal or prosecute a writ of error *in forma pauperis* is subject to the exercise of judicial discretion to determine the good faith of the application and meritorious character of the cause.[19] Such an application will be denied if the petition discloses no ground, sufficiently meritorious.[20]

In England, the counsel and solicitor assigned could not take any fee, profit, or reward of the pauper for the despatch of business, while the cause was pending and the party continued *in forma pauperis,* except paupers' fees, which were twopence a

12 Boyle v. Great N. Ry. Co., 63 Fed. 539.

13 O'Flaherty v. Hamburg-American Packet Co., 168 Fed. 411.

14 Clay v. Southern Ry. Co., C. C. A., 90 Fed. 472.

15 Oldfield v. Cobbett, 1 Phil. 613; Daniell's Ch. Pr. (2d Am. ed.) 44; Anon., 1 Ves. Jr. 409. It was so held in North Carolina and Tennessee, of an administrator; McKeil v. Cutler (N. C. 1853), Bushee's Eq. 139; Smith v. Ry. Co., 89 Tenn. 664. In North Carolina, of an assignee in bankruptcy, Osborne v. Henry, 66 N. C. 354. In New York, of the committee of a lunatic; Beehtle v. Ry. Co., 31 Abb. N. C. (N. Y.) 483. But see Thompson v. Thompson, cited in 1 T. & V. Ch. Pr. 513; Ferguson v. Dent, 15 Fed. 771; Clay v. Southern Ry. Co., C. C. A., 90 Fed. 472.

16 In re Mills, 135 U. S. 263, 34 L. ed. 107; Fuller v. Montague, 53 Fed. 206.

17 Woods v. Bailey, 113 Fed. 390.

18 Woods v. Bailey, 113 Fed. 390.

19 Kinney v. Plymouth Rock Squab Company, 236 U. S. 43.

20 Ibid.

sheet for the labor of copying.[21] Nor could any agreement be made for the payment of any recompense afterwards.[22] For an offense in either of these respects, both the lawyer and the client were guilty of contempt of court; and the client was dispaupered, and forever disqualified from suing as a pauper in the same suit.[23] In the courts of the United States an attorney who has contracted to bring a suit upon a contingent fee is an interested person; and in such a case, permission to sue *in forma pauperis* is denied.[24]

No fees except paupers' fees could be collected from the pauper, nor could costs be decreed against him,[25] except for scandal.[26] In case of success, however, the court might allow him full costs. "For though he is at no costs, or but small expense, yet the counsel and clerks do not give their labor to the defendant, but to the pauper."[27]

In the Federal Courts, in case of success, the attorney is allowed a reasonable compensation out of the recovery.[28] The order permitting a party to sue or defend *in forma pauperis* had to be served upon the opposite party as soon as possible, for the pauper was liable for all costs decreed against him before the

21 Daniell's Ch. Pr. (2d Am. ed.) 47.

22 Ibid. In New York such an agreement, in a case begun in a State court and afterwards removed to the District Court was held to be invalid. Matter of Tyndall, 117 App. Div. (N. Y.) 294. An attorney in such a case has no lien on the cause of action. O'Flaherty v. Hamburg-American Packet Co., 168 Fed. 411.

23 Ibid.

24 Boyle v. Great N. Ry. Co., 63 Fed. 539; Feil v. Wabash R. Co., 119 Fed. 490; Phillips v. Louisville & N. R. Co., 153 Fed. 795; Silvas v. Arizona Copper Co., 213 Fed. 504; Cahill v. Manhattan Ry. Co., 38 App. Div. (N. Y.) 314.

25 Ibid.; Scatchmer v. Foulkard, 1 Eq. Cas. Abr. 125.

26 Rattray v. George, 16 Ves. 232. See also Murphy v. Oldis, 2 Molloy, 475; Richardson v. Richardson, 5 Paige (N. Y.) 58.

27 Scatchmer v. Foulkard, 1 Eq. Cas. Abr. 125; Rattray v. George, 16 Ves. 232; Daniell's Ch. Pr. (2d Am. ed.) 49, 50.

28 Whelan v. Manhattan Ry. Co., 86 Fed. 219, 220; Devore v. Delaware, L. & W. R. R. Co. (U. S. C. C. Second Circuit); reported in Matter of Tyndall, 117 App. Div. (N. Y.) 294; where, after an infant plaintiff had recovered for $21,855.80, his attorney having taken the case upon a contingent fee of 50 per cent and sued *in forma pauperis*, the attorney was allowed one-third of the recovery in addition to his disbursements.

service of the order.[29] A party could be dispaupered for improper or vexatious conduct in the suit.[30]

The Act of July 1, 1916, relieves seamen from furnishing bonds or prepayment of, or making deposit to secure fees or costs in suits for wages or salvage and to enforce laws made for their health and safety.[31] It has been said that this has the practical effect of making them sue *in forma pauperis*.[32]

§ 414. Classification of costs. Different principles regulate the amount of costs according as they are decreed to be paid by one party to another, or out of a fund in court.[1] In the former case costs are said to be taxed as between party and party, in the latter as between solicitor and client.[2]

§ 415. Costs as between party and party. Costs as between party and party are regulated by statute. They are the amount of the "bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials."[1]

§ 416. Attorneys' fees in general. The Revised Statutes fix the following sums to be taxed as attorney's fees in a bill of costs between party and party: "On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars, provided that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law when the cause is discontinued, five dollars. For *scire facias* and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. For services rendered in cases removed from a District to a Circuit Court by writ of error or appeal, five dollars."[1]

29 Ballard v. Catling, 2 Keen, 606.

30 Wagner v. Mears, 3 Sim. 127.

31 39 St. at L. 313, 40 St. at L. 157; *infra*, § 425.

32 The Memphian, 245 Fed. 484.

§ 414. 1 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

2 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

§ 415. 1 U. S. R. S., § 983. But see Spaulding v. Tucker, 2 Sawyer, 50.

§ 416. 1 U. S. R. S., § 824. Besides the cases elsewhere cited, see

Because a master's original report is not sufficiently full to permit a disposition of the exceptions thereto without an original examination by the court of all testimony presented, the court may re-refer the cause. In such a case no allowance of costs should be made on account of objections and exceptions to the master's first report overruled, which is practically duplicated in the exceptions and objections to a second report.[2]

The Equity Rules provide: that "the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill of answer."[3] In the absence of an express local rule upon the subject, it was held that the court may allow the costs for drawing pleadings, decrees and orders, in accordance with the State practice as authorized by statute.[4]

Where, because of an unnecessary multiplication of proceedings, an extra allowance is made for the increase of costs thereby caused, no counsel fee can be for that reason allowed.[5]

The attorney's costs belong to the party, not to his attorney, and proceedings to collect them should be taken in the name of the party.[6] In the absence of a special agreement, however, the

Bashaw v. U. S., 47 Fed. 40. A State statute allowing an extra allowance in a partition suit was followed by the Federal court. Willard v. Serfell, 62 Fed. 625. The question whether counsel fees stipulated for in a note or mortgage can be taxed, depends upon the local law of the State, in both suits on the common-law side of the court, and suits in equity, so far as taxation against the defendant is concerned. Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065; Dodge v. Tolleys, 144 U. S. 451, 36 L. ed. 501; Gray v. Havermeyer, 53 Fed. 174. See also Fowler v. Equitable Tr. Co., 141 U. S. 384, 35 L. ed. 786; Robison v. Alabama & G. Mfg. Co., 51 Fed. 268; American F. L. M. Co. v. Whaley, 63 Fed. 743. For counsel fees out of the fund in equity cases, see *infra*, §§ 421, 422.

2 Firestone Tire & Rubber Co. v. Riverside Bridge Co., C. C. A., 247 Fed. 625.

3 Equity Rule 25.

4 Matheson v. Hanna-Schoelkopf, 128 Fed. 162, where ten cents a line for first page and six cents a line for each subsequent page was allowed, in accordance with Pa. acts 1842, § 9, P. L. 433 and Pa. acts 1864, P. L. 775.

5 Motion Picture Patents Co. v. Yankee Film Co., C. C. A., 201 Fed. 63, reversing 192 Fed. 134; construing U. S. R. S., § 982, Comp. St. p. 706, *supra*, § 407.

6 Broyles v. Buck, 37 Fed. 137.

value of the attorney's services to his client will be considered as worth at least the taxable costs.[7]

§ 416a. Attorneys' fees under Anti-Trust and Interstate Commerce laws. Where a plaintiff recovers damages under the Anti-Trust act, he is entitled to judgment for threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee.[1] The same practice prevails in an action for damages, caused by a violation of the Interstate Commerce Act,[2] or to recover money which the Interstate Commerce Commission has ordered paid.[3]

7 Celluloid Mfg. Co. v. Chandler, 27 Fed. 9. By the acts of May 28, 1896 (29 St. at L. 180, 181, 186), and March 3, 1905 (33 St. at L. 1156, 1207), the compensation of all the district attorneys of the United States, except in the District of Columbia, is limited to salaries therein fixed. Formerly the district attorney for the southern District of New York received compensation in addition to his salary in prize cases (U. S. R. S., §§ 4646, 4647; The Anna, Blatchf. Prize Cases, 337) and also when he appeared by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in any suit against such officer for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duties (U. S. R. S., § 827); and also for services under the direction of the Secretary of the Treasury and the Commissioner of Internal Revenue in suits or proceedings to recover fines, penalties and forfeitures (U. S. R. S., § 838; *Re* District Attorney, 23 Fed. 26; U. S. v. Bashaw, 152 U. S. 436, 38 L. ed. 505.

§ 416a. 1 Act of July 2, 1890, 26 St. at L. 209, § 7. Where the trial occupied about five days, and the plaintiff recovered a verdict for $500, the court, upon evidence of the value of their services, awarded to his attorneys $750. The judgment was affirmed upon appeal. Montague & Co. v. Lowry, 193 U. S. 38, 48, 48 L. ed. 608, 612. Where the defendant settled an action in the State court for damages caused by the same acts that were the foundation of his suit in the court of the United States, it was held that this barred the latter suit and that neither the treble damages, nor the attorney's fees, could be therein recovered. Clabaugh v. Southern Wholesale Grocers' Ass'n., 181 Fed. 706.

2 Act of January 4, 1887, 24 St. at L. 379, § 8, 3 Fed. St. Ann. 809, Comp. St. 3154, Pierce Fed. Code, § 6427. This statute is constitutional. Denver & R. G. R. Co. v. Baer Bros. Mercantile Co., C. C. A., 209 Fed. 577, where $250 was allowed. Such an item cannot, however, be included in the costs recovered by a shipper in an action against an initial carrier for loss on a connecting line. Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 186, 208, 31 Sup. Ct. 164, 55 L. ed. 167, 31 L.R.A. (N. S.) 7.

3 Ibid., as amended by Act of June 29, 1906, Ch. 3591, § 5, 34 St. at L. 590, Comp. St. Supp. 1909, p. 1159; Louisville & N. R. Co. v. Dickerson, C. C. A., 191 Fed. 705.

The Act to Regulate Commerce does not allow any attorney's fee for a reparation proceeding before the commission, but only allows such a fee in an action in the courts based upon the award of reparation.[4] The allowance for attorney's fee to be added as costs to the judgment recovered by a shipper on an unpaid award for reparation is for services of the attorney in the action on the award and not for services in the proceeding before the commission, and such part of an allowance for attorney's fees as is specially given for services in that proceeding should be eliminated from the judgment.[5] The reasonable attorney's fee authorized to be allowed in favor of the plaintiff in an action to enforce an award of damages made by the Interstate Commerce Commission to be taxed as a part of the costs "if the petitioner shall finally prevail," should not be taxed when a writ of error is issued, until this is determined.[6] It has been held that if a railroad company appeals or sues out a writ of error, an additional allowance for attorneys' fees in the court of review may be allowed.[7]

The allowance of counsel fees for services in a suit does not cover the subsequent services on appeal, as it must be assumed that the District Judge fixes the fee for services up to the time of the allowance, and considered the fee allowed as reasonable for those services.[8]

§ 416b. Attorneys' fees under Copyright law. In all actions, suits or proceedings under the copyright law, except when brought by or against the United States, or any officer thereof, "full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."[1] In an action for damages as well as in a suit to enjoin the infringement of a copyright, a reasonable counsel or attorney's fee, to be fixed by the court, must be taxed and collected as part of the plaintiff's costs, if he is successful.[2] Where there

4 Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 432.

5 Ibid.

6 Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co., C. C. A., 235 Fed. 474.

7 Louisville & N. R. Co. v. Dickerson, C. C. A., 191 Fed. 705, 712, where the attorney's fee upon the appeal was fixed at $100.

8 Mills v. Lehigh Valley R. Co. 226 Fed. 812.

§ 416b. 1 Act of March 4, 1909, 35 St. at L., 1075, § 40, Pierce Fed. Code Supp. § 1589.

2 Where a preliminary injunction

had been laches no counsel fee was allowed.[3] Where a copyright proprietor obtained an injunction, with a judgment for profits, against an innocent infringer, misled by the accidental omission of the copyright notice, who did not in his answer admit that the complainant was entitled to the relief granted, an attorney's fee was allowed.[4] When the owners of a copyright, which was infringed, did not object upon the first discovery of the infringement, and thus allowed defendant to expend large sums of money in advertising, an allowance of attorney's fees, being of discretion, was not granted in a suit for injunction and an accounting.[5] In a suit by the owner of a musical copyright to recover for the use of the composition on a mechanical player, the complainant may be allowed counsel fees.[6]

Where in a suit for the infringement of a copyright covering a commercial directory much labor was required to prove an infringement and the trial lasted for several days, an attorney's fee equal to the damages was allowed and affirmed.[7]

§ 416c. Attorneys' fees for collecting war risk insurance. The Act creating the Bureau of War Risk Insurance as amended provides: "That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were insti-

was granted, somewhat troublesome interrogatories were drawn, a motion made concerning them and a trial of one day; $300 was allowed besides statutory costs. Stodart v. Mutual Film Corp., 249 Fed. 507, 511.

3 Haas v. Leo Feist, 234 Fed. 105.

4 Strauss v. Penn Printing & Publishing Co., 220 Fed. 977.

5 Haas v. Leo Feist, Inc., 234 Fed. 105.

6 Feist, Inc. v. Am. Music Roll Co., C. C. A., 251 Fed. 243.

7 S. E. Hendricks v. Thomas Pub. Co., C. C. A., 242 Fed. 37 ($2.500.)

tuted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.[1]

§ 416d. Attorneys' docket fees. A docket fee of twenty dollars is taxed for a hearing upon an appeal,[1] and for a hearing upon an application for the writ of mandamus in the Supreme Court of the United States.[2]

It has been held that a docket fee can be taxed for each hearing, including a rehearing before the court after bill, answer, and replication have been filed,[3] but not for a hearing upon a demurrer which is overruled, when the defendant has leave to answer and an answer is filed.[4] When a demurrer was sustained, a docket fee was allowed.[5] When a motion to remand is granted, a docket fee may be allowed.[6]

To constitute "a final hearing in equity or admiralty," there must be a hearing of the cause upon its merits.[7] No docket fee

§ 416c. 1 Act of Sept. 2, 1914, ch. 293, § 13, Oct. 6, 1907, ch. 105, § 2, 40 St. at L. 399, amended May 20, 1918, ch. 77, § 1, 40 St. at L. 399, Comp. St. § 514.

§ 416d. 1 Kansas City, Ft. S. & Mo. Ry. Co. v. McDonald, 60 Fed. 522; John Shillito Co. v. McClung, 66 Fed. 22.

2 *Ex parte* Hughes, 114 U. S. 548, 29 L. ed. 281.

3 Am. D. R. B. Co. v. Sheldon, 28 Fed. 217; Peck S. & W. Co. v. Fray, 92 Fed. 947.

4 McLean v. Clark, 23 Fed. 861.

5 Price v. Coleman, 22 Fed. 694.

6 In W. D. Michigan, $20, Josslyn v. Phillips, 27 Fed. 481. In D. South Carolina, $10, Riser v. Southern Ry. Co., 116 Fed. 1014; Acker v. Charleston & W. C. Ry. Co., 190 Fed. 288. In N. D. Tennessee, $10. W. U. Tel. Co. v. Louisville & N. R. Co., 208 Fed. 481. In D. Indiana, a docket fee was denied: and such is said to be the practice throughout the Seventh Circuit. Smith v. Western Union Tel. Co., 81 Fed. 242; Walsh's Adm'x. v. Joplin & P. Ry. Co., 219 Fed. 345.

7 Wooster v. Handy, 23 Fed. 49; Goodyear D. V. Co. v. Osgood, 2 B. & A. Pat. Cas. 529; Coy v. Perkins, 13 Fed. 111; Yale Lock Mfg. Co. v. Colvin, 14 Fed. 269. *Contra*, Goodyear v. Sawyer, 17 Fed. 2.

is allowed for a hearing upon an interlocutory application by a party to the suit.[8] When a bill is taken as confessed, there must be a hearing before the decree, and consequently the complainant has been allowed to tax a docket fee.[9] When a bill was dismissed without a hearing, no docket fee was formerly allowed.[10] The voluntary dismissal of an amended libel filed after the submission to the court of exceptions to the original libel which were sustained, did not deprive the respondent of a docket fee.[11] In a case where, after an interlocutory decree requiring the defendant to act, the plaintiff moved for a dismissal of his bill latter was obliged to pay the former a docket fee as well as other costs.[12] No docket fee is allowed upon the dismissal of a bill for want of prosecution;[13] nor when a libel is dismissed without prejudice at the motion of the libellant without opposition;[14] nor when judgment is entered upon an offer of judgment before trial,[15] or by consent.[16] Nor for a reference upon a motion for an interlocutory injunction;[17] nor for a hearing upon a petition for leave to intervene;[18] nor when the complainant has the bill dismissed upon his own motion before a final hearing;[19] nor for a trial at which the jury disagreed.[20]

[8] Doughty v. West B. & C. Mfg. Co., 8 Blatchf. 107; Central Tr. Co. v. Wabash, St. L. & P. R. Co., 32 Fed. 684.

[9] Andrews v. Cole, 20 Fed. 410. *Contra*, Peerless Light Co. v. Leviton, 247 Fed. 606.

[10] Wooster v. Handy, 23 Fed. 49; Goodyear D. V. Co. v. Osgood, 2 B. & A. Pat. Cas. 529; Coy v. Perkins, 13 Fed. 111; Yale L. Mfg. Co., v. Colvin, 14 Fed. 269. *Contra*, Goodyear v. Sawyer, 17 Fed. 2.

[11] Albion Lumber Co. v. Inter-Ocean Transp. Co., 240 Fed. 1019.

[12] Goodyear v. Sawyer, 17 Fed. 2.

[13] Wooster v. Handy, 23 Fed. 49; Wighton v. Brainard, 28 Fed. 29.

[14] Albion Lumber Co. v. Inter-Ocean Transp. Co., 240 Fed. 1019.

[15] Swan v. Wiley, Harker & Camp. Co., 161 Fed. 236. The prevailing party may tax the disbursements necessarily made in order to enter judgment upon the offer. Ibid.

[16] The Dwinsk, 227 Fed. 958.

[17] Doughty v. W. B. & C. Mfg. Co., 8 Blatchf. 107.

[18] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 684; Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. 775. But see U. S. v. Payne, 147 U. S. 687, 37 L. ed. 332. *Cf.* U. S. v. King, 147 U. S. 676, 37 L. ed. 328.

[19] Coy v. Perkins, 13 Fed. 111; Yale Lock Mfg. Co. v. Colvin, 14 Fed. 269; Wooster v. Handy, 23 Fed. 49; Cahn v. Qung Wah Lung, 28 Fed. 396; Ryan v. Gould, 32 Fed. 754; N. Y. B. & B. Co. v. N. J. C. S. & R. Co., 32 Fed. 755. *Contra*, Goodyear v. Sawyer, 17 Fed. 2.

[20] Cleaver v. Traders' Ins. Co., 40 Fed. 863; Dedekam v. Vose, 3

But two docket fees are taxable in admiralty when a libel and cross-libel are tried together.[21] In a suit to enforce the claims of materialmen against the surety upon a bond of a contractor,[22] and upon a hearing before a master of disputed claims against receivers,[23] each claimant who appears by a separate attorney is entitled to a docket fee. In a proceeding in admiralty for the limitation of liability, where there has been an appraisal and a stipulation for value, the petitioner is entitled to a single docket fee;[24] and he may deduct from the fund the expenses of the administration, but not the cost of procuring the stipulation, nor the expense of the stipulation or the appraisal.[25] In such proceeding, each person claiming damages and recovering the same is entitled to a separate proctor's fee, payable by the stipulators for costs, and not out of the fund[26] unless the same proctor appears for several claimants, in which case his clients can tax but one docket fee.[27]

The docket fee, it has been said, "is taxable whenever the trial is entered upon by the swearing of a jury in a common-law case, or by the introduction of testimony or the final opening of the argument upon a final hearing in equity or admiralty. The fee is not made by the statute to depend upon a judgment or decree, but is taxable on a trial or final hearing. As the labor for which the docket fee is supposed to be a compensation is performed on or before the trial, equitably the party ought not to lose the

Blatchf. 77, 153; Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Strafer v. Carr, 6 Fed. 466; Huntress v. Town of Epson, 15 Fed. 732. But see Schmieder v. Barney, 19 Blatchf. 143; s. c., 7 Fed. 451; Wooster v. Handy, 23 Fed. 49. It was formerly held that in such a case a district attorney might collect the docket fee from the United States. Van Hoorebeke v. U. S., 46 Fed. 456.

21 British & South A. S. N. Co. v. Delaware, L. & W. R. Co., 195 Fed. 984.

22 Title Guaranty & Tr. Co. v. Crane Co., 219 U. S. 24, 55 L. ed. 72.

23 Ely v. Van Kannel Revolving Door Co., 184 Fed. 459.

24 *Re* Excelsior Coal Co., 136 Fed. 271; aff'd C. C. A., 112 Fed. 724, 74 C. C. A. 56. But see Norwich & N. Y. Transp. Co., 10 Benedict, 193, 18 Fed. Cas. No. 10,361.

25 *Re* Excelsior Coal Co., 136 Fed. 271; aff'd C. C. A., 112 Fed. 724, 74 C. C. A. 56.

26 The L. F. Munson, 127 Fed. 767; The Beneliff, 158 Fed. 377.

27 Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., C. C. A., 197 Fed. 703.

benefit of it by a discontinuance entered after the trial or hearing has begun."[28] Where several libels are consolidated for trial, but one docket fee can be taxed.[29]

It has been held that in actions by the United States, if the Government is successful, a docket fee of forty dollars, which will be paid into the treasury, may be taxed.[30]

In the Southern district of Mississippi where several suits by the same plaintiffs against different defendants were submitted and tried together before referees, a docket fee in each case was allowed.[31] In the Second Circuit where two patent cases were tried together and argued together upon one transcript on appeal, a single docket fee was granted.[32]

It has been said that no docket fee should be allowed when the attorney who appeared and acted for the successful party throughout the case was not admitted to practice in the court where the case was pending nor admitted to practice in the Supreme Court of the United States before the filing of the general replication.[33] No docket fee is allowed to a party, not an attorney, who conducts his own case.[34]

In criminal cases the defendant is not chargeable with the attorney's docket fees in the Supreme Court and the Circuit Court of Appeals.[35]

By analogy, five dollars for a discontinuance is taxed in equity in the Second Circuit.[36] Where, pending a jury trial, a case was settled by stipulation before its submission, the fee for discontinuance was not allowed.[37]

§ 416e. Attorneys' fees upon depositions. The fee for taking a deposition is allowed for a deposition taken *de bene esse*,[1] or

28 The Bay City, 3 Fed. 47, per Mr. Justice Brown. *Contra*, Howler v. Chicago, M. & St. P. Ry. Co., 166 Fed. 828.

29 The Stanley Dollar, C. C. A., 160 Fed. 911.

30 U. S. v. Southern Pac. Co., 172 Fed. 909; citing U. S. R. S., §§ 824, 837, Comp. St. pp. 632, 644; 29 St. at L. 179, § 17, Comp. St. p. 611.

31 Switzer v. Home Ins. Co., 46 Fed. 50.

32 Steffens v. Steiner, C. C. A., 232 Fed. 862.

33 Goodyear D. V. Co. v. Osgood, 13 Off. Gaz. 325.

34 Gorse v. Parker, 36 Fed. 840.

35 U. S. v. Miller, 223 Fed. 183.

36 Kaempfer v. Taylor, 78 Fed. 795.

37 Howler v. Chicago, M. & St. P. Ry. Co., 166 Fed. 828.

§ 416e. 1 Wooster v. Handy, 23 Fed. 49; Missouri v. Illinois, 202 U. S. 598, 50 L. ed. 1160; Ingham v. Pierce, 37 Fed. 647.

before an examiner,[2] or, according to some authorities, before a master,[3] for use on the final hearing. It has been held: that the fee cannot be taxed for the examination of a witness before a master upon a reference to compute damages and profits;[4] nor for a deposition taken for use upon an interlocutory application, such as an application for leave to intervene or a hearing upon the intervenor's claim,[5] or an application for an interlocutory injunction,[6] or an application to punish a person for a contempt,[7] unless it is subsequently put in evidence at the hearing of the cause upon issue joined,[8] nor for oral testimony in court.[9] Where witnesses are recalled upon a subsequent day for further examination, an additional attorney's fee cannot be charged for such second deposition.[10]

It has been held in admiralty that no fee can be charged for the deposition of a witness whose testimony is immaterial.[11] The authorities conflict as the whether a party can tax the costs of a deposition taken in good faith which was not offered in evidence upon the trial or hearing.[12] The libellant's proctor is not entitled to fees for the deposition of a witness whose testimony was immaterial.[13] When the testimony of several witnesses is taken by the same officer and returned to court under the same enclosure, the testimony of each witness is considered as a separate deposition.[14] As to the taxation of the fee for taking a

2 Missouri v. Illinois, 202 U. S. 598, 50 L. ed. 1160; Hake v. Brown, 44 Fed. 734.

3 Ferguson v. Dent, 46 Fed. 88; Matheson v. Hanna-Schoelkopf Co., 128 Fed. 162.

4 *Re* Strauss v. Meyer, 22 Fed. 467; Tuck v. Olds, 29 Fed. 883; Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. 775.

5 Central T. Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 684; Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. 775.

6 Simpson v. Brooks, 3 Blatchf. 456.

7 Spill v. Celluloid M. Co., 28 Fed. 870.

8 Indianapolis W. Co. v. American S. B. Co., 65 Fed. 534.

9 Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Erickson v. Grandfield, 193 Fed. 296.

10 Keasbey & Mattison Co. v. Am. Magnesia & Covering Co., 149 Fed. 439.

11 Alaska S. S. Co. v. Gilbert, C. C. A., 236 Fed. 716.

12 It was held that he can, in Sloss I. & S. Co. v. South Carolina & G. R. Co., 75 Fed. 106; Hunter v. International Ry. Imp. Co., 28 Fed. 842; Nead v. Millersburg H. W. Co., 79 Fed. 129. *Contra*, Pinson v. Atchison, T. & S. F. R. Co., 54 Fed. 464; The Persiana, 158 Fed. 912.

13 The Mary, 233 Fed. 121.

14 Broyles v. Buck, 37 Fed. 137.

deposition which is admitted in evidence in several suits, the decisions are not harmonious. It seems settled that when, by stipulation, a deposition is taken once for use in several suits, in each of which it is entitled, and in each of which the witness is sworn, a deposition fee may be taxed in each suit.[15] Where, however, a deposition taken in one suit is by stipulation read in another, the rule, except in the district of Tennessee[16] and perhaps in that of New Jersey,[17] would seem to be that the fee can only be taxed in the first suit.[18]

The expenses of taking the deposition cannot be deducted from the attorney's fee.[19]

It has been held that the fee cannot be taxed in favor of a party who did not appear by an attorney at the taking of the deposition.[20]

§ 417. Fees of clerk of Supreme Court. The fees of the clerk of the Supreme Court are fixed by rule as follows: "For docketing a case and filing and indorsing the transcript of the record, five dollars. For entering an appearance, twenty-five cents. For entering a continuance, twenty-five cents. For filing a motion, order, or other paper, twenty-five cents. For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words. For transferring each case to a subsequent docket and indexing the same, one dollar. For entering a judgment or decree, one dollar. For every search of the records of the court, one dollar. For a certificate and seal, two dollars. For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid. For an ad-

15 Wooster v. Handy, 23 Fed. 49, 63; Archer v. Hartford F. Ins. Co., 31 Fed. 660; Green v. French, 5 N. J. L. J. 228; L. E. Waterman Co. v. Lockwood, 128 Fed. 174; British & South Am. Steam Nav. Co. v. Delaware, L. & W. R. Co., 195 Fed. 984.

16 Jerman v. Stewart, 12 Fed. 271; Archer v. Hartford F. Ins. Co., 31 Fed. 660.

17 Green v. French, 5 N. J. L. J. 228.

18 Wooster v. Handy, 23 Fed. 49, 58; Am. Diamond R. B. Co. v. Sheldon, 28 Fed. 217; Winegar v. Cahn, 29 Fed. 676; Carey v. Lovell Mfg. Co., 39 Fed. 163; British & South Am. Steam Nav. Co. v. Delaware, L. & W. R. Co., 195 Fed. 984. See *Re* Hughes, 257 Fed. 986.

19 Broyles v. Buck, 37 Fed. 137.

20 Winegar v. Cahn, 29 Fed. 676.

mission to the bar and certificate under seal, ten dollars. For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio. For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing. For issuing a writ of error and accompanying papers, five dollars. For a mandate or other process, five dollars. For filing briefs, five dollars for each party appearing. For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars."[1] Upon moneys paid into court the clerk is allowed a commission of one per centum.[2]

The compensation of the clerk of the Supreme Court is limited to six thousand dollars a year. The balance of his fees and disbursements over and above his necessary clerk hire and incidental expenses, as certified by the Supreme Court or a justice thereof appointed by it for the purpose, must be paid into the Treasury.[3]

"1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk, for the payment of his fees, as he may require or otherwise satisfy him in that behalf. 2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed. 3. Upon payment by either party of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. 4. In cases of

§ 417. [1] Supreme Court Rule 24; 22 St. at L., ch. 443, p. 631.

[2] Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290.

[3] 22 St. at L. 603. See U. S. R. S., § 844.

appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed and of the whole record in cases of original jurisdiction. 5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and to the reporter, from time to time, as required, and a copy to the counsel for the respective parties. 6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel. 7. In case of reversal, affirmance or dismissal, with costs, the amount of the cost of printing the record, and of the clerk's fee, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process. 8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, and attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees."[4] In cases of dismissal for want of jurisdiction, such fees are taxed against the party bringing the cause into court, unless the court otherwise directs.[5] When a party has printed the transcript of the record at his own expense, he may docket the case without giving security for the clerk's fees;[6] but before the printed copies are delivered to the Justices or the parties for use on the final hearing, or on any motion in the progress of the cause, the clerk can require the payment of fifteen cents a folio for attending to the correctness and proper indexing of the printed copies of the record.[7] The same practice prevails when the appellant or plaintiff in error has furnished the clerk with twenty-five copies of part of the record, which was used in the court below, State

4 Supreme Court Rule 10.

5 *Re* Amendments to Rules, 108 U. S. 1, 4, 27 L. ed. 629, 630.

6 Supreme Court Rule 10.

7 Bean v. Petterson, 110 U. S. 401, 28 L. ed. 190.

or Federal. If the clerk demand the fees in advance, they must be paid.[8] When the clerk has no security for fees due to him from a party entitled to a mandate, he may withhold the mandate until his fees are paid, or he is otherwise satisfied in that behalf.[9]

§ 417a. Fees of clerks of Circuit Courts of Appeals. The salaries of the clerks of the Circuit Courts of Appeals are three thousand dollars a year, payable in equal quarterly instalments.[1] They must account for and pay to the United States the fees collected by them.[2] It has been held that such a clerk may retain for such fees five hundred dollars a year in addition to his salary.[3]

Their fees have been fixed by the Supreme Court under statutory authority,[4] as follows: "Docketing a case and filing the record, five dollars. Entering an appearance, twenty-five cents. Transferring a case to the printed calendar, one dollar. Entering a continuance, twenty-five cents. Filing a motion, order or other paper, twenty-five cents. Entering any rule or making or copying any record or other paper, for each one hundred words, twenty cents. Entering a judgment or decree, one dollar. Every search of the records of the court and certifying the same, one dollar. Affixing a certificate and a seal to any paper, one dollar. Receiving, keeping and paying money, in pursuance to any statute or order of court, one per cent. on the amount so received, kept and paid. Preparing the record for the printer, indexing same, supervising and printing and distributing the copies, for each printed page of the record and index, twenty-five cents. Making a manuscript copy of the record, when required by the rules, for each one hundred words, but nothing in addition for supervising the printing, twenty cents. Issuing a writ of error and accompanying papers or a mandate or other process, five dollars. Filing briefs for each party appearing, five dollars. Copy of an opinion of the court, certified under seal, for each printed page, but not to exceed five dollars in the

8 Steever v. Rickman, 109 U. S. 74, 27 L. ed. 861.

9 Osborn v. U. S., 131 U. S. cxxxvii, 23 L. ed. 871.

§ 417a. 1 26 St. at L. 826.

2 Ibid.

3 Morton v. U. S., 59 Fed. 349; U. S. v. Morton, C. C. A., 65 Fed. 204.

4 29 St. at L. 536.

whole for any copy, one dollar."[5] When a rule of a Circuit Court required the records in equity cases, upon demurrers and upon rules to show cause to be printed under the clerk's supervision, and the clerk was accustomed in each case to procure extra copies of the record as so printed and to use one of them for the transcript returned to the Circuit Court of Appeals, he was obliged to account to the Government for all received from litigants for such transcripts.[6]

By the Act of February 13, 1911: "In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States Circuit Court of Appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such Circuit Court of Appeals, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such Circuit Court of Appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided,* That either the court below or the Circuit Court of Appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required."[7]

"In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below,

[5] 168 U. S. 720; 150 Fed. cxxxix.

[6] U. S. v. Oliphant, C. C. A., 230 Fed. 1.

[7] July 10, 1911, 36 St. at L. 901.

one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record shall have been printed as herein provided shall be required."[8]

This statute abrogates the fee bill prescribed by the Supreme Court to the extent to which it applies.[9] The statute applies to a decree for an injunction and an accounting,[10] although it may not apply to appeals from every interlocutory decree.[11] It has been held in the Sixth Circuit not to apply to an appeal from an order granting a preliminary injunction upon affidavit.[12] It applies to appeals from and writs of error to adjudications in bankruptcy [13] and to appeals and petitions of revision in bankruptcy proceedings.[14]

The statute abolishes the fee of twenty-five cents a folio for preparing an index when the index has been prepared by the clerk below in pursuance of a rule in the District Court.[15]

8 Ibid., § 2, see Toledo St. L. & K. C. Ry. Co. v. Continental Tr. Co., 176 U. S. 219, 44 L. ed. 442.

9 Rainey v. W. R. Grace & Co., 231 U. S. 704.

10 Lovell McConnell Mfg. Co. v. Auto Supply Mfg. Co., 235 U. S. 383; Smith v. Farbenfrabriken of Elberfeld Co., C. C. A., 197 Fed. 894.

11 Ibid.

12 Ibid.

13 Ibid.

14 Re Burr Mfg. Co., C. C. A., 215 Fed. 898.

15 Rainey v. W. R. Grace & Co., 231 U. S. 704; Smith v. Farbenfabriken of Elberfeld Co., C. C. A., 97 Fed. 894. *Contra*, Colts Patent Firearms Mfg. Co. v. N. Y. S. Goods Co., C. C. A., 186 Fed. 625.

§ 417b. Fees of clerk of Court of Customs Appeals. The Supreme Court has ordered: "that the following table of fees to be charged in the United States Court of Customs Appeals be, and the same is hereby, adopted and approved, viz.: The fees of the clerk of the court shall be six dollars in each case. No fee shall be exacted in cases on appeal to other Federal Courts and transferred to this court for final determination. There shall be paid for each certificate of admission of an attorney to practice one dollar, and for making or copying any record or other paper and certifying the same fifteen cents per folio of one hundred words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his demand, provided that when an appeal is taken by the United States no payment of fees shall be required. In all other cases fees shall be paid in advance. It is further ordered that the fees and costs to be allowed to the marshal shall be, and hereby are, fixed the same as those allowed to the marshal of the Supreme Court of the United States." [1]

§ 417c. Fees of clerks of District Courts. By the Act of June 12, 1917, for the calendar year nineteen hundred and seventeen, and thereafter, "the maximum personal compensation of clerks of United States District Courts shall in no case exceed $3,500 per annum, and that single fees only shall be charged by United States marshals and clerks of United States District Courts against the United States and against private litigants in every judicial district." [1]

The fees of the clerks of the District Courts are fixed by statute as follows: "For issuing and entering every process, commission, summons, capias, execution, warrant, attachment or other writ, except a writ of venire, or a summons or subpœna for a witness, one dollar.[2] For issuing a writ of summons or subpœna, twenty-five cents.[3] For filing and entering every dec-

§ 417b. [1] Order of U. S. S. C., May 31, 1910, 217 U. S. 611.

§ 417c. [1] 40 St. at L. 157; Comp. St. § 1404a. As to fees in naturalization proceedings see Robb v. U. S., C. C. A., 233 Fed. 525.

[2] U. S. R. S., § 828. See Goodrich v. U. S., 47 Fed. 267; Jones v. U. S., 39 Fed. 410.

[3] U. S. R. S., § 828. See Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470; U. S. v. Van Duzee, 140 U. S. 169, 176, 35 L. ed. 399, 401; Jones v. U. S., 39 Fed. 410.

laration, plea, or other paper, ten cents.[4] For administering an oath or affirmation, except to a juror, ten cents.[5] For taking an acknowledgment, twenty-five cents.[6]

For taking and certifying depositions to file, twenty cents for each folio of one hundred words.[7] For a copy of such deposition furnished to a party on request, ten cents a folio."[8] A party

[4] U. S. R. S., § 828. So far as the clerk's fees are concerned, no paper is considered filed unless it has the proper indorsement by the clerk; and the mere placing of a paper in the court papers is no filing. Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470, 484; Henry Amy & Co. v. Shelby County, 1 Flip. 104. But the failure of the clerk to mark as filed a paper left in his office for that purpose cannot prejudice the party who has given it to him. Phinney v. Mutual Life Ins. Co., 178 U. S. 327, 336, 44 L. ed. 1088, 1092. When it is necessary to enter on the calendar a note of such filing, an additional fee of fifteen cents is allowed. Erwin v. U. S. 2 L.R.A. 229, 37 Fed. 470, 484. The clerk is not entitled to a fee for filing vouchers attached to an account. U. S. v. Jones, 147 U. S. 672, 37 L. ed. 325; U. S. v. Payne, 147 U. S. 687, 37 L. ed. 332. See U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; U. S. v. McCandless, 147 U. S. 692, 37 L. ed. 334; U. S. v. Taylor, 147 U. S. 695, 37 L. ed. 335; Goodrich v. U. S., 47 Fed. 267; Dimmick v. U. S., 36 Fed. 82. If two or more depositions are embraced in a single paper or a series of sheets attached together they form but a single paper within the meaning of the law. U. S. v. Barber, 140 U. S. 164, 168, 35 L. ed. 396, 398, *per* Mr. Justice Brown. It has been held that where the statutes are silent as to what papers shall be filed, that rests in the discretion of the judge of the court of first instance and his decision will not be reviewed upon appeal. There the clerk, under the direction of the judge, filed separately 15,621 vouchers filed with the reports of receivers, and charged 10c apiece, in the aggregate $1,562.10, for such filing. The judge overruled the objection of the parties: that the vouchers should not be filed, or, if filed since they were in bundles, should be filed in a bundle as one paper. Pennsylvania Co. for Insurance etc. v. Jacksonville, T. & K. W. Ry. Co., 66 Fed. 421.

[5] U. S. R. S., § 828. See U. S. v. Taylor, 147 U. S. 695, 37 L. ed. 335; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; Fuller v. U. S., 58 Fed. 329.

[6] U. S. R. S., § 828; U. S. v. Barber, 140 U. S. 17, 35 L. ed. 398.

[7] U. S. R. S., § 828. Where a suit is voluntarily dismissed by the complainant, without a submission or hearing, on a settlement of the case at complainant's cost, with consent of the defendant and the attorneys of both parties, the solicitor's fees for taking depositions are not allowable; but the clerk's fees are a proper charge under a decree dismissing the case at complainant's cost. Cahn v. Qung Wah Lung, 28 Fed. 396.

[8] U. S. R. S., § 828.

may tax the fee paid for a copy of his own deposition, for use in printing the evidence, as required by a rule.[9]

"For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents."[10] Where the number of words is less than one hundred, they are counted a folio and as such entry is, in fact, a record, it was held that the departmental construction is the proper one, which gives the clerk ten cents for filing a paper, and fifteen cents for the record entry in the calendar.[11]

A judgment is an order of the court within the meaning of the fee bill.[12]

An entry on the calendar[13] and a list of jurors required by the practice to be posted or preserved[14] is the making of a record for which a fee may be charged. In addition to the statutory fee for receiving, keeping and paying out money the clerk can make this charge per folio for each order or receipt entered or filed in connection with such receipt or payment.[15] This fee is also given for making a return to the court of review.[16]

9 Brewster v. Shuler, 38 Fed. 549; U. S. v. Wilson, 193 Fed. 1007.

10 U. S. R. S., § 828. See Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470.

11 Amy v. Shelby County, 1 Flip. 104. But see U. S. v. Kurtz, 164 U. S. 49, 41 L. ed. 346.

12 Blake v. Hawkins, 19 Fed. 204. See Davis v. U. S., 45 Fed. 162; Goodrich v. U. S., 42 Fed. 392; U. S. v. Taylor, 147 U. S. 696, 37 L. ed. 336; U. S. v. Payne, 147 U. S. 687, 37 L. ed. 332; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; Marvin v. U. S., 44 Fed. 405; Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470; Jones v. U. S., 39 Fed. 410; U. S. v. Converse, 63 Fed. 423; Fuller v. U. S., 58 Fed. 329. The clerk of the United States District Court for the District of New Jersey is entitled to collect from the plaintiff, in an action at law, fees for recording the proceedings and judgments therein in favor of plaintiff; because U. S. R. S., § 914, provides that the pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty, in the District Courts of the United States, shall conform as nearly as may be to the forms and modes of procedure in like causes in the States where such courts are held, and § 76 of the New Jersey General Statutes provides that when any civil action shall have been determined, the clerk of the court shall enter all the proceedings, including the judgment, in a book of records to be kept for that purpose. Morrison v. Bernard's Tp., 35 Fed. 400.

13 Amy v. Shelby County, 1 Flippin 104.

14 Ibid.

15 U. S. v. Kurtz, 164 U. S. 49, 52.

16 Mohrstadt v. Mutual Life Ins.

Where an appellant has filed a *supersedeas* bond, the clerk cannot, as a condition of his certifying and forwarding the transcript, require him to pay the fees which were due to him and the marshal before the appeal.[17]

The Act of February 13, 1911, previously quoted,[18] does not deprive the clerk of this fee for certifying to a printed transcript for the appellant or plaintiff in error.[19] Where an excessive fee is collected for such a service, the clerk must account therefor and pay it to the treasurer.[20]

The clerk may charge fees in an equity cause, as to absent defendants, as to whom the case is continued.[21] Where a case, after being referred to an auditor, is, with the sanction of the court, settled by the parties, and entry made, "Dismissed, at defendant's costs by consent," the process and pleadings in the State court, together with the proceedings for removal sent up in the transcript, and the proceedings in the Federal court, should be entered upon the final record; and the clerk may properly charge fifteen cents per folio for each entry.[22] The clerk is entitled to ten and not to fifteen cents per folio for transcripts of a record.[23] A transcript is a copy.[24]

Upon the admission of an attorney to the bar, not more than one dollar.[25]

"For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony is given three dollars.[26] For mak-

Co., 145 Fed. 751; Hoystradt v. Delaware, L. & W. R. R., 182 Fed. 880.

17 Jennings v. Johnson, C. C. A., 148 Fed. 337.

18 36 St. at L. 901, *supra*, § 417a.

19 Sarfert Co. v. Chipman, 205 Fed. 93; U. S. v. Oliphant, C. C. A., 230 Fed. 1.

20 U. S. v. Oliphant, C. C. A., 230 Fed. 1.

21 *Ex parte* Lee, 4 Cranch, C. C. 197.

22 Blain v. Home Ins. Co., 30 Fed. 667.

23 Cavender v. Cavender, 3 McCrary, 383. See Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470, 490; Jones v. U. S., 39 Fed. 410; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; U. S. v. McCandless, 147 U. S. 692, 37 L. ed. 334; U. S. v. Taylor, 147 U. S. 695, 37 L. ed. 335.

24 Ibid.

25 32 St. at L. 476.

26 U. S. R. S., § 828. See U. S. v. Payne, 147 U. S. 687, 37 L. ed. 332; U. S. v. King, 147 U. S. 676, 37 L. ed. 328; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; U. S. v. McCandless, 147 U. S. 692, 37 L. ed. 334; Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470.

ing dockets and indexing, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars."[27] It has been held in the Ninth Circuit that the petitioner in an application for the writ of *habeas corpus* may be obliged to pay eleven dollars for all services in the proceedings; but that the court has discretion to allow no costs or fees in such a case.[28]

For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.[29] For making dockets and taxing costs, in cases removed by writ of error, or appeal, one dollar.[30] For affixing the seal of the court to any instrument, when required, twenty cents.[31]

For every search for any particular mortgage, judgment, or other lien, fifteen cents.[32] For searching the record of the court for judgments, decrees or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made."[33]

It has been held that the clerk is liable for the damages which are the proximate result of a negligent search by him.[34]

As the statutes do not expressly provide for compensation to the clerk searching for petitions in bankruptcy, it has been held that a reasonable compensation for such services is fifteen cents for each name against which search is made.[35] The clerk of the District Court, instead of certifying the result of a search for liens on the original requisition delivered to him, may, and per-

27 U. S. R. S., § 828.

28 *Re* Moy Chee Kee, 33 Fed. 377.

29 U. S. R. S., § 828; U. S. v. Kurtz, 164 U. S. 49, 41 L. ed. 346; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; Van Duzee v. U. S., 41 Fed. 571.

30 U. S. R. S., § 828. The clerk's fee of one dollar for filing the note of issue when placing an appeal in admiralty on the calendar was taxable, and the clerk could charge for including the evidence in the record on the final decree in admiralty. The Alice Tainter, 14 Blatchf. 225, 227.

31 U. S. R. S., § 828. See Taylor v. U. S., 45 Fed. 531; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; Marvin v. U. S., 44 Fed. 405; Fuller v. U. S., 58 Fed. 329.

32 U. S. R. S., § 828.

33 U. S. R. S., § 828; *Re* Woodbury, 7 Fed. 705; Marvin v. U. S., 44 Fed. 405.

34 Selover v. Sheardown, 73 Minn. 393, 72 Am. St. Rep. 627; s. c., 76 N. W. 50.

35 Matter of Vermeule, 10 Ben. 1.

haps should, file such requisition, and give the certificate of the result of the search on another paper. A charge of ten cents for filing such paper is proper,[36] and so also is a charge of fifteen cents for each person against whom a search is required to be made, as compensation for making the search, and for the act of signing the certificate and certifying the result.[37] A compensation of fifteen cents per folio for making the certificate is proper; but not a charge for affixing the seal of the court to such certificate, unless required.[38]

"For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid."[39] Where an intervenor recovers part of a fund in court the clerk's poundage on the part so recovered is properly deducted therefrom.[40] The clerk is entitled to the fee upon money deposited for bail under a criminal indictment.[41] It has been held that this charge covers money collected by the marshal on executions.[42] These commissions, when due out of a fund in the hands of a public officer, must be paid in the first instance into the treasury.[43]

It has been held: that this charge cannot be made for the services of the clerk when he acts as distributing agent under the direction of the court.[44]

Where a trustee in bankruptcy files a bill in the District Court to settle conflicting claims to the proceeds of a sale, it is not his duty to pay the proceeds into the registry of the court; and consequently the clerk is not entitled to commissions on such money.[45] Money deposited for distribution upon a composition in bankruptcy need not be deposited with the clerk nor is he then entitled to commissions thereupon.[46] It has been held that the fact that the money is subject to the decree of the court, it not being in the court's registry, is not enough to give

36 *Ex parte* Woodbury, 7 Fed. 705.

37 Ibid.

38 *Ex parte* Woodbury 7 Fed. 705; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399.

39 U. S. R. S., § 828. In California two per centum. U. S. R. S., § 840; U. S. v. Walters, 51 Fed. 896.

40 Leary v. U. S., C. C. A., 257 Fed. 246.

41 Beekman v. U. S., 250 U. S. 114.

42 Fagan v. Cullen, 28 Fed. 843.

43 U. S. v. Wolters, 51 Fed. 896. *Contra*, U. S. v. Cigars, 2 Fed. 494.

44 *Re* Newbold, 244 Fed. 888.

45 Leach v. Kay, 2 Flip. C. C. 590.

46 The Adula, 127 Fed. 849.

the clerk a right to commissions.[47] But a subsequent decision holds that money deposited in a bank, under a decree of the court, and subject to its order, is within the meaning of chapter 20 of the acts of 1793, which provides that the clerk shall be entitled to a percentage on "all money deposited in court."[48] He is not entitled to this commission upon a fund paid by a master into a United States depository, subject to the order of the court.[49] Nor upon funds paid to and disbursed by court commissioners;[50] or by receivers who have deposited the same subject to the order of the court in a bank which is not a United States depository.[51] Railroad bonds deposited in a Circuit Court as collateral security by its order, and kept in a bank vault to which the clerk keeps the key, are not "money," and the clerk is not entitled to a commission thereon, when by order of the court he takes them from the bank and surrenders them to the depositor; nor is there any authority outside of the statute for the allowance of such a commission.[52] The money must either actually or constructively pass through the clerk's hands.[53] Money received by a master in chancery in payment for property sold upon the foreclosure of a mortgage, may be deposited with a designated depository of the United States, and the clerk is then entitled to his commission thereon.[54] But money paid by a bidder at such a sale as security for his compliance with his bid may by order of the court be paid in a certified check on a bank, and deposited in a trust company, and then the clerk is not entitled to a commission thereon.[55]

A clerk who receives, keeps, and pays out money under a judgment is entitled to a commission of one per cent. on the amount so received the same to be paid by the defendant as a part of the costs.[56] The court allowed the clerk extra compensation to the amount of one-half of one per cent., for transferring a large fund from the depository of the mint to a trust company.[57]

"For traveling from the office of clerk where he is required to

47 *Ex parte* Plitt, 2 Wall. Jr. 453.

48 *Ex parte* Prescott, 2 Gall. 146.

49 Michigan Cent. R. Co. v. Harsha, C. C. A., 134 Fed. 217.

50 S. Morgan Smith Co. v. Rockingham Power Co., 173 Fed. 923.

51 Edwards v. Bay State Gas Co., 177 Fed. 573.

52 Ibid.

53 Leech v. Kay, 4 Fed. 72.

54 Thomas v. Chicago & C. S. Ry. Co., 37 Fed. 548.

55 Easton v. H. & T. C. Ry. Co., 44 Fed. 718.

56 Blake v. Hawkins, 19 Fed. 204.

57 The Advance, 60 Fed. 422.

reside to the place of holding any court as required by law to be held, five cents a mile for going, and five cents a mile for returning, and five dollars a day for his attendance on the court while actually in session."[58]

"In bankruptcy proceedings clerks shall respectively receive as full compensation for their service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt."[59] They also receive for certificates of search for petitions and discharges in bankruptcy the same fees as for certificates for judgments.[60]

It has been held that the taxable costs earned by clerks, marshals and commissioners are their individual property, not that of the parties to the cause,[61] and that the parties cannot by an agreement as to set-off, or otherwise, deprive the clerk or other creditors of any lien or right to collect their paid fees.[62] It has been said: that the legal title to costs, including the fees of clerks and other officers, is in the successful party; but that he holds the same as trustee, and the officers may recover them in his name.[63] Where the clerk, through a mistake, collected less than his legal fees from a party who afterwards succeeded in the case, he subsequently was allowed to collect the remainder from the unsuccessful party, but not from him who had originally requested the service.[64]

§ 418. Marshals' fees. "The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons, or subpœna for a witness, one dollar for each person on whom such service may be made. His fees for all other services shall be the same as are herein

58 U. S. R. S., § 828. But see 24 St. at L. 253, 541; Erwin v. U. S. 2 L.R.A. 229, 37 Fed. 470; Morrow v. U. S., 44 Fed. 405; U. S. v. Pitman, 147 U. S. 669, 37 L. ed. 324; Goodrich v. U. S., 35 Fed. 193; Pleasants v. U. S., 35 Fed. 770; Jones v. U. S., 21 Ct. Cl. 1; U. S. v. King, 147 U. S. 676, 37 L. ed. 328. See also U. S. R. S., §§ 839-846; 18 St. at L. 333; U. S. v. Hill, 120 U. S. 169, 30 L. ed. 627.

59 30 St. at L. 544, 559, § 52.

60 32 St. at L. 419, 476.

61 Aiken v. Smith, C. C. A., 57 Fed. 423, 425; Hoysradt v. Delaware, L. & W. R. R., 182 Fed. 880.

62 Aiken v. Smith, C. C. A., 57 Fed. 423, 425.

63 Hoysradt v. Delaware, L. & W. R. R., 182 Fed. 880.

64 Ibid.

allowed to other marshals; but he shall pay into the Treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney-General."[1]

The fees of the other United States marshals, which are paid by private litigants, are fixed by statute as follows: "For service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpœna for a witness, two dollars for each person on whom service is made."[2] The marshal has a right to demand in advance the payment of fees for the service of process,[3] and may have an attachment to enforce payment against suitors in the court,[4] or against an indorser on the writ who, by local law, is liable to respond for the costs.[5] "For the keeping of personal property attached on mesne process, such compensation as the court, on petition setting forth the facts under oath, may allow.[6] For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.[7] For serving a writ of subpœna on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness."[8]

"For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ; and for making the service, seizing or levying on property, advertising and disposing of the same by sale,

§ 418. [1] U. S. R. S., § 832.

[2] U. S. R. S., § 829. See Burroughs Bros. Mfg. Co. v. Dulaney, 238 Fed. 255.

[3] Ray v. Knowlton, 11 Biss. C. C. 360; Duy v. Knowlton, 14 Fed. 107.

[4] Anonymous, 2 Gall. 101.

[5] Ibid.

[6] U. S. R. S., § 829. The marshal's fees for the custody of goods in cases of seizure, and other proceedings *in rem*, are not discretionary, but are dependent upon the precise regulations of law, or, in the absence of such regulations, are to be allowed upon the principle of a *quantum meruit*, graduated by the ordinary value of similar services and dependent upon the circumstances of each particular case. Where such fees are not regulated by law, an auditor should pass upon them. Bottomley v. U. S., 1 Story (Mass.) 135, 153. The marshal is entitled to be paid his fees at the time he delivers up the property to the person entitled to receive it. The Georgeanna, 31 Fed. 405. The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody. The Perseverance, 22 Fed. 462.

[7] U. S. R. S., § 829.

[8] U. S. R. S., § 829.

set-off, or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered."[9] The fees for services of a deputy marshal belong legally to the marshal, and he controls them, and his receipt must operate as a discharge of the fees.[10] No fee is allowed for service of a writ or warrant unless actually executed.[11]

The marshal may charge poundage on the debt, if authorized by State laws, where an insolvent is discharged from imprisonment by the Secretary of the Treasury on payment of costs.[12] Where a marshal who levied the execution has received his half commissions, his successor will be entitled to no more than his half commissions, for collecting and paying it over.[13] Where the

[9] U. S. R. S., § 829; Pomeroy v. Harter, 1 McLean (Ind.) 448.

[10] Wintermute v. Smith, 1 Bond 210.

[11] *Ex parte* Paris, 6 W. & M. 227.

[12] Townsend v. U. S., 1 U. S. L. J. 534b. For cases in which the marshal is entitled to poundage, see U. S. v. Ringgold, 8 Pet. 150; Causin v. Chubb, 1 Cranch, C. C. 267; Ringgold v. Glover, 2 Cranch, C. C. 427; U. S. v. Smith, 3 Cranch, C. C. 66; Mason v. Muncaster, 3 Cranch, C. C. 403; Ringgold v. Lewis, 3 Cranch, C. C. 367; Swann v. Ringgold, 4 Cranch, C. C. 238.

[13] 15 Op. Aty. Gen. 346. The marshal is not entitled to fees where no property is sold nor any money received under an execution. Irwin v. Cummings, Hempst. 703. Otherwise where money is paid, though no sale is necessary. Pomeroy v. Harter, 1 McLean (Ind.) 448. The marshal cannot charge interest on his fees, although he may on his disbursements. *Re* Donahue, 8 Bankr. Reg. 453. If the State Court compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation. Pomeroy v. Harter, 1 McLean (Ind.) 448; The Trial, 1 Blatchf. & H. 94. When an execution against the person was issued in the county of New York, the defendant held under arrest for some time, and the action subsequently settled by a compromise, the defendants paying a smaller sum than that specified in the execution, it was held that the marshal was entitled to poundage on the whole amount for which the execution issued; and that the rate of poundage should be that allowed the sheriffs in the different counties throughout the State, and not the special rate allowed in the county of New York. U. S. v. Haas, 5 Fed. 29. In the Southern District of New York, where an execution was stayed and set aside for a defect appearing upon its face, it was held that the marshal who had made a levy was entitled to his fees, but to no poundage. Amato v. Jacobus, C. C. A., 58 Fed. 855, in which the author was counsel. When the marshal ex-

case was removed after the levy of an attachment, it was held that the poundage should be equally divided between the sheriff and the marshal.[14]

"For each bail-bond, fifty cents.[15] For summoning appraisers, fifty cents each.[16]

"For executing a deed by a party or his attorney, one dollar.[17] For drawing and executing a deed, five dollars." [18] The marshal cannot object to the purchaser's drawing his own deed if he choose.[19]

"For copies of writs or papers furnished at the request of any party, ten cents a folio.[20]

"For every proclamation in admiralty, thirty cents.[21]

"For serving an attachment *in rem* or a libel in admiralty, two dollars." [22] The marshal may charge for copies of libels in admiralty, service in newspapers and by posting, at the rates charged for similar service by officers of the State courts.[23] Where process *in rem* is issued against a vessel, but before process is served the claimant, waiving service, gives a bond under section 941 of the Revised Statutes, and the case proceeds to final decree, no actual seizure having been made by the marshal, he is still entitled to his fees on the settlement of the case.[24] It is not necessary that there should be a sale in order to entitle him to his fees.[25]

"For the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day." [26]

An agreement with the marshal to pay more than the statutory fee for such services is against public policy and cannot be enforced.[27]

tends an execution on real estate for the government he is entitled to his fees, though the land is not yet sold or redeemed, nor in any way converted into money. U. S. v. Smith, 44 Fed. 405.

14 Duryee v. International Mach. & Eng. Co. (D. C., S. D. N. Y.) January, 1912.

15 U. S. R. S., § 829.

16 U. S. R. S., § 829.

17 U. S. R. S., § 829.

18 U. S. R. S., § 829.

19 The John E. Mulford, 18 Fed. 455.

20 U. S. R. S., § 829.

21 U. S. R. S., § 829.

22 U. S. R. S., § 829.

23 Lovering v. U. S., 117 Fed. 565.

24 The city of Washington, 13 Blatchf. 410.

25 The Captain John, 41 Fed. 147.

26 U. S. R. S., § 829.

27 The Neptune, C. C. A., 252 Fed. 129.

On delivering up the property the marshal may demand his fees of the person entitled to recover it.[28] He must take actual possession of the vessel, or he is not entitled to fees.[29] He may take such possession as to render him liable to the parties, and yet not be entitled to fees.[30]

The marshal's actual expenses for ship-keeping must, by vouchers, &c., be established to be necessary to the satisfaction of the court.[31] The approval by the district attorney of the employment of extra keepers will not be sufficient to establish the right of the marshal to an allowance for the employment of such extra keepers.[32] Notwithstanding the limit named in this clause, the marshal will be allowed the extra cost of dockage of a vessel seized while on a marine railway from which she could not be removed without danger of sinking.[33]

The libelant must get an order from the court directing the withdrawal of the keeper, if he would not be liable for keeper's fees should he lose the suit. Mere notice to the marshal is not enough.[34] If the parties agree that the vessel shall be four months in the marshal's charge, the sum actually paid a watchman by him is taxable as part of the costs, even though the claimant also had a keeper on the vessel.[35] Entry by the marshal into the bonded warehouse where the goods are stored, and levying of process against and affixing a notice of seizure upon such property, is an attachment upon the property within the meaning of the statute; and the custody fees of a keeper who visited the storehouse three times a day, though he did not enter, are taxable as costs.[36] The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody.[37] Nor will the court allow the marshal five dollars a day on the ground that two men were employed to watch,—one by day and one by night.[38] But two dollars and fifty cents a day is not the absolute limit, and more will be allowed in the case of danger from thieves, and in other

28 The Georgeanna, 31 Fed. 405.

29 The Hibernia, 1 Sprague, 78.

30 Ibid.

31 The Free Trader, 1 Brown, Adm. 72.

32 The Captain John, 41 Fed. 147, 149; The Perseverance, 22 Fed. 462.

33 The Novelty, 9 Ben. 195.

34 The Independent, 9 Ben. 489.

35 The San Jacinto, 30 Fed. 266.

36 Jorgenson v. Casks of Cement, 40 Fed. 606.

37 The Perseverance, 22 Fed. 462.

38 Ibid.

emergencies requiring more than one man to guard the property; since the marshal is bound to protect from damage a vessel in his custody.[39]

When a marshal has done his work in a defective manner, and additional labor becomes necessary in consequence, no compensation for the latter should be allowed.[40]

A marshal, being the party served, is not entitled to fees for serving a warrant for the delivery of a vessel to the claimant issued upon a stipulation of the parties; but he is entitled to be reimbursed for any expenses he is put to on account of having been served with such warrant.[41]

When a vessel sinks without the fault of the marshal after it has been attached he can charge the cost of raising and beaching.[42] The proper charge for this should ordinarily be determined upon a reference and not upon affidavit.[43] The cost of pumping out a vessel in charge of the marshal is properly allowed against the claimants in admiralty.[44]

If, in the estimation of the court, it was, under the circumstances, prudent for the marshal to remove and insure property in his possession, he will be allowed the expenses necessarily incurred thereby.[45] And he should insure it with reference to its actual market value, irrespective of its original cost.[46] The marshal is also entitled to be reimbursed for his expenses in hiring wharfage for a vessel in his custody, when such a course appears to have been necessary.[47]

If several processes are issued against one vessel, and the marshal has possession under all the processes, the *per diem* custody fees should be apportioned equally among the claimants, saving to the marshal, in case any party fails to pay his proper proportion, a remedy against the other parties for the amount.[48]

"When the debt or claim in admiralty is settled by the parties

39 Ibid.

40 The Nellie Peck, 25 Fed. 463.

41 The Jeanie Landles, 17 Fed. 91.

42 The Neptune, C. C. A., 252 Fed. 129.

43 Ibid.

44 The Captain John, 41 Fed. 147.

45 U. S. v. Three Hundred Barrels of Alcohol, 1 Ben. 72.

46 Ibid.

47 The Novelty (Steamboat), 9 Ben. 195. But see The F. Merwin, 10 Ben. 403.

48 The Circassian, 6 Ben. 512; The John Walls, Jr., 1 Spr. 178.

without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: *Provided*, that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof."[49] The word "claim" as here used applies equally to "a claim of forfeiture to the United States, in a proceeding *in rem* against a vessel," as well as to cases where the demand or claim is personal in its nature.[50] The sum paid a libelant in settlement of his claim, and not the amount claimed in the libel, is the basis upon which the marshal's commissions are to be determined.[51] The issuing of a process and the giving of a bond under section 941 of the Revised Statutes to the marshal will entitle him to his commissions in a suit *in rem* against a vessel under this clause, although the service of the process be waived and seizure of the vessel be not actually made. If the amount of the final decree is paid before execution, that is such a settlement of the claim as will entitled the marshal to his commissions.[52] So if part of the goods are sold or there is a part-payment in settlement, the marshal will be entitled to his commissions *pro rata*.[53]

Where a vessel is sold by a trustee under the limited liability act, the marshal is not entitled to a commission.[54]

"For sale of vessels or other property under process in admiralty or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars."[55]

The marshal is entitled to have the commissions included in the decree as part of the costs.[56]

The marshal is not authorized by law to employ an auctioneer

[49] U. S. R. S., § 829.

[50] The Captain John, 41 Fed. 147, 151.

[51] Robison v. Bags of Sugar, 35 Fed. 603; The Clintonia, 11 Fed. 740.

[52] The City of Washington, 13 Blatchf. 410. Compare Bone v. The Norma, Newb. Adm. 533. And see The Clintonia, 11 Fed. 740, citing the Russia, 5 Ben. 84; Robison v. Bags of Sugar, 35 Fed. 603.

[53] Swann v. Ringgold, Cranch, C. C. 246.

[54] The Vernon, 36 Fed. 113.

[55] U. S. R. S., § 829.

[56] The Enos, C. C. A., 251 Fed. 45; s. c. 245 Fed. 814.

to make sales under process or decree in admiralty; and if he employs one, he can make no charge for the services of such auctioneer which he could not otherwise have charged. Nor can he make such charge by a notice prior to the sale, that an auctioneer's fee will be required of the purchaser in addition to his bid.[57] Where a marshal has been paid his fees and commissions on the sale of a vessel under decree, and a claimant files a petition on which monition is issued, asking that the balance of the proceeds be paid to him, and the court so orders, the marshal cannot claim an additional commission on the amount paid by the claimant.[58] Upon an interlocutory sale of prize property, the marshal is entitled to full commissions.[59] So if the property is removed to and sold in another district.[60] The marshal's title to commissions accrues at the time of the sale, and he is entitled to deduct his fees at the time when he pays the proceeds into court.[61] If, by agreement of parties, the vessel is sold outside of the territorial limits of the marshal's authority, he is, nevertheless, entitled to his fees.[62] The marshal may be allowed compensation, in addition to his statutory fees, for services rendered in transferring a prize to another district under the order of the court.[63]

"For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others.[64] But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two

57 The John C. Mulford, 18 Fed. 455; Crofut v. Brandt, 13 Abb. Pr. (N. S.) 132.

58 The Colorado, 21 Fed. 592.

59 The Avery, 2 Gall. 308.

60 The San Jose Indiano, 2 Gall. 311.

61 The Avery, 2 Gall. 308.

62 The San Jose Indiano, 2 Gall. 311.

63 The Adula, 127 Fed. 839. *Cf.* U. S. R. S., § 4629.

64 U. S. R. S., § 829. The marshal is allowed mileage for actual travel in enabling him to make a return of *nulla bona*. Anon., Hempst, 450.

of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit." [65] Mileage is to be computed from the place where the process is returned to the place of service. The "place of return" is the place where the process is issued.[66] Mileage is computed upon the ordinary railroad route, if traversed by the marshal, although there is a shorter railroad, upon which trains run much less often.[67] The prevailing party cannot tax the fees of the marshal for serving subpœnas on witnesses residing without the district and more than 100 miles from the place of trial.[68] "In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court." [69]

§ 418a. Fees of United States commissioners. By the act of May 28, 1896, which provides for the appointment of United States Commissioners: "The terms of office of all commissioners of the circuit courts heretofore appointed shall expire on the thirtieth day of June, eighteen hundred and ninety-seven; and such office shall on that day cease to exist, and said commissioners shall then deposit all the records and other official papers appertaining to their offices in the office of the clerk of the circuit court by which they were appointed. All proceedings pending, returnable, unexecuted or unfinished at said date before any such

[65] U. S. R. S., § 829. See U. S. v. Harmon, 147 U. S. 268, 37 L. ed. 164; U. S. v. Fletcher, 147 U. S. 664, 37 L. ed. 322. He is not entitled to constructive mileage, and his actual traveling expenses must be divided among the causes in his hands to serve at the same time. *Re* Donahue, 8 Bankr. 453. Should the marshal arrest the wrong person, he is not entitled to fees of any kind; nor will he be allowed additional mileage for transporting a prisoner to a particular place by any other than the usual route of travel to that place. Matter of Crittenden, 2 Flippin, 212. He may charge actual expenses for serving a monition instead of the statutory mileage. The Wavelet, 25 Fed. 733. This statute applies to civil, as well as criminal, cases. National Bank of Commerce v. Cleveland, 156 Fed. 251.

[66] Matter of Crittenden, 2 Flip. 212.

[67] Lovering v. U. S., 117 Fed. 565.

[68] U. S. v. Southern Pac. Co., 172 Fed. 909.

[69] U. S. R. S., § 829. Generally the marshal should not be allowed any charges that are not expressly granted by statute. The John E. Mulford, 18 Fed. 455; Crofut v. Brandt, 13 Abb. Pr. (N. S.) 132.

commissioner shall be continued and disposed of according to law by such commissioner appointed as herein provided as may be designated by the district court for that purpose. It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States commissioners, at such places in the district as may be designated by the district court, which United States commissioners shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit court. The appointment of such United States commissioners shall be entered of record in the district courts, and notice thereof at once given by the clerk to the Attorney-General. That such United States commissioners shall hold their offices, respectively, for the term of four years but they shall be at any time subject to removal by the district court; and no person shall at any time be a clerk or deputy clerk of a United States court and a United States commissioner without the approval of the Attorney-General: Provided, That all Acts and parts of Acts applicable to commissioners of the circuit courts, except as to appointment and fees, shall be applicable to United States commissioners appointed under this Act. Warrants of arrest for violations of internal-revenue laws may be issued by United States commissioners upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector or deputy collector of internal revenue, or revenue agent, or private citizen; but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney. That United States commissioners and all clerks and all deputy clerks of United States courts are hereby authorized to administer oaths." [1]

"Each United States commissioner shall be entitled to the following-named fees, and none other: Drawing a complaint, with oath and jurat to same, fifty cents; copy of complaint, with certificate to same, thirty cents; issuing warrant of arrest, seventy-five cents; issuing a commitment and making copy of same, one dollar; entering a return, fifteen cents; issuing subpœna or subpœnas in any one case, with 5 cents for each necessary witness in addition to the first, twenty-five cents; drawing a bond of de-

§ 418a. [1] Act of May 28, 1896, ch. 252, § 19, 29 St. at L., 184 Comp. St. §§ 1333, 1677, see *infra*, Chapter XXXI.

fendant and sureties, taking acknowledgment of same and justification of sureties, seventy-five cents; for administering an oath (except to witness as to attendance and travel), ten cents; recognizance of all witnesses in a case, when the defendant or defendants are held for court, fifty cents; transcripts of proceedings, when required by order of court and transmission of original papers to court, sixty cents; copy of warrant of arrest, with certificate to same, when defendant is held for court, and the original papers are not sent to court, forty cents; order in duplicate to pay all witnesses in a case: For first witness, thirty cents, and for each additional witness, five cents, and for oath to each witness as to attendance and travel, five cents; for hearing and deciding on criminal charges and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed: Provided, That not more than one per diem shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be specially approved and allowed by the court: Provided further, That not more than one per diem shall be allowed for any one day: Provided further, That no per diem shall be allowed for taking a bond or recognizance and passing on the sufficiency of the bond or recognizance and the sureties thereon when the bond or recognizance was taken after the defendant had been committed to prison upon a final commitment, or has given bond or been recognized for his appearance at court, or when the defendant has been arrested on a capias or bench warrant, or was in custody under any process or order of a court of record. For the examination and certificate in cases of application for discharge of poor convicts imprisoned for nonpayment of fine or fine and costs, and all services connected therewith, three dollars; for attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day; for taking and certifying depositions to file in civil cases, ten cents for each folio; for each copy of the same furnished to a party on request, ten cents for each folio: for issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any parties charged with any crime or offense set forth in said article, two

dollars; for issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington, November ninth, eighteen hundred and forty-three, two dollars; for hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

"Such commissioners shall keep a complete record of all proceedings before them in criminal cases, in a well-bound book, which record book shall be delivered to and preserved by the clerk of the District Court for such district on the death, resignation, removal, or expiration of term of the commissioner, for which record the commissioners shall receive no compensation."[2]

This statute does not repeal by implication the authority of notaries public to take depositions in the same manner as Commissioners of the United States Circuit Courts[3] and to charge twenty cents a folio for the original transcript.[4]

Upon delivering to the District Court the wages and effects of a seaman who has died a Shipping Commissioner is entitled to a fee of two dollars and a commission of one per cent. upon the amount of such wages.[5]

§ 418b. Fees of masters, referees, commissioners, examiners, notaries, auditors and consuls. The legal fees paid to masters,[1] referees,[2] examiners,[3] commissioners,[4] and auditors[5] can be taxed. The compensation of masters has been previously explained. In taxing the fees of a referee in an action at common law as well as in a suit in equity, the Federal Court is not bound to follow the State Statute upon the subject; but may allow a reasonable compensation, in estimating which it should consider

2 29 St. at L. 184. § 21 Comp. St. §§ 652, 1451.

3 19 St. at L. 206, see U. S. R. S., § 847.

4 Am. Bank Protection Co. v. City Nat. Bank., 203 Fed. 715.

5 *Re* Johnson, 251 Fed. 319.

§ 418b. 1 *Supra*, §392.

2 N. J. Terminal Dock & Imp. Co. v. Estates of Long Beach, 179 Fed. 973.

3 Edison El. Lt. Co. v. Mather El. Co., 63 Fed. 559; Indianapolis Water Co. v. Am. S. B. Co., 65 Fed. 534.

4 Tesla El. Co. v. Scott, 101 Fed. 524.

5 Fenno v. Primrose, C. C. A., 119 Fed. 801, 807; Hulihan v. Corporation of St. Anthony in New Bedford, 173 Fed. 496.

the amount involved and the benefit to both parties, as well as the time devoted to the case and the amount that could be charged a client for the same labor.[6] In the Second Circuit examiners' fees are three dollars a day, and thirty cents a folio for typewriting the testimony.[7] Where witnesses were sworn in three cases and testified but once; in the First Circuit the master was allowed a fee of three dollars a day for attendance, twenty cents a folio for certifying and filing in one case and in other cases ten cents a folio.[8] In the District of Indiana, where a stenographer had been appointed special examiner he was allowed the fees paid under the State practice for similar services.[9] In the First Circuit the examiner is allowed ten cents a folio for a copy of the testimony for the use of counsel.[10]

When a deposition is taken by consent before a consul, the consular fees as fixed by statute, not merely those allowed to a commissioner, are taxed.[11]

§ 418c. Stenographers' fees. "When deemed necessary by the equity court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript."[1] The same rule applies to a proceeding before an auditor or referee in an action at common law, whether the stenographer is selected by the auditor or by the parties.[2]

6 N. J. Terminal Dock & Imp. Co. v. Estates of Long Beach, 179 Fed. 973, where the referee's fees were taxed at $1,000.

7 Edison El. Lt. Co. v. Mather El. Co., 63 Fed. 559.

8 L. E. Waterman Co. v. Lockwood, 128 Fed. 174, 176.

9 Indianapolis Water Co. v. Am. S. B. Co., 65 Fed. 534. But see German v. Stewart, 12 Fed. 271.

10 L. E. Waterman Co. v. Lockwood, 128 Fed. 174, 176.

11 Duplex Metals Co. v. Standard Underground Co., 218 Fed. 269.

§ 418c. 1 Eq. Rule 50.

2 *Re* Peterson, S. C. V. S., June 1, 1920. It seems that this State practice should be followed in taking such an item in an action at common law. Ibid, Corporation of St. Anthony in New Bedford v. Houlihan, C. C. A., 184 Fed. 252. In the Second Circuit, where the plaintiffs therein had paid for the stenographer's minutes, he was directed to report them to the court for filing, but a motion to make them a part of the judgment rule was denied unless the defendants should advance the fees therefor. Alder v. Edenborn, 198 Fed. 928.

The former practice was that before the final determination of the suit each party was obliged to advance the costs and expenses made by himself, namely, master's and stenographer's fees, the direct and redirect examination of his witnesses, and the cross and recross examination of those called by his opponent and his own adjournments.[3] In the Second Circuit, it is customary for the parties to divide the expense of the services of the stenographer upon a trial at common law and for the party who obtains a copy of the minutes to pay the additional charge for transcribing the same,[4] and if this is done by agreement the successful party can tax what he has advanced for this purpose.[5] Otherwise they cannot be taxed,[6] except when there is a writ of error. In the latter case the stenographer's fees for a copy of the minutes used not on the trial but in preparing the bill of exceptions or transcript may be taxed in the court of review.[7]

It has been said that even in an equity case, if the unsuccessful party wishes the testimony for an appeal, he must secure that for himself.[8] Except by consent, the cost of copies of stenographer's minutes obtained for the use of counsel in preparation for trial or for cross-examination or for argument can not be taxed.[9] These unfortunate decisions which seem to be justified by the precedents in the State courts should be abrogated by a rule permitting the court in its discretion to tax such a disbursement; since at the present time parties who are poor are thus hampered in bringing out the truth by cross-examination and consequently the court and jury too often receive a full presen-

3 MacDonald v. Shepard, 10 Fed. 919; Brickill v. Mayor, 55 Fed. 565; U. S. Printing Co. v. Am. Playing Card Co., 81 Fed. 506; Panoulias v. Nat. Equipment Co., 227 Fed. 1008; but see Urner v. Kayton, 77 Fed. 539.

4 Sedlacek v. Bryan, 192 Fed. 361. Where the successful party furnished a copy of the evidence to the other, it was held that he might tax ten cents a folio for the same.

5 L. E. Waterman Co. v. Lockwood, 128 Fed. 174; Sedlacek v. Bryan, 192 Fed. 361.

6 Ibid.

7 White v. Upper Hudson Stone Co., C. C. A., 2nd Ct. Jan. 2, 1918, not reported. *Contra*, Manahan v. Godkin, 100 Fed. 196.

8 L. E. Waterman Co. v. Lockwood, 128 Fed. 174.

9 The William Branfoote, C. C. A., 52 Fed. 390; Atwood v. Jacques, 63 Fed. 561; Roundtree v. Reinbert, 71 Fed. 255; Kelly v. Springfield Ry. Co., 83 Fed. 183; Tesla El. Co. v. Scott, 101 Fed. 524; Sedlacek v. Bryan, 192 Fed. 361; Stallo v. Wagner, C. C. A., 245 Fed. 636, 641. For the construction of a stipulation, see *Re* Pearce, 235 Fed. 917.

tation of no evidence except that which supports the case of the defendant. In the Southern District of New York stenographer's fees for reporting testimony in admiralty are taxable when ordered by the court.[10]

§ 419. Witness fees. The fees of a witness are, "for each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning."[1]

By the act of May 27, 1908: "Jurors and witnesses in the United States courts, in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado and Utah, and in the territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance, and five cents for each mile by any railway or steamship in going to and returning from said courts: Provided, that no constructive or double mileage fee shall be allowed by reason of any person being summoned as both a witness and juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof."[2] It has been held that this fee cannot be taxed for the attendance of a witness before a commissioner upon the taking of his deposition in admiralty.[3]

Jurors and witnesses in the District Court of the United States for Porto Rico shall be entitled to and receive 15 cents for each mile necessarily traveled over any stage line or by private conveyance and 10 cents for each mile over any railway in going to and returning from said courts. But no constructive or double mileage fees shall be allowed by reason of any person being summoned both as witness and juror or as witness in two or more cases pending in the same court and triable at the same term

10 The E. Luckenback, 19 Fed. 847; Rogers v. Brown, 136 Fed. 813. An oral order in open court is sufficient. Ibid.

§ 419. 1 U. S. R. S., § 848. This includes attendance in a foreign country under a *dedimus potestatem*; Agius v. Perkins Co., 151 Fed. 958.

2 Act of May 27, 1908, ch. 200, § 1, 35 St. at L. 377, Comp. St. § 1453.

3 The Mary, 233 Fed. 121.

thereof. Such jurors shall be paid $3 per day and such witnesses $1.50 per day while in attendance upon the court.[4]

Payments for examining property as to which they testify [5] or for services as experts [6] cannot be taxed.

When a witness is detained in prison for want of security for his appearance, he is entitled, in addition to his subsistence, to a compensation of one dollar a day.[7]

When a witness is subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation are allowed for attendance.[8] Both are taxed in the case first disposed of, after which the fee for *per diem* attendance alone is taxed in the other cases in the order in which they are disposed of.[9] It has been held that he doesn't suffer any abatement of his compensation because he is summoned to attend at the same time to testify in several suits, when some but not all the parties are the same; [10] and even if the parties are the same, when both suits are tried together, and the witness is examined but once, he is entitled to fees in each case; provided no order consolidating the suits has been obtained.[11] It has been held that in all such cases the fees, if paid, can be taxed, provided the witnesses were in good faith asked to attend.[12]

When the trial is postponed because of the illness of counsel,[13] or delay in the transmission of a deposition taken by the other side,[14] and the witnesses are required to remain during the postponement, they must be paid for the intervening time. So, also, when the witnesses are required to remain after their examination to the end of the hearing.[15]

Fees for travel of a witness in going and returning can only

4 Act of March 2, 1917, ch. 145, § 47, Comp. St. § 3803.

5 Tuck v. Olds, 29 Fed. 883.

6 Bone v. Walsh Const. Co., 235 Fed. 901.

7 U. S. R. S., § 848.

8 U. S. R. S., § 848.

9 U. S. R. S., § 848.

10 Parker v. Bigler, 1 Fish. 285; The Vernon, 36 Fed. 113; Archer v. Hartford F. Ins. Co., 31 Fed. 660. But see Simpkins v. Atchison T. & S. F. Ry. Co., 61 Fed. 999.

11 L. E. Waterman Co. v. Lockwood, 128 Fed. 174. *Contra,* The Vera, C. C. A., 229 Fed. 557.

12 The Vernon, 36 Fed. 113; Archer v. Hartford F. Ins. Co., 31 Fed. 660; U. S. v. Miller, 223 Fed. 183.

13 Whipple v. Cumberland C. Mfg. Co., 3 Story, 84.

14 Hunter v. Russell, 59 Fed. 964.

15 Whipple v. Cumberland C. Mfg. Co., 3 Story, 84.

be taxed once for each occasion of taking testimony, although each occasion embraces a number of days;[16] unless his second attendance was required by an adjournment caused by the fault of the unsuccessful party, when his traveling fees may be taxed for his attendance at such adjourned day if incurred.[17]

Witnesses summoned and attending court are entitled to their mileage and *per diem* fees if the cause was docketed and could have been tried at the term at which the witnesses attended.[18]

If a witness is subpœnaed at the place of trial on the day when the subpœna requires him to attend, he is not entitled to any mileage.[19]

Where witnesses were subpœnaed to testify to a particular point, although the opposite party admitted the point, mileage and *per diem* fees up to the time of such admission were allowed;[20] and a second trial being had, and no stipulation or entry made on the record that the point would be admitted at the second trial, such *per diem* and mileage fees were allowed for attendance at the latter trial also.[21]

But it has been held, on the other hand, that a party may not tax the fees of a witness whom he has subpœnaed, but whose testimony is either abandoned or stricken out.[22] Nor the fees of witnesses upon a distinct and unrelated count [23] cause of action [24] upon which the party in whose name judgment was entered did not succeed. Nor may he tax the fees of more than three witnesses to a single fact;[25] nor fees and mileage for himself when he testified in his own behalf;[26] nor fees which he has not paid.[27] The master and crew of a vessel may be allowed their witness

16 Spill v. Celluloid Mfg. Co., 28 Fed. 870.

17 Hake v. Brown, 44 Fed. 734.

18 Young v. Merchants' Ins. Co., 29 Fed. 273.

19 The Sunnyside, 5 Ben. 162.

20 Young v. Merchants' Ins. Co., 29 Fed. 273.

21 Ibid.

22 Troy I. & N. Factory v. Corning, 7 Blatchf. 16; The Persiana, 158 Fed. 912.

23 U. S. v. Miller, 233 Fed. 183.

24 U. S. v. Minneapolis, St. P. & S. S. M. Ry. Co., 235 Fed. 951.

25 Bussard v. Catalino, 2 Cranch, C. C. 521.

26 Nichols v. Brunswick (D. Mass.), 3 Cliff, 88; Roundtree v. Rembert (D. S. C.), 71 Fed. 255; L. E. Waterman Co. v. Lockwood (D. Mass.), 128 Fed. 174. *Contra*, Tuck v. Olds, 29 Fed. 883, W. D. Michigan.

27 Leary v. Miranda, 40 Fed. 607; O'Neil v. Kansas City S. & M. R. Co., 31 Fed. 663.

fees in a suit for collision when their only interest is the value of their personal effects which were lost.[28]

It has been held that fees and mileage may be taxed for the attendance as witnesses of officers of a corporate defendant,[29] but not where a defendant corporation was ordered to account before a master in a suit for an infringement of a patent.[30]

Only the necessary expenses of a government clerk sent away from his place of business as a witness for the government will be paid to him, and nothing can be taxed in the bill of costs for his travel or attendance.[31] The same rule applies to deputy-clerks, as they are also officers of the court.[32] But clerks employed by the marshal in his office, keeping his accounts, are not officers of the court, and are entitled to fees and mileage.[33] A deputy-marshal is an officer of the court; but unless he is actually engaged in attendance upon the court, he is entitled to *per diem* fees and mileage, if summoned as a witness by the government.[34] It has been held that the United States may tax the necessary expenses of an employee who attended as a Government witness at a place distant from his office, irrespective of the distance traveled by him.[35]

The mile is computed upon the shortest, most practical and ordinary route, although the witness traversed a longer distance.[36] A witness can be subpœnaed and must be allowed mileage from and to his residence, in any part of a district to attend a court held with that district,[37] or from another district if he does not reside more than one hundred miles from the place of trial.[38] The authorities conflict upon the question, whether when a witness in a civil case who resides more than one hundred miles from the place of trial voluntarily attends his mileage for more

28 The Teaser, C. C. A., 22 Fed. 13.

29 Wead v. Millersburg H. W. Co., 79 Fed. 129.

30 Am. Diamond Drill Co. v. Sullivan Mach. Co., 32 Fed. 552.

31 U. S. R. S., § 850; U. S. R. S., § 849; U. S. v. Sanborn, 28 Fed. 299.

32 *Ex parte* Burdell, 32 Fed. 681.

33 Ibid.

34 Ibid.

35 U. S. v. National Surety Co., 168 Fed. 314.

36 Jennings v. Menaugh, 118 Fed. 612; Hunter v. Russell, 59 Fed. 964.

37 The Syracuse, 36 Fed. 830; Sims v. Schult, 40 Fed. 143; Hunter v. Russell, 59 Fed. 964. But see Smith v. Chicago & N. W. Ry. Co., 38 Fed. 321; Holmes v. Sheridan, 1 Dill, 421, note. See Manufacturing Co. v. Saliers, 6 Cent. L. J. 82.

38 U. S. R. S., § 876; The Syracuse, 36 Fed. 830.

than one hundred miles can be taxed.[39] A witness does not lose his right to his fees merely because he was not subpœnaed, if his attendance and examination were procured in good faith.[40]

Where a party has paid some witnesses more and some less than the legal fees, he cannot group together the amounts so paid and collect the legal fees for all.[41]

Witness fees incurred, but not paid, have been taxed.[42]

39 According to the rulings in the First Circuit, a witness is entitled to mileage from his residence, no matter how far distant it may be, Prouty v. Draper, 2 Story, 199; Whipple v. Cumberland Cotton Mfg. Co., 3 Story, 84; Hathaway v. Roach 2 W. & M. 63; U. S. v. Sanborn, 28 Fed. 299; The City of Augusta, C. C. A., 80 Fed. 297, 303; Davis v. Smith, 199 Fed. 538. But see The Gov. Ames, C. C. A., 187 Fed. 40, 49. Even when he has not been served with a supœna. U. S. v. Sanborn, 28 Fed. 299. It was held by the District Court for South Carolina that a witness for the United States, voluntarily coming to and attending court on the verbal instructions of the district attorney, is entitled to the *per diem* and mileage fees, although his residence is out of the district, and more than one hundred miles from the place at which the court is held. *Re* Williams, 37 Fed. 325. It has been held that, when the witness lives without the district, mileage for only one hundred miles can be taxed: in the Second Circuit Anon., 5 Blatchf. 134; Eastman v. Sherry, 37 Fed. 844; The Vernon, 36 Fed. 113; Haines v. McLaughlin, 29 Fed. 70; Buffalo Ins. Co. v. Prov. & Stonington S. S. Co., 29 Fed. 237; Wooster v. Hill, 44 Fed. 819; the Third Circuit, The Progesso, 48 Fed. 239; The Fourth Circuit in a civil case, Sloss I. & S. Co. v. South Carolina & G. R. Co., 75 Fed. 106; the Sixth Circuit, Woodruff v. Barney, 1 Bond 528, Fed. Cas. 17, 986; The Vernon, 36 Fed. 113, Burrows v. Kansas C. Ft. S. & M. R. Co., 54 Fed. 278. In the Seventh Circuit, Marks v. Merrial Paper Co., C. C. A., 203 Fed. 16. (In Dreskill v. Parish, 5 McLean 213, it was held that in such a case no fees or mileage could be taxed, see Smith v. Chicago & N. W. Ry. Co., 38 Fed. 321); in the Eighth Circuit, Pinson v. Atchison T. & S. F. R. Co., 54 Fed. 464; U. S. v. Green, 196 Fed. 255; and the Ninth Circuit, Spaulding v. Tucker, 2 Sawyer 50; Haines v. McLaughlin, 29 Fed. 70; U. S. v. Southern Pac. Co., 172 Fed. 909; U. S. v. Southern Pac. Co., 230 Fed. 270.

40 Anderson v. Moe, 1 Abb. (U. S.) 299; U. S. v. Sanborn, 28 Fed. 290; The Vernon, 36 Fed. 113; The Syracuse, 36 Fed. 830; Eastman v. Sherry, 37 Fed. 844; Simpkins v. Atchison T. & S. F. R. Co., 61 Fed. 999; Sloss I. & S. Co. v. S. C. & G. R. Co., 75 Fed. 106; Hanchett v. Humphrey, 93 Fed. 805; Am. Bank Protection Co. v. City Nat. Bank, 203 Fed. 715; U. S. v. Southern Pac. Co., 230 Fed. 270. *Contra*, Haines v. McLaughlin, 12 Sawyer, 126; Lillienthal v. Southern Cal. Ry. Co., 61 Fed. 622.

41 Burrow v. Kansas City, F. S. & M. R. Co., 54 Fed. 278.

42 Primrose v. Fenno, 113 Fed.

A witness subpœnaed by the prevailing party to the suit cannot, upon his own motion, have his fees that remain unpaid taxed in the bill of costs against the losing party.[43] But it has been held that witnesses do not lose their right to mileage and *per diem* fees by not insisting upon prepayment; nor by the fact that they were in attendance on the court in another cause between different parties, and received *per diem* and mileage fees therefor.[44] When a person has been served with a subpœna and has received money for traveling expenses, he cannot refuse to obey such subpœna because the proper amount of mileage has not been paid; and person subpœnaed as witnesses in the courts of the United States, if they have the means, are obliged to obey whether their fees are advanced or not.[45]

§ 419a. Disbursements for copies of papers. The Revised Statutes expressly provide for the taxation of the "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials."[1]

When copies of papers, necessarily obtained for use on the trial, are put in evidence, and no order is made rejecting them, it is the duty of the clerk to allow, on taxation, the disbursements paid for them.[2] So when obtained and the complainant dismissed his bill on the eve of trial.[2a]

It has been held that fees paid for certified copies of a party's own muniments of title cannot be taxed, since he is presumed to have the originals in his possession, unless he proves the contrary; but that he may tax fees paid for transcripts of the record of suits and other papers on which he relied to defeat his adversary's claim of title.[2b]

The expense of a certified copy of the file label and application for a patent in suit or a copy of the opinion and of the decree of

375. *Contra,* O'Neil v. Kansas City S. & M. R. Co., 31 Fed. 663.

43 O'Neil v. Kansas City S. & M. R. Co., 31 Fed. 663.

44 Young v. Merchants' Ins. Co., 29 Fed. 273.

45 Norris v. Hassler, 23 Fed. 581; U. S. v. Durling, 4 Biss. 509, 510; Hake v. Brown, 44 Fed. 734.

§ 419a. 1 U. S. R. S., 983.

2 Wooster v. Handy, 23 Fed. 49.

2a Bone v. Walsh Constr. Co., 235 Fed. 901.

2b Ford v. Louisville, N. O. & T. Ry. Co., 45 Fed. 210. The cost of copies of testimony obtained solely for the use of counsel in preparing for trial, Tesla El. Co. v. Scott, 101 Fed. 524; Atwood v. Jaques, 63 Fed. 561.

the court in the case may be allowed.[3] Fees paid for copies of depositions [4] or for certified copies of patents when opposing counsel does not insist that certified copies should be offered [5] cannot be taxed. Nor payments for certified copies of the opinions of other courts or of officers in the Patent Office which were published in the Federal Reporter, or the Official Gazette, or any other standard or official publication.[6] It has been said that when the taxation of the expense of certified copies of foreign patents, or translations thereof, is required, a certificate of the necessity by the trial judge, or by some other judge in his absence, should be submitted to the clerk.[7]

Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not obtained for use on trials, and disbursements in procuring them have been disallowed.[8] In the Second Circuit fees paid for copies of opinions for use in preparing orders are usually taxed. In the Sixth Circuit the notarial fees paid for affidavits on a motion are taxed, but not the expense of writing the affidavits in the form of depositions.[9] The taxation of transcripts of stenographers' minutes is previously discussed.[10]

§ 419b. Bills for printing and lithographing. The Revised Statutes expressly provide for the taxation of the "amount paid printers." [1] Disbursements for printing the record, evidence, and other papers in a suit in equity in a District Court, when required by rule, in the First [2] and Second [3] Circuits, the District of Maryland,[4] and any district where it is an established

3 Motion Picture Patents Co. v. Universal Film Mfg. Co., 232 Fed. 263.

4 Christensen v. General Electric Co., 248 Fed. 284.

5 Motion Picture Patents Co. v. Universal Film Mfg. Co., 232 Fed. 263.

6 Ibid.

7 Ibid.

8 Wooster v. Handy, 23 Fed. 49.

9 Atwood v. Jaques, 63 Fed. 561.

10 *Supra*, § 418c.

§ 419b. 1 U. S. R. S., § 983.

2 Jordan v. Agawam Woollen Co., 3 Cliff. 239.

3 Dennis v. Eddy, 2 Blatchf. 195; Hake v. Brown, 44 Fed. 734. Where such costs had been taxed against the defendant, who subsequently appealed, it was held that he must pay them to the respondent before he could be entitled to receive from the latter copies of such record for use in making up the transcript upon his appeal. Parsons Non-Skid Co. v. E. J. Willis Co., 176 Fed. 176; Christensen v. Gen. Electric Co., 248 Fed. 284.

4 Detroit Heating & Lighting Co. v. Kemp, 182 Fed. 847.

practice to print the same before the final hearing,[5] but not in the District of South Carolina,[6] are taxable as costs. Disbursements for printing testimony and other papers, when not required by rule or special order or by the established practice,[7] cannot be taxed. Thus, in the Second [8] and in the Third [9] Circuits, the expense of printing exhibits in the District Court cannot be taxed; although it seems that such a disbursement may be taxed for printing them in the Circuit Court of Appeals.[10]

In the Third Circuit the reasonable cost of making photo-lithographs of exhibits, when necessarily made, in the court of first instance may be taxed.[11]

When printing or lithographing, otherwise taxable, is done by the successful party he may tax the reasonable cost but not any overhead charge.[12]

The expense of printing superfluous papers should be disallowed, but in such a case it is the safer practice to apply to the court before the printing that these be omitted from the transcript or the printed papers.[13]

The appellant or plaintiff in error, when allowed costs, may tax his disbursements for clerk's fees and for printing the record.[14] Where, upon an appeal from a decree dismissing a bill which was affirmed with costs, the defendant had taken a cross-appeal from the dismissal of his cross-bill, which appeal was dismissed, the cross-appellant was allowed to tax the fees paid for one-half the cost of printing the record.[15] Where the costs of printing the record on an appeal had been paid by a receiver under an order out of the fund in his hands, the defendant, who finally succeeded was allowed to tax these disbursements,[16] but

5 Detroit Heating & Lighting Co. v. Kemp, 182 Fed. 847.

6 Lee v. Simpson, 42 Fed. 434.

7 Detroit Heating & Lighting Co. v. Kemp, 182 Fed. 847; Atwood v. Jaques, 63 Fed. 561; Spaulding v. Tucker, 2 Saw. 50.

8 Edison v. Am. Mutoscope Co., 117 Fed. 192.

9 Keasbey & Mattison Co. v. Am. Magnesia & Covering Co., 149 Fed. 439.

10 Edison v. Am. Mutoscope Co., 117 Fed. 192.

11 Duplex Metals Co. v. Standard Underground Cable Co., 218 Fed. 269.

12 Ibid.

13 Tompkins v. St. Regis Paper Co., 240 Fed. 838. Costs of unnecessary printing were enforced in B. & S. F. Co. v. Kraetze, 150 U. S. 111, 37 L. ed. 1019.

14 Supreme Court Rule 10; Circuit Court of Appeals Rule 23.

15 Nichols, Shepard & Co. v. Marsh, 131 U. S. 401.

16 Ferguson v. Dent, 46 Fed. 88, 94.

not the receiver's fees and the necessary disbursements incidental to the receivership.[17] Disbursements for printing objections to a petition to the Supreme Court in its original jurisdiction for a writ of mandamus are taxable.[18]

Disbursements for printing briefs on appeal, in error, or in original proceedings in the Supreme Court or Circuit Courts of Appeals, are not taxable,[19] except on admiralty appeals to the Circuit Court of Appeals when in the Second Circuit they are taxed. Disbursements for printing briefs which the rules require to be printed are taxable in the District Courts in the Second Circuit,[20] even when the brief is printed after the argument.[21]

§ 419c. Premiums paid surety companies. In the Second [1] and Third [2] Circuits, premiums on bonds and stipulations for costs in admiralty; in the Second,[3] Third,[4] and Fifth [5] Circuits, but not in the Sixth Circuit,[6] nor in bankruptcy in the Fourth Circuit [7] premiums on supersedeas bonds; premiums on appeal and supersedeas bonds in the Second,[8] and Ninth [9] Circuits but not in the First,[10] Third [11] or Sixth,[12] Circuits; premiums on bonds or stipulations given to secure the release of vessels; and

17 Ferguson v. Dent, 46 Fed. 88, 96; Elk F. O. & G. Co. v. Jennings, 90 Fed. 767.

18 *Ex parte* Hughes, 114 U. S. 548, 29 L. ed. 281; Gird v. California Oil Co., 60 Fed. 1011.

19 Ibid.

20 Hake v. Brown, 44 Fed. 734; Dennis v. Eddy, 12 Blatchf. 195. Such an item was taxed in the Third Circuit, Bailey v. Mississippi Home Tel. Co., 254 Fed. 359. Not in the Ninth Circuit, where the rules do not direct that briefs be printed. Gird v. California Oil Co., 60 Fed. 1011.

21 Sackett v. Smith, 46 Fed. 39.

§ 419c. 1 Edison v. Am. Mutoscope Co. (S. D. N. Y.), 117 Fed. 192.

2 The Beneliff (E. D. Pa.), 158 Fed. 377.

3 Edison v. Am. Mutoscope Co., 117 Fed. 192.

4 Jones v. Edward B. Smith Co., 183 Fed. 990.

5 Smythe v. New Orleans Land Co., C. C. A., 184 Fed. 892.

6 Lee Injector Mfg. Co. v. Penberthy Injector Co., C. C. A., 109 Fed. 964.

7 *Re* Hoyt, 119 Fed. 987.

8 The Volund, C. C. A., 181 Fed. 643.

9 The Europe, C. C. A., 190 Fed. 475.

10 The Gov. Ames, 199 Fed. 587; aff'd C. C. A., 187 Fed. 40, 48.

11 The Texas, C. C. A., 226 Fed. 897.

12 Parkerson v. Borst, C. C. A., 256 Fed. 827.

in the Second Circuit the amounts paid individuals in a foreign country for giving such security; have been taxed.[13]

§ 420. Miscellaneous disbursements. The Revised Statutes provide that "the bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."[1] The Federal courts are not absolutely limited in the taxation of costs to such items as are specifically named in the statute.[2] It has been held that, as to other matters, the State practice should be followed, except where that would produce injustice.[3] Fees paid an attorney for the examination of a witness before a master or special examiner,[4] payments to an attorney for traveling expenses,[5] payments to messengers,[6] cannot be taxed.

Disbursements for surveys and plans necessitated by an order to make a pleading more definite and certain, cannot be,[7] but the cost of maps necessarily used on a trial have been taxed.[8] In admiralty, the expense of taking photographs showing injuries to a vessel and for interpreters' fees necessary to obtain the testimony of foreign witnesses were taxed.[9] Disbursements for copies of models in the Patent Office used as evidence are taxable,[10] but not disbursements for other models.[11]

13 The Hurstdale, 171 Fed. 607.

§ 420. 1 U. S. R. S., § 983.

2 Spaulding v. Tucker, 2 Sawyer, 50; Gunther v. Liverpool, L. & G. Ins. Co., 10 Fed. 830; U. S. v. Minneapolis, St. P. & S. S. M. Ry. Co., 235 Fed. 951.

3 Huntress v. Epsom, 15 Fed. 732, expense of a review by the jury. Primrose v. Fenno, 113 Fed. 375, 377; where auditors' fees were apportioned. In Whipple v. Cumberland Mfg. Co., 3 Story, 84; the cost of a survey was apportioned. See *Re* Peterson, U. S. Sup. Ct., June 1, 1920.

4 Strauss v. Meyer, 22 Fed. 467.

5 Wooster v. Handy, 23 Fed. 49.

6 Ibid.

7 New Hampshire L. Co. v. Tilton, 29 Fed. 764.

8 Lilienthal v. Southern Cal. Ry. Co., 61 Fed. 622.

9 The S. V. Luckenbach, C. C. A., 197 Fed. 888.

10 Wooster v. Handy, 23 Fed. 49.

11 Ibid. Kelly v. Springfield Ry. Co., 83 Fed. 183, 186; Bone v. Walsh Const. Co., 235 Fed. 901.

It has been held that notarial fees for presentment and protest of a note, although paid before suit was brought, are considered as costs, not as damages.[12] When the defendant finally prevailed, and a decree directing him to account was set aside, he was allowed to include in his bill of costs the fees which he had been obliged to pay the master.[13] A party who finally prevails cannot tax the costs he has paid upon the over-ruling of his demurrer[15] or for unsuccessful intermediate appeals.[16] Where a party obtains a preliminary injunction against the prosecution of an action at law, a continuance of which, upon a final hearing, is denied, it is proper to charge in the decree in equity with the costs of the action at law.[17] In the distribution of the assets of an insolvent corporation, the costs in actions brought before the insolvency proceedings, which were allowed to continue so as to establish the claims against the assets, were taxed as part of the costs of the case in which the distribution took place.[18] Where a gas company, as a condition for an injunction enjoining the enforcement of a statute reducing the price of gas, deposited with the master the excess collected above the former rate and was finally unsuccessful, it was held that the interest upon this fund should be applied to the cost of the administration, thus relieving the gas company from this expense and giving to the gas payers no indemnity for their loss of interest.[19] Where a judgment was reversed, with costs to the plaintiff in error, and the defendant in error succeeded upon the second

12 Baker v. Howell, 44 Fed. 113; *supra*, § 6.

13 American D. D. Co. v. Sullivan M. Co., 32 Fed. 552.

15 New York B. & P. Co. v. N. J. C. S. & R. Co., 32 Fed. 755. For the costs of a receivership, see Kell v. Trenchard, C. C. A., 146 Fed. 245, *supra*, §§ 324, 409.

16 Troxell v. Delaware L. & W. R. Co., 205 Fed. 830; Cincinnati H. & D. Ry. Co. v. Sheriff of City of N. Y., C. C. A., 207 Fed. 768; Aiello v. Crampton, C. C. A., 203 Fed. 695.

17 Spring Garden Ins. Co. v. Amusement Syndicate Co., C. C. A., 178 Fed. 519. Where a suit was brought to enjoin actions at law upon the ground that, in equity, the plaintiff had no causes of action, with an alternative prayer for an apportionment of the damages against the several complainants in case the court should hold that the plaintiffs had a right to sue; it was held that the costs of the actions at law might be included in the judgment in equity against the complainants.

18 Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850.

19 Central Tr. Co. v. New Amsterdam Gas Co., 167 Fed. 983.

trial, he was not allowed to tax as a disbursement the amount he had paid in settlement of the judgment for the costs of error.[20]

An allowance of costs in a decree or mandate refers to the ordinary costs incident to the litigation and does not include the expenses of a receiver.[21] But where it was stipulated that the costs and expenses should be taxed one-half against the parties and intervening creditors and one-half against the bankrupt, the loss incurred by the receiver in a litigated transaction was therein included.[22]

§ 421. Costs out of the fund. Costs are paid out of a fund or estate in the course of distribution by a court of equity, to trustees who have been obliged to engage in litigation for the benefit of the estate, and to persons who have been successful in suits brought by them on behalf of themselves and others similarly situated.[1] The expression "trustees" is used here in the broadest sense of the word, as including not only those appointed by a deed of trust, but also agents, receivers,[2] and personal representatives of a decedent.[3] All of these, when under a bill for an accounting they account fairly and pay the balance due from them into court, are entitled to their costs,[4] provided that they have not acted unconscientiously in the suit [5] or in the previous administration of their trust.[6] The same is true when a suit is honestly commenced by one of them for the directions of the court concerning his trusteeship.[7]

20 Jennings v. Burton, 177 Fed. 603.

21 Keel v. Trenchard, C. C. A., 146 Fed. 245.

22 King Hardware Co. v. J. T. Christopher Co., C. C. A., 222 Fed. 224.

§ 421. 1 Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

2 Atty. Gen. v. City of London, 1 Ves. Jr. 243; s. c., 3 Bro. C. C. 171; Curteis v. Candler, Mad. & Geld. 123; Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568.

3 Rashleigh v. Master, 1 Ves. Jr. 201; Samuel v. Jones, 2 Hare, 246.

4 Atty. Gen. v. City of London, 1 Ves. Jr. 243; s. c., 3 Bro. C. C. 171; Rashleigh v. Master, 1 Ves. Jr. 201; Samuel v. Jones, 2 Hare, 246; Curteis v. Candler, Mad. & Geld. 123.

5 Henley v. Philips, 2 Atk. 48; Lloyd v. Spillat, 3 P. Wms. 344, 346.

6 Howard v. Rhodes, 1 Keen, 581; O'Callahan v. Cooper, 5 Ves. 11, 129; Hide v. Haywood, 2 Atk. 12.

7 Hicks v. Wrench, Mad. & Geld. 93; Henley v. Philips, 2 Atk. 48.

When a foreclosure suit is brought at the request of certain bondholders, the expenses of the trustee and its counsel, should be charged upon the proceeds of the sale and not against those at whose instances the suit was brought.[8]

Counsel for a trustee are not ordinarily entitled to compensation out of the funds collected by a receiver for services rendered after the receivership was constituted.[9] A mere depositary should be allowed no costs or counsel fees beyond the expense of a watching retainer to his attorney, which, however, should also include the expense of preparing his answer.[10] But in suits brought by or against any of them, except possibly receivers, to which a stranger is a party, they are usually, if unsuccessful, liable personally to him for the costs as between party and party,[11] which costs, together with the expenses of the suit, will be allowed them upon their accounting,[12] if the suit was prosecuted or defended in good faith for the benefit of their trust.[13] The trustee is not entitled to compensation where he has acted in the interest of one of the parties to a controversy concerning a right to share in the trust funds.[14] A trustee of a mortgage was refused compensation, out of a fund collected by him, for his expenses in defending a suit brought by a party, to whom the fund belonged.[15]

Costs will also be paid out of a fund under the control of a court of equity to persons who have been successful in a suit concerning it, brought by them in behalf of themselves and others similarly situated with them.[16] Instances of this are suits

8 Fidelity Tr. Co. v. Hutchinson Chem. & Alkali Co., C. C. A., 221 Fed. 63.

9 Guaranty Tr. Co. v. Chicago Rys. Co., C. C. A., 185 Fed. 411. But see Burden Central Sugar-Refining Co. v. Ferris Sugar-Mfg. Co., C. C. A., 87 Fed. 810; Haight & Freese Co. v. Weiss, C. C. A., 165 Fed. 430, 164 Fed. 688.

10 Fullerton v. Bigelow, C. C. A., 177 Fed. 359.

11 Edwards v. Harvey, G. Cooper, 40; Poole v. Franks, 1 Molloy, 78; Westley v. Williamson, 2 Molloy, 458. See § 313. But see Tug. R. C. & S. Co. v. Brigel, C. C. A., 70 Fed. 647, cited *supra*, § 409.

12 Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; Humphrys v. Moore, 2 Atk. 108.

13 Henley v. Philips, 2 Atk. 48; Lloyd v. Spillat, 3 P. Wms. 344, 346; Central Tr. Co. v. Valley R. Co., 55 Fed. 903.

14 Pike v. Cincinnati Realty Co., C. C. A., 179 Fed. 97.

15 Western Union Tel. Co. v. Boston S. D. & Tr. Co., C. C. A., 112 Fed. 37.

16 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. &

brought by a single creditor for a general administration of assets,[17] by a legatee against an executor for the benefit of the estate,[18] by a single beneficiary of a trust to prevent a loss to the trust estate,[19] and by a stockholder for the benefit of the corporation.[20] Disbursements paid by a part of the creditors for the investigation by an accountant of the books of an insolvent corporation, which resulted in the realization of a large sum to the receivership were repaid out of the fund.[21] Creditors who are allowed to intervene in such a suit are not ordinarily en-

B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; *Ex parte,* Jaffray, *Re* Waite & Crocker, 1 Low. 321; *Ex parte* Plitt, 2 Wall. Jr. 453; Stewart v. C. & O. C. Co., 5 Fed. 149.

17 Bennett v. Going, 1 Molloy, 527; Hare v. Rose, 2 Ves. Sen. 558. Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850, where the counsel for the complainant were given an allowance for services, beneficial to all the creditors, which were rendered after the appointment of the receivers. A solicitor, employed by the complainant after the suit had been brought and the receiver appointed, was not allowed a counsel fee from the fund when he had rendered no services beneficial to it. Barker v. Southern Bldg. & Loan Ass'n., 181 Fed. 638; Central Tr. Co. v. U. S. Light & Heating Co., C. C. A., 233 Fed. 420. See, however, Mason v. Codwise, 6 J. Ch. (N. Y.) 183.

18 Fraser v. Cole, C. C. A., 214 Fed. 556.

19 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Stewart v. C. & O. C. Co., 5 Fed. 149.

20 For allowances of attorneys fees to minority stockholders, see Meeker v. Winthrop Iron Co., 17 Fed. 48; William Firth Co. v. Millen Cotton Mills, 129 Fed. 141; reversed s. c., as Lamar v. Hall & Wimberly, C. C. A., 129 Fed. 79; McCourt v. Singers-Bigger, C. C. A., 145 Fed. 103, holding that a stockholder, who, by his suit, recovered a fund, was entitled to be paid his attorney's fee and the other expenses of the litigation, but that other stockholders and officers, who resisted such recovery by defending in the name of the corporation, were not; Thompson v. Romar, C. C. A., 258 Fed. 339, where a fee was allowed for the services of the counsel who brought a former suit in the State court for the same relief; Grant v. Lookout Mountain Co., 93 Tenn. 691, 27 L.R.A. 98; Alexander v. Atlanta, etc., R. R. Co., 113 Ga. 193, 54 L.R.A. 305; Forrester v. Bostor, etc., Co., 29 Mont. 397, 74 Pac. 1088; Colley v. Wolcott, C. C. A., 187 Fed. 595. See Singers-Bigger v. Young, C. C. A., 166 Fed. 82, 86. But see Kinney v. Columbia Sav. & L. Ass'n, 113 Fed. 359; Cuyler v. Atlanta & N. C. R. Co., 132 Fed. 570.

21 Sands v. E. S. Greeley & Co., 83 Fed. 772; for a case where the creditors who advanced the money amounting to $3,500 to prosecute claims belonging to the estate were given the entire proceeds of the litigation. See Cornell v. Nichols & Langworthy Mch. Co., C. C. A., 201 Fed. 320, 323.

titled to an allowance,[22] although if their services have been beneficial to the fund an allowance may be made a counsel fee therefrom.[23]

Compensation has been allowed in a similar case to a party who by his litigation had benefited the fund, although he eventually failed to collect his own claim against it.[24] But not where the litigation was instituted for the collection of a claim, the greater part of which was disallowed and the assets of the defendant placed in the hands of a receiver appointed in an ancillary proceeding.[25] Where attorneys representing certain heirs in litigation to recover land procured the appointment of a guardian *ad litem* of an infant heir, who was made the defendant, and such guardian appeared and was allowed a fee, it was held that they could not afterwards claim compensation from the minor's interest because their services inured to his benefit.[26]

A decree enjoining the waste of corporate assets cannot award a counsel fee to the complainant or his attorney when there is no fund collected for distribution.[27] The attorney for

22 Robinson v. Mutual Reserve Life Insurance Co., 182 Fed. 850.

23 Equitable Trust Co. v. N. Y. v. Western Pac. Ry. Co., 236 Fed. 814. Attorneys for minority stock and bondholders who did not participate in the reorganization.

24 *Ex parte* Plitt, 2 Wall. Jr. 453; Feehheimer v. Baum, 43 Fed. 719, 730; Central Tr. Co. v. Condon, C. C. A., 67 Fed. 84, 111; D. G. Tompkins Co. v. Chester Mills, 90 Fed. 37. But see Weed v. Central Ga. Ry. Co., 100 Fed. 162. See U. S. v. Boyd, 79 Fed. 858; Jefferson Hotel Co. v. Brumbaugh, C. C. A., 168 Fed. 867, where the fund was distributed among sub-contractors and creditors of the complainant; Haehnlen v. Drayton, C. C. A., 192 Fed. 300, where the first decree obtained by the attorneys was set aside for want of notice to the trustee under the mortgage, but a substituted decree was subsequently entered founded upon the pleading which they had filed. In such a case, where the order appointing the receiver was reversed, the allowance of compensation to the solicitor who procured the appointment was also set aside. Jacksonville, T. & K. W. Ry. Co. v. American Const. Co., 57 Fed. 66. Where a bill for the dissolution of a corporation was dismissed because a suit for the same purpose had been previously brought in the State where it was incorporated, it was held that the corporation was not entitled to an allowance for counsel fees. Groom v. Mortimer Land Co., C. C. A., 192 Fed. 849.

25 Kimball v. Atlantic States Life Ins. Co., 223 Fed. 463.

26 Tull v. Nash, C. C. A., 141 Fed. 557.

27 Davidson v. Am. Blower Co., 245 Fed. 773.

minority stockholders who bring such a suit may perhaps collect their compensation from the corporation.[28]

In some cases, courts of equity have allowed to the solicitors of an insolvent defendant, the estate of which was administered in the suit, a counsel fee from the fund.[29] But this will not be done when after the payment of debts there is a surplus, in which case the remedy of the attorney is against his client.[30]

Before the statute upon the subject,[31] costs and a counsel fee out of the fund were usually allowed to the successful party, upon a bill of interpleader or a bill in the nature of an interpleader.[32] Such costs are in the distribution of the fund paid before all claims against it except for taxes.[33] Those of prior lienors who are not benefited by the litigation [34] and do not adopt the proceeding,[35] and the claims for the compensation and reimbursements of trustees who have not been guilty of misconduct.[36]

The same rule applies to a suit brought by a single creditor of the estate against an executor or administrator for the satisfaction of his own claim.[37] In such cases the personal representative can only recover his costs from that part of the estate which remains after the complainant has been paid the full amount of his claim with costs, even though the creditor thus sweeps away the entire estate.[38] Not so, however, when a bill is filed by one creditor in behalf of himself and the rest for a general administration of assets; in which case the personal representative is always entitled to his costs out of the fund unless he has forfeited them by his misconduct.[39] When the

28 Ibid.

29 Huff v. Bidwell, C. C. A., 218 Fed. 6; Bowlker v. Haight & Freese Co., S. D. N. Y., 1906, per Lacombe, J., in which the author was counsel.

30 Huff v. Bidwell, C. C. A., 218 Fed. 6.

31 39 St. at L. 929, Comp. St., § 991a; *supra*, §§ 157, 158.

32 Dunlop v. Hubbard, 19 Vesey, 205; Dowson v. Hardcastle, 2 Cox Eq. 279; Louisiana State Lottery Co. v. Clark, 16 Fed. 20; Mutual Life Ins. Co. v. Lane, 151 Fed. 276; *supra*, §§ 157 and 158.

33 Huff v. Bidwell, C. C. A., 218 Fed. 6.

34 Buel v. Kanawha Corp., 201 Fed. 762.

35 Huff v. Bidwell, C. C. A., 218 Fed. 6.

36 Bennet v. Going, 1 Molloy, 529.

37 Humphreys v. Moore, 2 Atk. 108; Davy v. Seys, Moseley, 204.

38 Adair v. Shaw, 1 Sch. & Lef. 243; 280; Uvedale v. Uvedale, 3 Atk. 117.

39 Bennet v. Going, 1 Molloy, 529; Young v. Everest, 1 R. & M. 426;

laches or inaction of the trustee under a mortgage has caused a suit by a bondholder or a junior incumbrancer to preserve the mortgaged property, and the former's action in the suit has been of no special value to the fund, he may be disallowed compensation from the fund until after satisfaction of the beneficiaries who appeared by their own counsel in the suit.[40]

At least without the consent of the Attorney-General a United States District Attorney cannot be allowed a counsel fee out of a fund collected by him for a receiver who was appointed in a suit by the United States.[41] The amount of the judgment against the defendant cannot be increased by such a fee.[42] Costs out of fund should not be allowed in advance of the general distribution of the assets, or until all the persons interested have an opportunity to be heard.[43]

An allowance may be made directly to the attorney or to his client in the discretion of the court,[44] and the court in determining the amount thereof may properly be guided by the judge's knowledge of the extent and value of the services rendered.[45]

§ 422. Costs as between solicitor and client. Costs payable out of fund in court are termed costs as between solicitor and client.[1] Costs as between solicitor and client include all reasonable expenses and counsel fees, and are not, like costs as between party and party, confined to the amount named in the statute.[2] These are not infrequently estimated upon a percentage basis

Minuse v. Cox, 5 J. Ch. (N. Y.) 441, 9 Am. Dec. 313.

40 See D. A. Tompkins Co. v. Chester Mills, 90 Fed. 37; Bound v. South Carolina Ry. Co., 59 Fed. 509.

41 McPherson v. United States, C. C. A., 245 Fed. 135.

42 Fraser v. Cole, C. C. A., 214 Fed. 556; Farmers' Loan & Tr. Co. v. N. Y. Rys. Co., C. C. A., 215 Fed. 712; Huff v. Bidwell, C. C. A., 218 Fed. 6.

43 Girard Tr. Co. v. McKinley-Lanning L. & Tr. Co., 135 Fed. 180.

44 Colley v. Wolcott, C. C. A., 187 Fed. 595.

45 Ibid. Where it was stipulated that, in consideration of the payment of a large sum of money to the receiver, the fees and expenses of the defendants' counsel should be paid out of the fund it was held that the fact that unsuccessful appeals were taken by the defendants to the Circuit Court of Appeals and to the Supreme Court of the United States did not deprive the court of original jurisdiction of jurisdiction to make allowances out of the funds in accordance with the stipulation. U. S. v. Stone, C. C. A., 187 Fed. 577.

§ 422. 1 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

2 Trustees v. Greenough, 105 U.

which is usually proper.[3] In some cases more than one-third [4] in

S. 527, 26 L. ed. 1157; Cowdrey v. G., H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; *Ex parte* Jaffrey; *Re* Waite & Crocker, 1 Low. 321; *Ex parte* Plitt, 2 Wall. Jr. 453. It has been said that, for gathering the facts and filing a bill in equity $400 is, ordinarily a reasonable counsel fee; but that, under special circumstances, $500 may be allowed upon the substitution of an attorney. Morton v. La Roche (S. D. N. Y.), 116 Fed. 1022. $500 was allowed a trustee for filing an answer and aiding the machinery of a foreclosure suit. Farmers' Loan & Tr. Co. v. N. Y. Rys. Co., 215 Fed. 712. $1,000 was allowed for the preparation and service of a bill under which receivers of a Building Association were appointed. Miers v. Columbia Mut. Building, &c., Ass'n. (S. D. N. Y.), 166 Fed. 781. $1,200, for instituting an action, in which receivers were appointed, and conducting the proceedings generally for the benefit of all the creditors, was allowed a firm of lawyers, although one of them also received $4,000 for services to the receivers. Ely v. Van Kannel Revolving Door Co. (E. D. N. Y.), 184 Fed. 459. $30,000 was allowed a firm of lawyers for filing original, amended and supplemental bills, and bringing a large amount of assets into court for administration and conservation, when they were also paid $35,000 for services to the receivers up to a certain time. Guaranty Tr. Co. v. Chicago Rys. Co., C. C. A., Seventh Ct., 185 Fed. 411.

[3] Brown v. Pennsylvania Canal Co., 244 Fed. 980, 983.

[4] For a case where an attorney was allowed $1,000 out of a fund of $2,500, see Smith v. Cooper, 120 Fed. 230. Where counsel were paid $2,000 for disbursements and it was agreed that their compensation should be liberal in case of success, it was held that one-third of the fund collected, $91,420, should be allowed them. Frink v. McComb, 60 Fed. 486. Where $186,000 was recovered in a suit for the construction of a will, and to determine the effect of certain advancements, the Circuit Court of Appeals allowed $57,094, increasing the allowance by the master of about 31 per cent., namely $51,892. Of this increased amount $20,000 was paid the counsel upon whom rested the burden of the litigation; two other attorneys received $14,797 each; and the fourth, whose services were confined to two arguments in the Supreme Court of the United States, only $7,500. Gilden v. Cowan, C. C. A., 123 Fed. 48. The original litigation is reported as Adams v. Cowen, 174 U. S. 800, 43 L. ed. 1188, 177 U. S. 471, 44 L. ed. 851; Cowen v. Adams, C. C. A., 78 Fed. 536, 24 C. C. A. 198. In a case involving $208,000, the court allowed $5,000 to the leading counsel in the Circuit Court of Appeals and $10,000 to be divided between two counsel in the Supreme Court of the United States, although the appeals were successful. U. S. v. Stone, C. C. A., 187 Fed. 577, 580.

[5] Twenty per cent. of $25,000 was held to be a reasonable contingent fee when the amount was not specified in the agreement between client and attorney. St. Louis, I. M. & S. Ry. Co. v. Clark, 51 Fed. 483. $1,000 was allowed for the fee of a counsel, who filed a bill of interpleader upon a life insurance policy

others twenty percent[5] in another fifteen percent[6] in another thirteen percent.[7] Five per centum of the fund collected was held a reasonable counsel fee in such a case, when the fund was more than seventy-five thousand dollars.[8] Ten per centum of the fund collected was held a reasonable counsel fee, when the fund was less.[9]

In no case, however, will the personal expenses and compensation for the personal services of a person, not a trustee, who has

of the face value of $50,000. Mutual Life Ins. Co. v. Lane, 151 Fed. 276. $150, when the amount was $10,000. McNamara v. Provident Sav. Life Assur. Soc., C. C. A., 114 Fed. 910, 912. See Mutual Life Ins. Co. v. Farmers' & Mechanics' Nat. Bank, 173 Fed. 390, 402. Where a party sued by a trustee in bankruptcy for $500 paid the money into court upon the making of the bankrupt's wife an additional defendant, it was allowed $25 as an attorney's fee. Caten v. Eagle Building & Loan Ass'n, 177 Fed. 996. Where an attorney had asked for a payment on account, it was held that he had not thereby waived his contract right to a liberal contingent fee. Frink v. McComb, 60 Fed. 486. As to the extent of an attorney's lien, see Mass. & So. Const. Co. v. Tp. of Gill's Creek, 48 Fed. 145; Claflin v. Bannett, 51 Fed. 693; Coe v. Western R. Co., 65 Fed. 16. A State statute regulating the allowances in a partition suit was followed by a Federal Court of Equity. Willard v. Serpell, 62 Fed. 625. Where the recovery was $609,400.80 the sum of $104,299 was allowed for counsel fees in a suit by a minority stockholder. Of this $45,600 was given to the counsel who first protested against the action of the majority and brought a prior suit in a State court. Thompson v. Bomar, C. C. A., 258 Fed. 339.

6 *Re* J. M. Fiske & Co., 209 Fed. 982, where one of the suits involved went through the New York State courts to the Court of Appeals and about $27,000 recovered, the allowance was $5,000. In another, where a settlement was made by which the estate received in cash $11,000, and a release of a claim of about $7,000 upon a fund in the hands of the trustees; $3,000 was allowed for counsel fees. For the collection of $270,000 after a trial by a referee and upon review in the District Court, the Circuit Court of Appeals and the Supreme Court of the United States; $40,000. Ibid.

7 Brown v. Pennsylvania Canal Co., 244 Fed. 980, 983, where the fund was more than $1,500,000 and the allowance $200,000 the court excluding from the basis of the percentage the interest of the defendant in the fund recovered.

8 Fechheimer v. Baum, 43 Fed. 719; Central R. & B. Co. v. Pettus, 113 U. S. 116, 128, 28 L. ed. 915, 919.

9 Where the amount collected was $35,869.77, the plaintiff's counsel was allowed ten per cent. thereof. Harrison v. Perea, 168 U. S. 311, 317, 42 L. ed. 478, 480. See also Adams v. Kepler M. Co., 38 Fed. 281.

engaged in litigation in behalf of himself and others, be included in them.[10]

§ 422a. Attorneys' liens. Under section 3477 of the Revised Statutes, a contract giving an attorney a lien upon a claim against the United States which he is retained to collect cannot be enforced;[1] but an agreement giving him a contingent fee in such a case is valid[2] a contingent fee of one-third was allowed in accordance with the contract.[3]

It seems that the law of the State where the attorney was retained and conducted the litigation regulates his rights in this respect.[4] It has been held by a State court, that an attorney's lien upon a cause of action can be enforced, after the removal of the suit to a Federal Court and its discontinuance thereupon a settlement with the client.[5] At least in States where the statutes give attorneys a lien upon their client's causes of action[6] or property obtained by litigation,[7] the Federal courts will enforce the lien, which cannot be defeated by a settlement made by the client.[8] It has been held that this lien can be enforced against a fund paid voluntarily to the corporation by defendants to a stockholder's suit to recover it.[9]

The lien has been denied to counsel who is not attorney of record although on account of the attorney's illness he performed most of the work which would ordinarily have been done by the latter.[10] Where the attorney after notice of a claim of

10 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157. See U. S. v. Stone, C. C. A., 187 Fed. 577.

§ 422a. 1 Nutt v. Knut, 200 U. S. 12, 21, 26 Sup. Ct. 216, 50 L. ed. 348.

2 Ibid.

3 Ibid.

4 *Re* Paschal, 10 Wall. 438, 495, 19 L. ed. 992; The Johnson Lighterage Co., 240 Fed. 435, 446.

5 Oishei v. Pennsylvania R. R. Co., 117 App. Div. (N. Y.) 110.

6 *Re* Baxter & Co., C. C. A., 154 Fed. 22; Bray v. Staples, C. C. A., 180 Fed. 321.

7 Colley v. Wolcott, C. C. A., 187 Fed. 595, where no reference to such a statute was made. Everett Clarke & Benedict v. Alpha Portland Cement Co., C. C. A., 225 Fed. 931 seems to hold that in equity an attorney has a lien upon a judgment recovered by him for his client.

8 *Re* Baxter & Co., C. C. A., 154 Fed. 22.

9 Meighan v. Am. Grass Twine Co., C. C. A., 154 Fed. 346. *Contra, Re* Meighan, 106 App. Div. (N. Y.) 599. See Harv. Law Rev., XIV, 211.

10 Goodwin Film & Camera Co. v. Eastman Kodak Co., C. C. A., 222 Fed. 249, affirming 216 Fed. 831. Where an attorney agrees to give

set-off took as payment for his fees the judgment upon which he had a lien, it was held that he thereby merged his lien in the judgment so that his rights were subject to the set-off.[11]

An agreement between a *guardian ad litem* and an attorney as to the amount of the latter's fees is not binding unless ratified by the court.[12] In the Second Circuit it was held that fifty per cent. of the amount collected upon a settlement made after the case had been prepared and called for trial was not excessive where the fee was contingent upon success, although the plaintiff was an infant.[13] That a contract for a contingent fee of fifty per cent. in an action for damages for negligence is not unreasonable is settled in the State of New York.[14] In a similar case the Circuit Court of Appeals held that the question whether such a contract was fair and not unconscionable should be submitted to the jury.[15]

It has been held that an assignment of a claim for treble damages under the Anti-Trust Act to an attorney in settlement of his charges for legal services, the value of which he had estimated at one fifteenth of the amount of the claim,[16] and that an agreement by an attorney to pay the expenses of litigation upon a contingent fee [17] are champertous and cannot be enforced.

It has been held that, in the Second Circuit where attorneys have been employed by a plaintiff under a contingent fee, it is held that the court has discretionary power, upon their disagreement with their client, to grant an order of substitution, conditional on the plaintiff's paying a reasonable compensation for their services, already rendered, and their disbursements.[18]

counsel a specified part of a contingent fee, the latter thereby acquires a lien on the sum which the former receives in payment for the services. Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. ed. 530.

11 Northwestern Port Huron Co. v. Babcock, 223 Fed. 484.

12 Ryan v. Phila. & Reading Coal & Iron Co. (E. D. N. Y.), 189 Fed. 253.

13 Ryan v. Phila. & Reading Coal & Iron Co. (E. D. N. Y.), 189 Fed. 253. *Contra,* Herman v. Met. St. Ry. Co., S. D. N. Y., 121 Fed. 184.

14 Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y. 492.

15 Muller v. Kelly, C. C. A., 125 Fed. 212.

16 General Film Co. v. Sampliner, C. C. A., 6th Ct. 232 Fed. 95; Sampliner v. Motion Picture Patents Co. (S. D. N. Y.), 243 Fed. 277. See General Film Co., v. Sampliner, C. C. A., 6th Ct., 252 Fed. 443.

17 Jones v. Pettingill, C. C. A., 1st Ct., 245 Fed. 269.

18 Ronald v. Mutual Reserve Fund

In the Third Circuit, that in such a case, an assignment is equivalent to a discharge by the client and cancels the contract for a contingent fee.[19] In such cases the compensation fixed by the contract is evidence which may be considered in estimating the value of the services.[20] The attorney's retaining lien upon papers in his possession is recognized by the Federal courts.[21]

§ 423. Taxation of costs. Costs as between party and party are taxed by a judge or clerk of the court, and are included in and form a portion of the judgment or decree.[1]

Unless they are awarded in interlocutory proceedings costs should not be taxed before final judgment.[2] It is not improper when the judgment or decree is entered to leave a blank for the amount of costs and the clerk to insert them with the consent of the court after they are subsequently.[3] This is the more convenient practice, when the decree is signed by the judge [4] and has been permitted after an affirmance on appeal.[5] It is the better practice to serve, upon the adverse party, notice of the taxation with a copy of the proposed bill of costs,[6] but costs are often taxed *ex parte*.

To each bill of costs should be attached an affidavit by some person acquainted with the facts, stating that the services for which fees are charged were performed.[7] Receipts may be substituted for affidavits, even, it has been held, as regards payments for the fees of witnesses.[8] It has been held that the court

Life Ass'n, 30 Fed. 228; Silverman v. Penn. R. R. Co., 141 Fed. 382; Du Bois v. City of New York, C. C. A., 134 Fed. 570; Ibert v. Ætna Life Ins. Co., 213 Fed. 996.

19 The Johnson Lighterage Co. (D. N. J.), 240 Fed. 435, 446.

20 The Johnson Lighterage Co. (D. N. J.), 240 Fed. 435, 447.

21 Everett Clarke & Co. v. Alpha Cement Co., C. C. A., 225 Fed. 931.

§ 423. 1 U. S. R. S., § 983.

2 Mills v. Lehigh Valley R. Co., 226 Fed. 813.

3 Sizer v. Many, 16 How., 14 L. ed. 861.

4 Ibid.

5 Ibid.

6 For the construction of the rule of the Ninth Circuit upon this point, see Spoor v. Riverside County, 113 Fed. 26.

7 U. S. R. S., § 984; Jerman v. Stewart, 12 Fed. 271. Fees of witnesses were disallowed where the affidavit or certificate stated the "place from which each came to attend trial," instead of the place of their respective residences, The Gov. Ames, C. C. A., 187 Fed. 40, 49; and where the only affidavit as to residence was based entirely upon information, Ibid.

8 Primrose v. Fenno, 113 Fed. 375.

will not on the taxation enforce a stipulation that disbursements not allowed by rule or statute may be included in the bill of costs.[9] The bills when taxed must be filed with the papers in the cause.[10]

When the taxation is by the clerk, a motion for a retaxation of the costs may be made before, or an appeal taken to, a judge of the court.[11] A party who objects to a charge in lump should demand a specification of the items of which it is composed.[12] Where there is a dispute as to a question of fact, material to the taxation of a bill of costs, a reference to an auditor may be made.[13]

Costs as between solicitor and client are taxed by the court, usually by means of a reference to a master.[14]

Costs taxed in the Circuit Court of Appeals without objection cannot be objected to for first time in the District Court after a remand.[15] Where the Supreme Court affirmed a decree with costs of the court below as well as of the Supreme Court, it was held that the latter court had no power to grant costs as between solicitor and client out of the fund.[16]

It was held that unpaid fees of officers need not be formally taxed as costs; but that if they are of record or entered on the proper writ, that will be sufficient to support an execution thereupon,[17] and that an error in such taxation may be corrected by the clerk subsequent to a settlement between the parties, after a reversal of the judgment.[18]

9 Lee v. Simpson, 42 Fed. 434.

10 U. S. R. S., § 983.

11 *Re* Strauss v. Meyer, 22 Fed. 467; Tuck v. Olds, 28 Fed. 883. Where a court rule provided that an appeal from the taxation by the clerk must be taken within ten days thereafter, an appeal taken after the specified time was dismissed, although the successful party had noticed it. Snyder v. McCarthy, C. C. A., 197 Fed. 166.

12 Dedekam v. Vose, 3 Blatchf. 153.

13 Bottomley v. U. S., 1 Story, 153.

14 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; Cowdrey v. G., H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950.

15 Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed. 568.

16 Mason v. Pewabic Mining Co., 153 U. S. 361, 366, 38 L. ed. 745.

17 Woolfolk v. Jones, 216 Fed. 807. See *supra*, § 298.

18 Hoystradt v. Delaware, L. & W. R. R., 182 Fed. 880.

§ 424. Appeal from taxation of costs. Ordinarily, no appeal will lie to a court of review from a decree in equity,[1] or admiralty,[2] when the sole ground of error is the allowance of costs between party and party. But when the decree is otherwise erroneous it may be modified as to the costs.[3]

This question may be reviewed when it is denied that the court had power to award the costs [4] or when the right to costs depends on the construction or application of a statute [5] or of a mandate of the appellate court.[6] A decree permitting a complainant to dismiss on paying the costs of the defendant is appealable.[7] A court of review may reverse a decree for an error in taxing costs as between party and party,[8] and in allowing an attorney's fee,[9] and for an error in taxing costs directed to be paid to the clerk,[10] and also for an erroneous construction of its own decree concerning a division of the costs.[11] An appeal lies from a decree awarding costs as between solicitor and client.[12] Upon such an appeal,

§ 424. 1 Canter v. Insurance Co., 3 Pet. 307, 317, 7 L. ed. 688; Elastic Fabric Co. v. Smith, 100 U. S. 110, 25 L. ed. 547; Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568; Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. ed. 895; Harding v. Corn Products Mfg. Co., C. C. A., 198 Fed. 628; Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co., C. C. A., 208 Fed. 549.

2 The Eva D. Rose, C. C. A., 166 Fed. 101. But see Roberts v. N. Y. El. R. Co., 155 N. Y. 31.

3 Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., C. C. A., 254 Fed. 553.

4 Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412; Michigan Central R. Co., C. C. A., 124 Fed. 727, 733; Scatcherd v. Love, C. C. A., 166 Fed. 53; Stallo v. Wagner, C. C. A., 245 Fed. 636.

5 Ibid.

6 Blanks v. Klein, C. C. A., 78 Fed. 395; Kell v. Trenchard, C. C. A., 146 Fed. 245. See *supra*, § 361.

7 Pomona Fruit Growers' Exch. v. Stebler, C. C. A., 241 Fed. 123. See *supra*, § 361.

8 The City of Augusta, C. C. A., 80 Fed. 297, 307, citing O'Reilly v. Morse, 15 How. 62, 124, 14 L. ed. 601, 628; Burns v. Rosenstein, 135 U. S. 449, 456, 34 L. ed. 193, 196. But see DuBois v. Kirk, 158 U. S. 58, 67, 39 L. ed. 895, 899; Gamewell F. A. Tel. Co. v. Municipal Signal Co., C. C. A., 77 Fed. 490; Blanks v. Klein, C. C. A., 78 Fed. 395, and cases there cited.

9 Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412; Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. ed. 451.

10 *Re* Michigan Cent. R. Co., C. C. A., 124 Fed. 727.

11 Kell v. Trenchard, C. C. A., 146 Fed. 245.

12 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157. Where the appeal was from an order as to costs entered at the foot of a final decree, but the transcript did not contain the decree, nor anything to show whether evidence was taken

the court may reverse the decree if the costs have been awarded upon erroneous principles;[13] or because the amount allowed is too large,[14] or too small,[15] although it rarely interferes with the discretion of the court below in these respects.[16]

A party who wishes to have the propriety of the disbursements reviewed must raise the question before the clerk or the District Judge and also in an assignment of error and bring up the papers used upon the taxation.[17] The court of review will not decide what items should be allowed before they have been taxed below.[18]

§ 425. Security for costs. A complainant who does not reside within the district may be compelled to give security for costs.[1] The matter is usually regulated by a rule of the court; but, in the absence of a such a rule, a court of equity has inherent power

upon the application for the order; it was held that there could be no reversal unless error was manifest in the terms or subject-matter thereof, and that in the absence of proof to the contrary it would be presumed that the parties affected were before the court, there having been an apportionment between them. Corn Products Refining Co. v. Chicago Real Estate Loan & Tr. Co., C. C. A., 185 Fed. 63.

13 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915. Where a corporation was so insolvent that it had no interest in the fund collected by the disposition of its assets, it was held that it could not be heard upon such an appeal. Haight & Freese Co. v. Weiss, C. C. A., 165 Fed. 430.

14 Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; Harrison v. Perea, 168 U. S. 311, 317, 42 L. ed. 478, 480.

15 Glidden v. Cowen, C. C. A., 123 Fed. 48.

16 Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568; Sloan v. Mitchell, C. C. A., 72 Fed. 89. But see Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; Weiss v. Haight & Freese Co., C. C. A., 165 Fed. 432. But see Bowker v. Haight & Freese Co., C. C. A., 165 Fed. 430.

17 Williamson v. Electric Service Supplies Co., C. C. A., 242 Fed. 873.

18 Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412; Central Improvement Co. v. Cambria Steel Co., C. C. A., 210 Fed. 696, 706, 723, aff'd 240 U. S. 166.

§ 425. 1 Lyman V. & R. Co. v. Southard, 12 Blatchf. 405. But see Woodworth v. Sherman, 3 Story, 171. The Minnesota rule requiring the plaintiff in every case to give security for costs means only the clerk's costs. Robinson v. Honstain, 79 Fed. 678. The Pennsylvania rule provides for the filing of security when the plaintiff removes from the district after the suit is brought. Osborne v. Pennsylvania R. Co., 159 Fed. 301.

to direct such security to be filed.[2] In actions at common law, the State statute is usually followed,[3] except in where an Act of Congress directs that no security need be filed.[3a] Such security may also be required of a non-resident defendant to a bill of interpleader when he takes aggressive action.[4]

In order to obtain an order compelling such security, the defendant must move as soon as he ascertains the plaintiff's residence.[5] In the absence of a court rule upon the subject, if he takes after such discovery any step in the cause before moving, it seems that he thereby waives his right to security,[6] unless a necessity for unforseen disbursements such as the expense of a reference, subsequently arises.[7]

Upon a failure to file security when required, the plaintiff's proceedings will be stayed.[8] A plaintiff's proceedings may also be stayed until he pays the costs of another suit between the same parties upon the same cause of action in which he was unsuccessful, even if that other suit was in a State court,[9] or a Federal court in another district,[10] and, it has been held, when the other suit was *in forma pauperis*.[11] When one of several plaintiffs is a resident of the district, by the old chancery practice, no security for costs was required.[12] If the defendant does not demand

2 Karns v. W. L. Imlay Rapid Cyanide Process Co., 181 Fed. 751.

3 Winkley Co. v. Bowen Mfg. Co., 180 Fed. 624; Handy Varnish Co. v. Midland Linseed Oil Co., 191 Fed. 256. *Contra*, Stewart v. The Sun, 36 Fed. 307; O'Brien v. Hearn, 125 Fed. 95.

3a Silvas v. Arizona Copper Co., 213 Fed. 504.

4 Gross & Phillips Mfg. Co. v. Gerhard, 8 Rep. 136.

5 Migliorucci v. Migliorucci, 1 Dick. 147; Foster v. Swasey, 2 W. & M. 217; Bliss v. Brooklyn, 10 Blatchf. 217; Prince v. Towns, 33 Fed. 161.

6 Migliorucci v. Migliorucci, 1 Dick. 147; Foster v. Swasey, 2 W. & M. 217; Bliss v. Brooklyn, 10 Blatchf. 217; Prince v. Towns, 33 Fed. 161; Karns v. W. L. Imlay Rapid Cyanide Process Co., 181 Fed. 751. *Contra*, O'Brien v. Hearn, 125 Fed. 95, where a court rule existed. But see Stewart v. The Sun, 36 Fed. 307.

7 Uhle v. Burnham, 46 Fed. 500.

8 Fox v. Blew, 5 Madd. 147.

9 Buckles v. C., M. & St. P. R. Co., 47 Fed. 424.

10 Kimble v. Western Union Tel. Co., 70 Fed. 888.

11 Ibid.

12 Winthrop v. Royal Exch. Ass. Co., 1 Dickens, 282; Walker v. Easterby, 6 Ves. 612; Gilbert v. Gilbert, 2 Paige Ch. (N. Y.) 603. But, under rule 35 of the Circuit Court, for the Southern District of New York, a non-resident plaintiff, although joined with a resident,

security for costs within a reasonable time, that such security has not been given will not, when the cause is called for trial, be a ground for a continuance.[13]

Where a plaintiff has recovered judgment against a solvent defendant, and process is outstanding in the nature of an execution to collect the same, it is not proper to require the plaintiff to make a deposit to secure costs due a commissioner.[14] A party who has filed a claim before a master or commissioner may be required to give the security for the costs for the determination thereof including the fees of the officer and the stenographer if it appears that his claim is doubtful and that his proceedings are dilatory or of needless length.[15] It was held in New York, by Chancellor Kent, that a person who sued in another's right, as an executor or administrator, could not be compelled to give security for costs;[16] but a receiver in bankruptcy,[17] and the receiver of a national bank appointed by the Comptroller who had not filed a certificate showing that the proceedings were taken by direction of the Treasury Department, when suing in another district, have been compelled to file security for costs.[18] The United States and parties suing or defending under the direction of any Department of the Government are by statute exempted from liability to give security for costs, at least upon appeals and writs of error.[19] By an executive order issued by the President August 14, 1914 concerning practice in the District Court of the Canal zone "The plaintiff in any civil suit, or special

must file security for costs. El. Vehicle Co. v. Gallagher, 145 Fed. 394.

13 Hawkins v. Willbank, 4 Wash. 285.

14 U. S. v. St. Charles Co., 31 Fed. 442.

15 Indra Line v. Palmetto Phosphate Co., C. C. A., 236 Fed. 94, 96.

16 Goodrich v. Pendleton, 3 J. Ch. (N. Y.) 520. See Cathcart v. Hewson, 1 Hayes, 173.

17 Osborne v. Pennsylvania R. Co. (E. D. Pa.), 159 Fed. 301. But see The Alert, 199 Fed. 542. *Cf.* §§ 634, 643, *infra.*

18 Platt v. Adriance, 90 Fed. 772. *Contra,* Platt v. Beach, 2 Benedict, 303, Fed. Cas. No. 11,215; Stanton v. Wilkeson, 8 Benedict, 357, Fed. Cas. No. 13,299; Pepper v. Fidelity & Casualty Co., 125 Fed. 822. It has been held that a non-resident receiver of a national bank must file security for costs, in an action at common law, when the State practice so requires, unless he filed a certificate bringing himself within the provisions of U. S. R. S., § 1001.

19 U. S. R. S., § 1001. The costs are paid out of the contingent fund of the Department which authorized the suit, defense or appeal.

proceedings, may be ruled to give security for the costs upon motion of the defendant, or of any officer of the court interested in the costs accruing in such suit; and if such rule be entered against plaintiff, and he fail to comply therewith, within the time prescribed by the court or judge thereof, the suit shall be dismissed.[20] This leaves the requirement of security in the discretion of the court.[21]

Security for costs in admiralty is usually required from both parties to a proceeding as subsequently described.[22] "Courts of the United States, including appellate courts, hereafter shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."[23] Such costs if not paid are included in the decree in favor of the seamen and become a lien on the recovery which may be enforced by the persons entitled to them.[24] The statute does not apply to proceedings upon appeal or error.[25]

Persons allowed to sue *in forma pauperis* are not obliged to file security for costs in the court of original jurisdiction;[26] but they must do so upon an appeal or writ of error.[27] Where in a suit in admiralty, brought *in forma pauperis* after a decree dismissing the libel, an appeal was taken with a stipulation signed by a surety, conditioned that appellant "should answer all damages and costs," if he fail to make his plea good, upon an affirmance "with costs:" it was held that the respondent might recover against the libellant and the surety, his costs in both the Circuit Court of Appeals and the District Court.[28] The

20 Panama R. Co. v. Curran, C. C. A., 256 Fed. 768.

21 Ibid.

22 *Supra*, §§ 562, 570, 571.

23 39 St. at L. 313, § 40 Stat. L. 157, *supra*, § 414, Comp. St., § 1630a.

24 The Memphian, 245 Fed. 484.

25 *Ex parte* Abdu, 247 U. S. 27; The Nigretia, C. C. A., 249 Fed. 348.

26 St. at L., 252; Boyle v. Great N. Ry. Co., 63 Fed. 539; *supra*, § 413. It has been held that, upon a motion to compel security, the plaintiff may cure an omission in his original petition for leave to sue as a pauper. Donovan v. Salem & P. Nav. Co., 134 Fed. 316.

27 Gallaway v. Fort Worth Bank, 186 U. S. 177, 46 L. ed. 1111; Bradford v. Southern Ry. Co., 195 U. S. 243, 251, 49 L. ed. 178, 181; *supra*, § 413.

28 The Joseph B. Thomas, 158 Fed. 559.

usual security required is a bond or undertaking with a sufficient surety for two hundred and fifty dollars,[29] but the plaintiff may at any stage of the case be obliged to file additional security.[30] In one case a bond for two thousand dollars was required.[31] In the District of Ohio it is held that a surety to a bond is a party to the suit, and that his liability can be enforced by summary proceedings after the final decree; that the statute of limitations does not begin to run in his favor until the final decree; and that security "for costs" includes the costs of an appeal.[32] Where a State statute made the indorser of a writ liable for the costs, it was held that he remained liable for costs in both State and Federal courts after a removal,[33] but the State practice of denying an application for security for cost, when delayed until after answer, is not followed in the Southern District of New York.[34]

29 Deprez v. Thomson-Houston El. Co., 66 Fed. 22.

30 Ibid. See Carpenter v. Knollwood Cemetery, 195 Fed. 96.

31 Ibid.

32 M'Claskey v. Barr, 79 Fed. 408.

33 Pullman's Palace Car Co. v. Washburne, 66 Fed. 790.

34 O'Brien v. Hearn, 125 Fed. 95.

CHAPTER XXVIII.

ENFORCEMENT OF DECREES AND ORDERS, INCLUDING EXECUTIONS AND WRITS OF POSSESSION AND CONTEMPTS.

§ 426. Enforcement of decrees and orders in general. Decrees and orders are enforced in seven ways: by writ of execution,[1] by attachment for contempt,[2] by writ of sequestration,[3] by writ of assistance,[4] by the action of the court itself through the medium of a master[5] or receiver[6] or other person appointed for that purpose.[7]

The Equity Rules provide: "Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party; and every person not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party."[8]

§ 427. Executions. A statute passed June 1, 1872, and incorporated in the Revised Statutes December 1, 1873, provides that "the party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in

§ 426. 1 § 427.
2 §§ 428–438.
3 § 439.
4 § 440.
5 § 441.
6 Chapter xix, *supra*.
7 § 441.
8 Eq. Rule 11, re-enacting but condensing Eq. Rule 10 of 1842.

relation to remedies upon judgments, as aforesaid by execution or otherwise."[1]

In pursuance of this statute, the Circuit and District Courts have generally promulgated rules adopting the State practice in this respect.[2] "The words 'in like causes' were probably used because many of the States had adopted codes of practice, which abolish the distinction between common law and equity practice, and in such States there are no causes that are technically known as common law causes."[3]

It has been held that the statute does not apply to criminal cases;[4] and that the United States are not entitled to remedies, which the State statutes grant to the State, but withhold from individuals.[5] The statute applies to remedies against the property of the judgment debtor only and not to remedies against his person;[6] and a State statute providing for the imprisonment of a judgment debtor, in certain cases of malicious prosecution, is not followed.[7] A State statute requiring the registration of a judgment against a municipal corporation in a certain office before its enforcement by execution was applied to the judgment of a Federal court;[8] but a State statute forbidding the enforcement by execution of a judgment against a municipal corporation does not affect the judgments of a court of the United States.[9]

The rules provide that final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District court in

§ 427. [1] U. S. R. S., § 916; 4 St. at L., ch. 68, p. 281; Lamaster v. Keeler, 123 U. S. 376, 31 L. ed. 238. The Pennsylvania statute authorizes the sale of a patent right under a special *fieri facias*. Pennsylvania Act of 1870 (P. L. 58); Erie Wringer Mfg. Co. v. National Wringer Co., 63 Fed. 248; Philadelphia & B. C. R. Co.'s Appeal, 70 Pa. St. 355; Floyd v. Farnsworth, 12 Wkly. Notes, 500. *Cf.* Ager v. Murray, 105 U. S. 126, 26 L. ed. 942; *supra*, § 79.

[2] See for examples the rules promulgated by the U. S. C. C., S. D. N. Y., October 11, 1878, and December 29, 1881.

[3] McDowell, J. in Clark v. Allen, 117 Fed. 699, 701.

[4] Clark v. Allen, 114 Fed. 374; Clark v. Allen, 117 Fed. 699.

[5] Clark v. Allen, 117 Fed. 699.

[6] Friedly v. Giddings, 119 Fed. 438.

[7] Friedly v. Giddings, 119 Fed. 438.

[8] Hart v. New Orleans, 12 Fed. 292, 293. See Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132.

[9] Hart v. New Orleans, 12 Fed. 292; New Orleans v. Morris, 3

suits at common law in actions of assumpsit.[10] A decree for a deficiency after a sale of mortgaged property in a foreclosure suit is enforced in the same manner.[11]

A judgment at common law[12] or a decree in equity[13] can be enforced by execution when it provides that either party shall recover a specified sum of money, although there is no direct provision for the issue of an execution; but the Federal court will not ordinarily issue an execution against an executor to collect a claim against the estate until after its decree has been presented to the State court which has jurisdiction of the settlement.[14] Where the decree directed, that plaintiff recover a specified sum of money, that he had a lien upon certain machinery and that such machinery be sold to satisfy the lien unless the amount adjudged to be due was paid within sixty days; that part of the sum which was not paid by the proceeds of the sale was enforced by execution.[15]

In the absence of statutory authority no execution will lie against the property of a county or other public corporation,[16] nor against sureties to enforce a decree against their principals in a suit to which they were not parties.[17]

A judgment creditor has a right to credit money collected by execution first upon that part of the indebtedness for the payment of which no surety is bound.[18]

Where an execution becomes dormant after levy by instructions to the officer not to sell, it loses its priority of lien as against later levies or liens acquired during its dormancy, but it is not extinguished and upon direction to proceed with the sale it is entitled to priority of levy as against any liens subsequently acquired.[19]

10 Eq. Rule 8, repeating Eq. Rule 8 of 1842.

11 Eq. Rule 10, repeating Eq. Rule 92 of 1842.

12 Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273.

13 Richards v. Harrison, 218 Fed. 134.

14 Alexander v. Fidelity Trust Co., C. C. A., 249 Fed. 1, 13.

15 Pease v. Rathbun-Jones Engineering Co., C. C. A., 228 Fed. 290.

16 Clearwater County v. Pfeffer, C. C. A., 236 Fed. 183.

17 Gillispie v. Riggs, 248 Fed. 843.

18 Santa Marina Co. v. Canadian Bank of Commerce, 242 Fed. 142.

19 *Re* Zeis, C. C. A., 245 Fed. 737.

A sale under an execution is not a judicial sale and requires no confirmation by the court.[20]

Unless the State statute give such power to a sheriff a Federal marshal cannot collect under an execution a bank deposit as other debt due the judgment debtor.[21]

§ 427a. Powers of United States marshals. The marshal in the courts of the United States has duties analogous to those of the sheriff in the different States.[1] It is his duty to attend the District Courts when sitting in the district, and "to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."[2] He has the right under the direction of the Attorney-General to protect judges of the courts of the United States while in the discharge of their official duties, and while on their way to hold court, and if necessary, to take human life in their defense.[3] "The marshals and their deputies have, in each state, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State have by law, in executing the laws thereof."[4]

Under these provisions of the Revised Statutes the marshal or his deputy, if resisted when in the performance of his duty, may call to his aid a sufficient force from his district, called the *posse comitatus*, or power of his county, from the corresponding force which the sheriff or county officer has at his command,[5]—that is, such number of men as are necessary for his assistance in the execution of the writs of the United States;

20 In Re Haywood Wagon Co., 219 Fed. 655.

21 Berkman v. N. Y. Produce Exchange Bank, Municipal Court, N. Y. City, 1st Dist. part I, per Spiegelberg, J., Sept., 1917, N. Y. L. J., Oct., 1917.

§ 427a. 1 *Re* Neagle, 135 U. S. 1, 34 L. ed. 55; s. c., 39 Fed. 833; U. S. R. S., § 788. A delivery to a sheriff for "service" is an unlimited delivery and makes it his duty to obey the command of the writ and to do all acts necessary to realize the money which he is thereby directed to collect. *Re* Tengwall Co., C. C. A., 201 Fed. 82.

2 U. S. R. S., § 787.

3 *Re* Neagle, 135 U. S. 1, 34 L. ed. 55; s. c., 39 Fed. 833.

4 U. S. R. S., § 788; *Re* Neagle, 135 U. S. 1, 68, 34 L. ed. 55, 73. It has been held that this gives to the marshals the same and no more power to arrest without a warrant than is conferred by the State statutes upon the said officers. *Re* Acker, 66 Fed. 290, 294.

5 6 Op. Atty. Gen. 466, 469.

and therein every person above the age of fifteen and able to travel is bound to be aiding, and if they refuse to assist, may be punished by fine and imprisonment.[6] It has been said, that this force by the common law included all persons, whatever might be their occupation, whether civilians or not; and including the military of all denominations,—militia, soldiers, marines,—all of whom were alike bound to obey the commands of a sheriff or marshal. "The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus.*"[7]

An act of Congress has, however, provided, that "it shall not be lawful to employ any part of the army of the United States as a *posse comitatus,* or otherwise for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."[8] Under this statute, it seems that the aid of the army cannot be obtained by a marshal unless the President shall employ it to suppress insurrection after a proclamation commanding the insurgents to disperse.[9]

The marshal and his deputies may carry arms and use force in the execution of their official duty although a State statute forbids carrying concealed weapons;[10] but they may not make arrests nor carry arms outside of the districts for which they are appointed.[11]

The Revised Statutes provide that "all writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained."[12] In such a case, the writ may be executed by the marshal of the district from which it was

6 Bac. Abr. Sheriff (11).

7 6 Op. Atty. Gen. 466, 473.

8 Act of June 18, 1878, § 5; 20 St. at L. 145; 1 Sup. U. S. R. S. 363.

9 16 Op. Atty. Gen. 162; U. S. R. S. §§ 5298, 5300.

10 U. S. ex rel. McSweeney v. Fullhart, 47 Fed. 802; Sifford's Case, 5 Am. Law. Reg. 659.

11 Walker v. Lea, 47 Fed. 645.

12 U. S. R. S., § 985.

issued in the other district without any independent writ being directed to him for that purpose.[13] All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State or in any Territory, but they must be issued from, and made returnable to, the court wherein the judgment was obtained.[14]

When a marshal dies, or is removed from office, or his term expires, after he has taken under execution any real property and before sale or other final disposition thereof, the like process issues to the succeeding marshal, and the same proceeding is had as if his predecessor were still in office.[15] In such a case, when the former marshal has sold the real estate but executed no deed, the court may on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by the former marshal, order his successor to perfect the title, and execute and deliver a deed to the purchaser upon payment of the balance due.[16]

§ 427b. Stay of execution. At common law, in cases where a writ of error may issue from the Supreme Court,[1] or from a Circuit Court of Appeals,[2] the execution cannot issue until the expiration of ten days from the entry of the judgment.

The writ may, however, be previously prepared by the clerk.[3]

It has been held: that when a motion for a new trial is pending after the entry of judgment, the ten days does not begin to run till such motion is denied, that the denial does not become effective till the order has been filed in the clerk's office;[4] and that Sundays must be excluded from the computation of the time.[5]

Stays of proceedings, pending an application to the Supreme Court of the United States for a writ of *certiorari,* are often

13 Prevost v. Gorrell, 5 W. N. C. (Pa.) 151.

14 U. S. R. S., § 986.

15 U. S. R. S., 994; Doolittle v. Bryan, 14 How. 563, 14 L. ed. 543.

16 U. S. R. S., § 994; Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271.

§ 427b. 1 U. S. R. S., § 1007.

2 Danielson v. Northwestern Fuel Co., 55 Fed. 49.

3 Board of Com'rs v. Gorman, 19 Wall. 661, 22 L. ed. 226.

4 Brown v. Evans, 18 Fed. 56; Danielson v. Northwestern Fuel Co., 55 Fed. 49.

5 Danielson v. Northwestern Fuel Co., 55 Fed. 49.

granted, when security has been given pending the review by the Circuit Court of Appeals.[6] A temporary stay of execution has been granted, although no writ of error was sued out, so that other lienholders might enter judgment against the judgment debtor, and thus share in the proceeds of the sale.[7]

It has been held that there may be a stay of execution in order to give the defendant time to file a bill in equity to reform the contract upon which the judgment was entered.[8]

The court may compel the judgment debtor to give security as a condition of a stay of proceedings for more than ten days after entry of judgment.[9]

The Revised Statutes further provide that "when a Circuit Court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."[10]

Where a motion to set aside a judgment was granted, upon condition that the costs should be paid within sixty days, which payment was not made, it was held that the order did not supersede, but merely suspended, the judgment; and that the execution was properly based upon the original judgment and not upon one subsequently entered in the cause.[11]

6 Boston & M. R. Co. v. Gokey, 150 Fed. 686; Dancel v. Goodyear Shoe Mach. Co., S. D. N. Y., March 31, 1906. Edwards H. Childs for the motion. Roger Foster opposed in which the author was counsel.

7 Eaton v. Cleveland, St. L. & L. & K. C. Ry. Co., 41 Fed. 421.

8 American R. Co. of Porto Rico v. Ponce & G. R. Co., C. C. A., 246 Fed. 925.

9 Fisher v. Meyer, 10 Fed. 268.

10 U. S. R. S., § 987; Cambuston v. U. S., 95 U. S. 285, 288, 24 L. ed. 448, 450; Emma Silver Min. Co. v. Parks, 14 Blatchf. 411, 413; Brown v. Evans, 18 Fed. 56.

11 U. S. v. Noojin, 155 Fed. 377.

"In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term." [12] It has been held that this only applies where the defendants has property, upon which the judgment of the State court would be a lien, and he, by reason of such lien, would be entitled under the State law to a stay.[13] A State statute providing that no execution should issue upon a judgment against a county for a specified period was followed by the Federal court.[14]

§ 427c. Proceedings by adverse claimant. Where a marshal takes possession of property not subject to execution which is owned by a party to the writ, the case is one which arises under the laws of the United States, and the Federal District Court has jurisdiction of a suit to recover the property.[1] So is a suit against a marshal for infringing a State statute which has been adopted by a rule of a court of the United States.[2]

It has been held that, where a marshal under an execution in equity has seized the property of a person not a defendant to the writ, such third person cannot file a petition *pro interesse suo* to recover possession, but that his remedy is an original bill, or an action at law;[3] that such a suit arises under the laws of the United States, when the marshal claims that the property belongs to the defendant to the writ;[4] but that it does not when the marshal makes no such claim.[5]

§ 427d. Appraisal subsequent to levy. When it is required by the laws of any State that goods taken in execution on a writ of *fieri facias* shall be appraised before they are sold, the appraisers appointed under the authority of the State may appraise goods taken in execution on such a writ issued out of a court of the United States, in the same manner as if such

12 U. S. R. S., § 988.

13 The Island Queen, 152 Fed. 470.

14 Clearwater County v. Pfeffer, C. C. A., 236 Fed. 183.

§ 427c. 1 Front St. Cable Ry. Co. v. Drake, 65 Fed. 539.

2 Sowles v. Witters, 46 Fed. 497.

3 *Ex parte* Mensing, 55 Fed. 17. *Contra*, St. Paul, M. & M. Ry. Co. v. Drake, C. C. A., 72 Fed. 945; *supra*, § 258.

4 Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314.

5 Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; *supra*, § 34.

writ had issued out of a court of such State; and the marshal, in whose custody the goods are, shall summon the appraisers in the same manner as the sheriff is, by the laws of such State, required to summon them, and if the appraisers, after having been duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement.[1] When such appraisers attend, they are entitled to the like fees as in cases of appraisement under the laws of such State.[2]

§ 427e. Interest upon judgment. Under the Revised Statutes, "interest is allowed on all judgments in civil causes recovered in a Circuit or District Court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the court of such state."[1] The interest is calculated from the date of the judgment, at such rate as is allowed by law on judgments "recovered in the courts of such State."[2] This statute does not apply to judgments against the United States.[3] It does not apply to decrees in equity, nor to judgments or decrees of the Supreme Court of the United States.[4] When a judgment against a municipal corporation was revived against its successor by *scire facias,* the order awarded execution for interest as well as principal.[5]

It has been held that the right of the United States to issue execution under a judgment in a purely governmental suit, such as an action upon a bail bond, is not barred by any limitation, nor by laches in failing to issue the execution until more than ten years after the entry of the judgment.[6]

§ 427f. Certificate of probable cause. "When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery

§ 427d. [1] U. S. R. S., § 993; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253.

[2] U. S. R. S., § 993.

§ 427e. [1] U. S. R. S., § 966.

[2] Ibid.

[3] U. S. v. Sherman, 98 U. S. 565, 25 L. ed. 235.

[4] Perkins v. Fourniquet, 14 How. 328, 331, 14 L. ed. 441, 443.

[5] Grantland v. Memphis, 12 Fed. 287.

[6] U. S. v. Noojin, 155 Fed. 377.

of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall upon final judgment be provided for and paid out of the proper appropriation from the Treasury."[1]

It has been said: "I think this statute means: (1) Where the officer who ordered the seizures had no reasonable grounds for suspecting a violation of law, the recovery against him, if he is sued, shall be personal, and shall be collected from him. (2) Where the subordinate officer who made the seizure had no order from a superior to make it, and acted without reasonable grounds for suspecting a violation of law, the recovery shall be against him personally, and shall be collected from him. (3) But where the seizure was made under orders from a proper superior officer or where the seizure was made on what reasonably seemed to be proper cause, the recovery may still be had against the officers; but it is, by the certificate provided for in the statute, converted into a recovery against the government. If this is not the meaning of the statute, I am at a loss to understand what its does mean. Surely Congress was not making provision to relieve revenue officials, and to provide for payment by the government, in contemplation of illegal judgments to be rendered by the courts. If the intent was not to allow recoveries in such cases as we have here, the statute would simply have forbidden recoveries where the officer acted under proper orders, or where there was reasonable ground to suppose that the seizure should be made, or, perhaps there would have been no statute enacted. The question might have been left as at common law."[2]

§ 427f. [1] U. S. R. S., § 989; Cox v. Barney, 14 Blatchf. 289; Andrae v. Redfield, 12 Blatchf. 407; Frerichs v. Coster, 22 Fed. 637; Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543; U. S. v. Sherman, 98 U. S. 565, 25 L. ed. 235; Campbell v. James, 3 Fed. 513; Dunnegan v. U. S., 17 Ct. Cl. 240, 247; White v. Arthur, 10 Fed. 80; Flanders v. Seelye, 105 U. S. 718, 26 L. ed. 1217. See *supra*, §§ 96g, 96h.

[2] Haymes v. Brown, 132 Fed. 525, 527.

The effect of this statute is after such certificate has been given practically to convert the suit against the officer into a claim against the United States.[3] There is no liability on the part of the government until there has been a recovery against the officer, and a certificate of probable cause has issued.[4]

The certificate will be granted where it is affirmatively shown that the officers, who instituted the proceedings, acted in good faith and on reasonable ground of suspicion, although the verdict of the jury against them was clearly right under the evidence.[5] The court is not justified in granting such a certificate to a collector of internal revenue who acted at the request of a revenue agent whose only authority was an instruction from the chief clerk of the supervisor.[6]

A certificate may be granted by a judge who did not try the case.[7] If, however, that judge has denied the application, another judge will rarely, if ever, grant it.[8] A certificate may be granted before or after an execution is issued.[9] A certificate cannot be granted before trial.[10]

In case of appeal or writ of error, no money will be paid out of the Treasury upon the judgment until an affirmance by the appellate court and entry of judgment below in accordance with its mandate.[11]

It has been held that after judgment neither the government nor the collector is liable for interest.[12] The Supreme Court of the United States, upon affirming a judgment in such a case, will allow interest on it, which will be included by the court below in its judgment of affirmance.[13] It has been held that when the government has had no notice, actual or constructive, and no opportunity to defend, it is not concluded by the certificate of probable cause.[14] The postmasters are not included within the statute.[15] A similar statute regulates an

3 U. S. v. Sherman, 98 U. S. 565, 25 L. ed. 235.

4 Ibid.; Cox v. Barney, 14 Blatchf. 289.

5 U. S. v. 83 Sacks of Wool and 5,974 Sheepskins, 147 Fed. 747.

6 Frerichs v. Coster, 22 Fed. 637.

7 Cox v. Barney, 14 Blatchf. 289.

8 Frerichs v. Coster, 22 Fed. 637.

9 Cox v. Barney, 14 Blatchf. 289.

10 Andrae v. Redfield, 12 Blatchf. 407.

11 Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543.

12 White v. Arthur, 10 Fed. 80.

13 Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543.

14 Dunnegan v. U. S., 17 Ct. Cl. 247.

15 Campbell v. James, 3 Fed. 513.

action against a person "for or on account of any thing done by him while an officer of either House of Congress in the discharge of his official duty."[16]

The Revised Statutes further provide: "When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."[17] It has been held that this is not inconsistent with the statute previously quoted; and that in no case can there be a recovery against a revenue officer for a wrongful seizure upon probable cause, when the goods are returned intact; the remedy of the complainant being limited to a claim for loss or damages to his property while in the custody of the officer, which can be collected only from the government.[18]

§ 427g. Proceedings supplementary to execution. By the adoption of a rule to that effect, a District Court of the United States at common law acquires power to enforce the proceedings supplementary to execution authorized by the State statutes,[1] including the right to examine strangers to the suit, in order to ascertain the existence and location of the assets of the judgment debtor;[2] but not jurisdiction of an independent bill in equity authorized by a State statute, and not within the ordinary chancery jurisdiction;[3] nor can a Federal Court of equity enforce such a State statute.[4]

Equitable assets held by the defendant to a decree in which

16 18 St. at L., p. 371.

17 U. S. R. S., § 970.

18 Agnew v Haymes, C. C. A., 141 Fed. 631.

§ 427g. 1 *Ex parte* Boyd, 105 U. S. 647, 26 L. ed. 1200; Canal & C. St. R. Co. v. Hart, 114 U. S. 651, 661, 29 L. ed. 226, 228. See §§ 51–151c.

2 Walker v. Monad Eng. Co., C. C. A., 196 Fed. 206.

3 Hudson v. Wood, 119 Fed. 764.

4 Regina Music Box Co. v. F. G. Otto & Son, 124 Fed. 747.

no strangers to the suit claim any interest can be subjected to the payment of sums thereby awarded through the appointment of a receiver,[5] or otherwise, upon a petition in the original cause.[6] An original bill for that purpose is irregular; but it may be sustained as such a petition.[7] Then no subpœna need be served, an ordinary notice being sufficient.[8]

It has been held that the new equity rules[9] authorize proceedings to collect the amount awarded by a decree in equity to be made in the manner prescribed by the State statutes, and that a trustee against whom a decree in equity has been rendered in his representative capacity may be examined in proceedings supplementary to execution in accordance with the State practice.[10]

§ 428. Contempts. An attachment is the proper process to compel obedience to a decree or order requiring the performance of a specific act other than the payment of money,[1] or to punish a contempt of court.[2] It seems, that in districts held in States where imprisonment for debt has been abolished, disobedience to a decree or order for the payment of money cannot be punished by attachment;[3] unless the defaulting party is an officer of the court, as an attorney,[4] or has bid in property at a judicial sale;[5] or the motion is made by a master or the clerk of the Supreme Court to compel payment of his fees.[6] It is a contempt to evade obedience to an order or decree by acts which are tantamount to a violation, although there are colorable changes from what has been forbidden.[7] Thus, where the injunction forbad a sale at a

5 Dancel v. Goodyear Shoe Machinery Co., explained *supra*, § 302.

6 Maitland v. Gibson, 79 Fed. 136.

7 Ibid.

8 Ibid.

9 Eq. Rule 8.

10 Brown v. Fletcher, 239 Fed. 360.

§ 428. 1 Rule 8; Mallory Mfg. Co. v. Fox, 20 Fed. 409.

2 U. S. R. S., § 725; *Re* Chiles, 22 Wall. 157, 22 L. ed. 819.

3 Mallory Mfg. Co. v. Fox, 20 Fed. 409; Nelson Morris & Co. v. Hill, 89 Fed. 477.

4 Jeffries v. Laurie, 27 Fed. 195; *Re* Pitman, 1 Curtis, 186; Bagley v. Yates, 3 McLean, 465; The Laurens, 1 Abb. Adm. 508; *Re* Paschal, 10 Wall. 483, 19 L. ed. 992; U. S. v. Mann, 2 Brock. 9.

5 Camden v. Mayhew, 129 U. S. 73, 32 L. ed. 608.

6 Equity Rule 68; S. C. Rule 10; Cutting v. Van Fleet, 252 Fed. 100, *supra*, § 395.

7 U. S. v. Southern Wholesale Grocers' Ass'n, 207 Fed. 434; Lovell McConnell Mfg. Co. v. International Automobile League, C. C. A., 202 Fed. 219.

discount from prices fixed by a patent license, a charge of the fixed price, followed by a return to the purchaser of a check for the amount of the previous discount payable to a charity selected by the latter, was punished as a contempt.[8] Where the injunction forbad the circulation of a book or list containing only the names of a certain class of dealers, it was said that the adding to, or omission of names from such a list with the intent of evading the decree would be a contempt.[9] Where an injunction forbad members of an association from confederating to prevent manufacturers from selling goods to dealers not listed in a book published by the association it was held that it was violated by continuing to send a list containing the names only of those who had agreed to maintain the minimum prices established by the association to the same manufacturers when seeking information as to the standing of those wishing to buy from them, and by stating that none of the methods, rules, practices or activities of the association would be affected by the decree.[10]

The courts of the United States have power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other persons, to any lawful writ, process, order, rule, decree, or command of the said courts."[11] Beyond this the District Courts have no such power.[12] The act, just quoted in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, is doubtful.[13]

An act committed in the presence of the judge at his dwelling

[8] Lovell-McConnell Mfg. Co. v. International Automobile League, C. C. A., 202 Fed. 219.

[9] U. S. v. Southern Wholesale Grocers' Ass'n, 207 Fed. 434, 439.

[10] U. S. v. Southern Wholesale Grocers' Ass'n, 207 Fed. 434, 439.

[11] U. S. R. S., § 725.

[12] *Ex parte* Robinson, 19 Wall. 505, 510.

[13] Field, J. in *Ex parte* Robinson, 19 Wall. 505, 510. State v. Morrill, 16 Ark. 384; Little v. State, 90 Ind. 338; Hale v. State, 55 Ohio St. 210; State v. Shepherd (S. C. Mo.), 76 S. W. 79; Hawes v. State,

while the court is in recess although in a room occasionally used as a court room, is not committed in the presence of the court.[14] The word "near" has been construed as used in its literal sense as a designation of locality but with a broader meaning as including a natural tendency and effect.[15]

The phrase, "so near the presence of the court as to obstruct the administration of justice" applies to all acts of misbehavior the natural tendency and effect of which is to interfere with the administration of justice, wherever the acts may be committed.[16] "The test of the requisite nearness is made by Congress to depend upon the effect of the act upon the administration of justice. If obstructive of it in fact, it will be held to have been committed near enough the presence of the court to come within the meaning of the act. The locality is important only as reflecting upon whether the misbehavior is or is not obstructive."[17]

It is a contempt of court to interfere, otherwise than by a judicial proceeding, with a judicial sale or a sale under an execution; as it has been held by representation in words or circulars to bidders and persons present that the sale was irregular and unfair,[18] or by combination to restrain competition.[19]

It is a contempt for a public officer to attempt unlawfully to dispossess the court, its officers or its records from rooms in which they are located.[20]

46 Nebraska, 149; Carter v. Commonwealth, 96 Va. 791, 45 L. R. A. 310, 32 S. E. 780. See Constitutional Regulation of Contempt of Court, Harv. Law Rev., XIII, 615; Statutory Restriction on the Power of Courts to Punish for Contempt, Yale L. J., Dec. 1903. It was held, that a statute was unconstitutional which provided, that, in all cases of indirect contempt, the party charged should be entitled to have the case tried by a different judge than the one who made the order and by a jury. Smith v. Speed, 11 Oklahoma, 95, 55 L.R.A. 402; *Re* Creely, (Cala. Ct. of App., First Dist., August, 1908) 97 Pac. 766. That this can be done has been held in People ex rel. Munsel v. Court of Oyer & Terminer, 101 N. Y. 245; *Re* Oldham, 89 N. C. 23, 45 Am. Rep. 673; criticised by N. Y. L. J., November 28, 1908.

14 U. S. v. Huff, 206 Fed. 700, 704.

15 U. S. v. Huff, 206 Fed. 700, 702, 705.

16 Ibid.

17 U. S. v. Huff, 206 Fed. 700, 705, *per* Grubb, J. See Toledo News Paper Co. v. U. S., 247 U. S. 402, affirming C. C. A., 237 Fed. 458.

18 *Re* Sowles, 41 Fed. 752.

19 *Re* Boyd, 228 Fed. 1003, see *supra*, § 394.

20 *Re* Lyman, 55 Fed. 29.

Misbehavior in the presence of the court may consist in an assault,[21] or in abusive language addressed to the court,[22] or one of its officers,[23] or any person in the court-room.[24] Similar conduct in an ante-room of the court, or so near the court-room as to be heard therein,[25] or seen therefrom, or from the jury-room,[26] is also punishable as a contempt.

So are an assault upon a trustee in bankruptcy while in the performance of his duties,[27] and interference with property held in an official capacity by a Federal marshal or his deputy,[28] or by a Federal receiver.[29] Where an order directed the officers, agents and attorneys to turn over to a receiver all notes of their corporation in their possession the attorney was held to be guilty of contempt for delivering notes which he held to the president who destroyed them.[30] It is not a contempt to institute a suit in a State court, to enjoin a receiver appointed by a court of the United States, from executing the order of the latter court,[31] al-

21 Sharon v. Hill, 24 Fed. 726; *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419; U. S. v. Patterson, 26 Fed. 509; U. S. v. Barrett, 187 Fed. 378.

22 *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419.

23 *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419; such as a judge, or an attorney, U. S. v. Barrett, 187 Fed. 378; *Cf. Re* Newman, C. C. A., 214 Fed. 69.

24 U. S. v. Emerson, 4 Cranch, C. C. 188; U. S. v. Carter, 3 Cranch, C. C. 423.

25 U. S. v. Emerson, 4 Cranch, C. C. 188.

26 U. S. v. Barrett, 187 Fed. 378.

27 Writ of error dismissed, O'Neal v. U. S., 190 U. S. 36, 47 L. ed. 945; writ of habeas corpus denied; *Ex parte* O'Neal, 125 Fed. 967. This commitment was one of the grounds for the impeachment of Judge Swayne, who was acquitted by the Senate of the United States.

28 A seizure by a sheriff, under State process, of property in the custody of a deputy marshal after its sale by the marshal, but before its delivery to the buyer, is a contempt of the Federal Court. Sabin v. Fogarty, 70 Fed. 482. Where a marshal who had replevied goods allowed the plaintiff's agents to put them in a car and to procure a shipping receipt and bill of lading for the same, directed to a stranger to the suit, it was held that the property had passed out of the custody of the Federal Court and that a sheriff who levied a State writ of attachment upon them was not guilty of contempt. Animarium Co. v. Bright, 82 Fed. 197.

29 *Re* Tyler, 149 U. S. 164, 37 L. ed. 689; Royal Tr. Co. v. Washburn, B. & I. R. Co., C. C. A., 139 Fed. 865, *Re* Dialogue, 215 Fed. 462, *supra*, § 311.

30 *Re* Star Spring Bed. Co., C. C. A., 203 Fed. 640.

31 Royal Tr. Co. v. Washburn, B. & I. R. Co., C. C. A., 139 Fed. 865.

though an attempt to enforce such a mandate of the State court would be.[32]

The filing of a brief containing a scandalous and insulting attack on the conduct of the judge, from whose decision an appeal was taken, was held to be a ground for suspending the attorneys indefinitely from practice before the Circuit Court of Appeals, where such brief was filed,[33] but not to be a ground for disbarring them from practice in a Circuit Court of the United States in another Circuit.[34]

It was held that the fact that a marshal knew a talesman, whom he subpœnaed under an open venire, to be a friend of the defendant in a criminal case, is not sufficient to convict him of a wilful contempt of court,[35] and it has been said that a bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a Federal court, is not a contempt.[36]

It has been held to be a contempt to assault a United States commissioner, because of some past judicial action by him,[37] and to inflict cruel and unusual punishment upon a Federal prisoner.[38]

It has been said to be a contempt for an attorney to carry a pistol into court.[39]

A hearing before a master in chancery or examiner, is for this purpose, treated as a proceeding in court.[40] Proceedings before a grand jury are considered to be in the presence of the court.[41] It is a contempt for a grand juror to disclose the testimony upon which an indictment was based;[42] and for a petit juror to dis-

32 Ibid.

33 *Re* Watt & Dohan, C. C. A., Second Circuit, July 1, 1905, approved (C. C. E., D. Pa.), 149 Fed. 1009.

34 *Re* Watt & Dohan, 149 Fed. 1009.

35 Richards v. U. S., C. C. A., 126 Fed. 105.

36 U. S. v. Carroll, 147 Fed. 947.

37 *Ex parte* McLeod, 120 Fed. 130.

38 *Re* Birdsong, 39 Fed. 599; where the prisoner was chained by the neck so that he could neither lie nor sit and left so chained in darkness for several hours of the night.

39 Sharon v. Hill, 24 Fed. 726.

40 Sharon v. Hill, 24 Fed. 726; U. S. v. Anonymous, 21 Fed. 761.

41 Heard v. Pierce, 8 Cushing (Mass.) 338, 341, 54 Am. Dec. 757; cited *Re* Savin, 131 U. S. 267, 277, 33 L. ed. 150, 153.

42 *Re* Atwell, 140 Fed. 368.

cuss a case, in violation of the court's direction to the contrary,[43] and to tamper with a juror or with a talesman before he is selected for a jury,[44] although the offense is committed at some distance from the court-house, but within the jurisdiction of the court.[45] Such is the conduct of counsel in treating a juror to a drink, and private conversations with a juror in which one respondent promised to introduce him to a legislator and the other listened to a request for aid in promoting a bill without either promising or refusing such a system.[46]

An attempt in the hall adjoining the room where a trial is in progress to bribe a witness subpœnaed to attend it, is a contempt of court.[47] Bribery of a witness in the town where the court is held has been held to be a contempt within the statute.[48] So is an attempt to intimidate a witness.[49] It has been held to be a contempt of court to interrupt and violently break up the testimony of a witness before an examiner by questioning, prompting and talking with the witness.[50] An attorney has been punished for contempt in instituting an unfounded suit in a State court against a Federal judge, for the purpose of disqualifying the latter from hearing a pending cause.[51]

It has been said that it might be a contempt to ask relief which might obstruct, delay or embarrass the court in proceeding under the mandate of a court of review.[52] A State district attorney may be punished for contempt in applying to a State court for a mandamus, to compel a Federal receiver to disobey an order of

43 *Re* May, 1 Fed. 737; U. S. v. Devaughan, 3 Cranch, C. C. 84.

44 *Re* Cuddy, 131 U. S. 280, 33 L. ed. 154; Kirk v. U. S., C. C. A., 192 Fed. 273; Kelly v. U. S., C. C. A., 250 Fed. 947; *Re* Kelly, 243 Fed. 696.

45 U. S. v. Carroll, 147 Fed. 947; Kirk v. U. S., C. C. A., 192 Fed. 273.

46 *Re* Kelly, 243 Fed. 696, aff'd C. C. A., 250 Fed. 947; certiorari denied, Tolen v. U. S., 248 U. S. 585.

47 Savin, Petitioner, 131 U. S. 267, 33 L. ed. 150; Fischer v. McDaniel, 9 Wyoming 457.

48 *Re* Brule, 71 Fed. 943; U. S. v. Carroll, 147 Fed. 947. See Cuddy, Petitioner, 131 U. S. 280, 33 L. ed. 154.

49 Turk v. State Arkansas, April, 1919, 185 S. W. 472.

50 U. S. v. Anonymous, 21 Fed. 761.

51 *Ex parte* Davis, 112 Fed. 139. Application for writ of prohibition denied, *Re* Paquet, C. C. A., 114 Fed. 437. This commitment was one of the grounds for the impeachment of Judge Swayne, who was acquitted by the Senate of the United States.

52 Coram v. Davis, 174 Fed. 664, 665.

the Federal court.[53] It was held to be a contempt of court to sue in a court of another State a party while there for the purpose of attending the taking of a deposition; and a fine of the expenses of such suit, including the counsel fees therein, was imposed upon the party who brought it.[54]

It is not a contempt for an attorney to call the attention of the State court to certain facts, which result in an order that invades the Federal jurisdiction, when such order is entered upon the court's own motion;[55] nor for an attorney to advise his client that an order is void, when he does not advise the client to disobey the same.[56] It has been said to be a contempt of court to bring before it a collusive suit.[57]

The Federal court cannot punish for contempt, a person who is not its officer, nor a suitor therein, upon the charge of using, or of an attempt to use, its process, to obstruct the administration of justice in a State court.[58]

It has been held not to be a contempt to take in another State and file and publish within the jurisdiction, the deposition in a case there pending, for the purpose of deceiving the court, when the paper has not been offered in evidence,[59] nor to conspire to commit a contempt of court.[60]

It is a contempt for even a judge to disobey a writ of supersedeas,[61] even though the payment or decree below has been affirmed, when no mandate has been issued.[62] To lynch a pris-

53 Royal Tr. Co. v. Washburn, B. & I. R. Ry. Co., 113 Fed. 531; *supra*, § 311.

54 Bridges v. Sheldon, 7 Fed. 17, 45–47; *supra*, § 167. But see Blight v. Fisher, Pet. C. C. 41.

55 *Re* Watts & Sachs, 190 U. S. 1, 47 L. ed. 933. But see *Re* Fortunato, 123 Fed. 622.

56 *Re* Noyes, C. C. A., 121 Fed. 209, 226.

57 Lord v. Veazie, 8 How. 251, 12 L. ed. 1067.

58 *Re* Riggsbee, 151 Fed. 701; Cleveland v. Chamberlain, 1 Black, 419, 17 L. ed. 93.

59 Doniphan v. Lehman, 179 Fed. 173.

60 Ibid.

61 *Re* Noyes, C. C. A., 121 Fed. 209, 225; where the judge was fined $1,000. The disobedience consisted in letters to the marshal, directing him to "hold things in *statu quo*" and to guard gold dust, which by the writ a receiver had been directed to return to the defendants to the suit, and in a letter to the military commander asking him to render the marshal such assistance as was required.

62 Merrimack River Sav. Bank v. City of Clay Center, 219 U. S. 527, 55 L. ed. 320.

oner, who is in the custody of a State jailer, pending a supersedeas from a court of the United States which prevents his execution until an appeal from an order denying an application for the writ of *habeas corpus* has been decided.[63] It has been said to be a contempt of an appellate court to destroy property pending an appeal from a decree denying a prayer for an injunction against such destruction,[64] and that the issue by the court of first instance of an injunction against such destruction pending the appeal does not deprive the appellate court of jurisdiction to punish the act.[65]

It is a contempt to part with money pending an application to compel the payment thereof into court,[66] but not for a bankrupt to misappropriate assets subject to the order of the court when the court has made no order in relation to them.[67]

Advice to disobey a writ, when given to a marshal by a United States District Attorney and by a representative of the Department of Justice is a contempt of court.[68]

It has been held that it is a contempt for a person duly subpœnaed to refuse to attend, no matter how immaterial his evidence may be and irrespective of the sufficiency of the pleadings in the suit;[69] and for a person to refuse to attend and produce documents, when he has been duly served with a subpœna *duces tecum* requiring the production of the same, although they are immaterial to the suit,[70] and although they may tend to criminate him.[71] In the latter case, it is his duty to raise the objection after he has produced the documents in court.[72] It was held that a man was guilty of contempt for failing to attend in obedience to a subpœna and to present to the court the facts which ex-

63 U. S. v. Shipp, 203 U. S. 563, 51 L. ed. 319.

64 Merrimack River Sav. Bank v. City of Clay Center, 219 U. S. 527, 55 L. ed. 320.

65 Ibid.

66 Wartman v. Wartman, Taney, 362, 29 Fed. Cas., p. 303, No. 17,210.

67 *Re* Probst, C. C. A., 205 Fed. 512.

68 *Re* Noyes, C. C. A., 121 Fed. 209, 228, 231.

69 Nelson v. U. S., 201 U. S. 92, 114, 50 L. ed. 673, 685; Fairfield v. U. S., C. C. A., 146 Fed. 508.

70 Fairfield v. U. S., C. C. A., 146 Fed. 508.

71 U. S. v. Collins, 146 Fed. 553; U. S. v. Terminal R. Ass'n, 148 Fed. 486.

72 U. S. v. Collins, 146 Fed. 553; U. S. v. Terminal R. Ass'n, 148 Fed. 486.

cused him from attendance,[73] and to evade service of an order [74] although he may evade service of process in the suit.[75]

It was held by a State court that concealment to avoid service of a subpœna is a criminal contempt,[76] and so has been held to be an attempt to entice out of the jurisdiction or conceal a witness who has not yet been served.[77] A member of a firm was not punished for disobedience to a subpœna *duces tecum* requiring him to produce papers in the possession of his partners in another country although he had not requested them to send them.[78]

It has been held that a court has no jurisdiction to punish as a contempt a violation of an oral stipulation made in open court.[79]

An attorney [80] or other officer [81] of the court may be thus compelled to pay to a person named in the order money received by him in his official capacity. Where, however, there is room for a reasonable doubt as to how much is due from the officer, the court will usually refuse to proceed against him summarily, and require the complaining party to begin a suit.[82]

It is a contempt of court for a person to assist another, whether acting as the latter's agent or otherwise, in committing an act which has been forbidden to himself in an injunction issued against him individually.[83]

73 Carman v. Emerson, C. C. A., 71 Fed. 264.

74 *Re* Rice, 181 Fed. 217.

75 Ibid.

76 Aaron v. State Mississippi 1913, 62 So. 41p., approved Harvard Law Rev., Dec. 1913, XXVII, p. 165, Col. Law Rev. Dec. 1913, p. 746; N. Y. L. J. Oct. 8, 1913, criticized, 17 Law Notes 104.

77 Rex. v. Carroll Victoria L. R. A., Dec. 1913, p. 380, 382.

78 Munroe v. U. S., C. C. A., 216 Fed. 107, reversing 210 Fed. 326.

79 *Ex parte* Buskirk, C. C. A., 72 Fed. 14, 20.

80 *Re* Paschal, 10 Wall. 483, 19 L. ed. 992; Jeffries v. Laurie, 27 Fed. 195.

81 *Re* Pitman, 1 Curt. 186; Bagley v. Yates, 3 McLean, 465; The Laurens, 1 Abb. Adm. 508.

82 See *Re* Paschall, 10 Wall. 483, 19 L. ed. 992; U. S. v. Mann, 2 Brock. 9.

83 Dadirrian v. Gullian, 79 Fed. 784; Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 130 Fed. 893; *Re* Rice, 181 Fed. 217, an attorney. A person enjoined from the infringement of a patent was held to commit a contempt by contributing to a fund to defray the expenses of another who was contesting the validity thereof. Bate Ref. Co. v. Gillett, 30 Fed. 683. It has been held: that a defendant corporation which, when enjoined

A party is guilty of contempt by violating an injunction as the agent of a corporation which he has organized.[84]

A domestic or foreign corporation, as well as an individual, may be fined for a contempt.[85]

It is no defense to a proceeding for the punishment of a defendant for the violation of an injunction against the infringement of a patent, by himself or his employees, that he had instructed them to obey the injunction and that the violation was made without his knowledge.[86]

§ 428a. Contempt by publication. The older cases both in the English Chancery and the Federal courts hold that it is a contempt to criticise in the press the conduct of the court,[1] and to publish anything which may create a prejudice against either party to a pending cause.[2]

In 1825 a large number of suits against the United States founded upon Spanish land claims were pending in the District Court for the District of Missouri. After an opinion in favor of the Government in a suit by Antoine Soulard, his attorney,

from selling a certain cordial in certain bottles with a particular label, sold its entire stock of cordials with such bottles and labels to a third person, under an arrangement that he would fill all orders for the cordial which the defendant should receive, was guilty of contempt; although it did not share in the profits of such sales, and although it acted under advice of counsel. Société Anonyme v. Western Distilling Co., 42 Fed. 96. It was held that a defendant had violated an injunction against his "making, using or vending for use" certain specified articles, where, after the injunction, he sold such an article previously manufactured. A. B. Dick Co. v. Wickelman, 89 Fed. 95; and that an injunction against the sale of certain articles was not violated by the sale of articles of that character which had been bought from the plaintiff. *Re* Rubin, 193 Fed. 425. Parties were held guilty of contempt when they had paid the expenses of an act prohibited in an injunction against them, which was committed by an applicant to them for employment. Motion Picture Patents Co. v. Laemmle, 186 Fed. 641; L. E. Waterman Co. v. Standard Drug Co., C. C. A., 202 Fed. 167.

84 U. S. Envelope Co. v. Transo Paper Co., 221 Fed. 79; Frank F. Smith Metal Window Hardware Co. v. Yates, C. C. A., 244 Fed. 793.

85 U. S. v. Memphis & L. R. R. Co., 6 Fed. 237.

86 Gillette Safety Razor Co. v. Wolf, 180 Fed. 776.

§ 428a. 1 See the language of Lord Chancellor Hardwicke in 2 Atk. 469, 471; Hollingsworth v. Duane, Wall. C. C. 77–100; U. S. v. Duane, Wall. C. C. 102.

2 *Re* Read & Huggonson, Atk. 469.

Edward Lawless, published a letter in a newspaper in which he deplored and with no more unfairness than is usual in newspaper arguments pointed out certain errors into which he claimed the judge had fallen when rendering the decision. The decision was subsequently reversed by the Supreme Court of the United States.[3] The District Judge, James H. Peck, as soon as he read the article, brought Lawless by a writ of attachment before himself, abused him for some time in open court, held the attorney guilty of contempt, ordered his imprisonment for twenty-four hours, and suspended him from the bar of the court for eighteen calendar months. The result was to prevent the attorney from any further prosecution of land claims since the time for bringing such suits expired shortly after, or during, his term of punishment.

This caused the impeachment of Judge Peck, who was acquitted because the majority against him did not amount to two-thirds of the Senate.[4] The acquittal resulted in the passage of the Act of March 2, 1831, previously quoted, limiting the power of the courts of the United States to punishment for contempt to the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of their officers of the courts in official transactions, and the misbehavior, disobedience or resistance of any such officer, or by any party, juror, witness, or any other person to a writ, proceeding, order, decree or command of such courts.[5] This was modelled upon a Pennsylvania statute passed in 1809,[6] following a similar acquittal of the bench of the Supreme Court of that State, all but one of whom had been impeached for imprisoning Thomas Passmore for public abuse of Andrew Bayard because of the latter's institution of proceedings to set aside a judgment upon an award of arbitrators.[7] It has been copied in

3 Soulard v. U. S., 4 Peters 510; s. c. 10 Peters 100.

4 Report of the Trial of James H. Peck, Judge of the United States District Court for the District of Missouri before the Senate of the United States on an impeachment preferred by the House of Representatives against him for High Misdemeanors in office. By Arthur J. Stansbury, Boston. Published by Hilliard Gray & Co., 1833, p. 592; Foster's Commentaries on the Constitution, § 90.

5 4 St. at L. 487, re-enacted U. S. R. S., § 725; Judicial Code, § 268, 36 St. at L. 1087.

6 Pa. Public Laws, April 3, 1909, ch. lxxviii, p. 146.

7 Report of the Trial and Acquit-

whole or in part by many States of the Union. The Pennsylvania act contained a direction that publication out of court should not be made the basis of summary attachment and punishment.

Notwithstanding this statute, it has been held by a majority of the Supreme Court of the United States, two Justices dissenting and two not voting, that a publication tends to obstruct the administration of justice and may consequently be punished for contempt when its manifest purpose was to engender a shrinking in the mind of a judge from deciding the case otherwise than as advocated by the writer through creating an impression on the judge's mind that he could not decide otherwise without giving rise to suspicion as to the integrity or fairness of his purposes or motives; when it directly tends to incite to such a condition of the public mind as leaves no room for doubt, that if the judge, acting on his belief and conviction, grants relief to the complainant he would be subject to odium and hatred; when it was also obviously intended to produce the impression that any order which might be rendered by the judge, not in accordance with the opinions of the writer, would be disregarded; and when its character, because of intemperance or general tendency, was such as to produce in the public mind a condition which might give rise to a refusal to respect any order which the court might render in conflict with the rights advocated by the public.[8] The dissenting opinion of Mr. Justice Holmes is clear and strong:

tal of Edward Shippen, Esq., Chief Justice, and Jasper Yeates and Thomas Smith, Esquires, Assistant Justices of the Supreme Court of Pennsylvania. On an Impeachment, before the Senate of the Commonwealth, January, 1805. By William Hamilton, Editor of the Lancaster Journal, Lancaster: printed by the Reporter, p. 491. With an Appendix, p. 96; Foster's Commentaries on the Constitution, Vol. I, Appendix 663–664.

[8] Toledo Newspaper Co. v. U. S., 247 U. S. 402, 412, 414, affirming C. C. A., 237 Fed. 986, affirming 220 Fed. 458. Killetts, J., imposed a fine upon the newspaper of $7,500 and costs and fined the writer of the articles $200. It has been held in Ohio, under a similar statute, that the publication of charges of misconduct against a judge holding court, in a newspaper which the writer had reason to believe would be circulated and read in the courtroom, and which was thus circulated and read, is "misbehavior in the presence of or so near the court or judge as to obstruct the administration of court or justice." Myers v. State, 21 W. L. Bull. 404; s. c., 46 Ohio St. 473, 15 Am. St. Rep. 638, 22 N. E. 43. See Patterson v.

"When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their presence' as is stated in *Ex parte Robinson,* 19 Wall. 505. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point and point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect of its dignity—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case. Without invoking the rule of strict construction I think that 'so near as to obstruct' means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. 'So near as to' refers to an accomplished fact, and the word 'misbehavior' strengthens the construction I adopt. Misbehavior means something more than adverse comment or disrespect.

"But suppose that an imminent possibility of obstruction is sufficient. Still I think that only immediate and necessary action is contemplated, and that no case for summary proceedings is made out if after the event publications are called to the attention of the judge that might have led to an obstruction although they did not. So far as appears that is the present case. But I will go a step farther. The order for the information recites that from time to time sundry numbers of the paper have come to the attention of the judge as a daily reader of it, and I will assume, from that and the opinion, that he read them as they came out, and I will assume further that he was entitled to rely upon his private knowledge without a statement in open court. But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was

Colorado, 205 U. S. 454, 51 L. ed. 879; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; *Re* Hearst's Chicago American (C. C. Ill.), Chicago Legal News, November 16, 1902. The last word upon the subject has not been spoken.

printed even a tendency to prevent his performing his sworn duty. I am not considering whether there was a technical contempt at common law but whether what was done falls within the words of an act intended and admitted to limit the power of the courts."[9]

The rule now in force in England was stated by the Privy Council at the end of the thirteenth century: "Committals for contempt by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."[10]

Public criticism in a newspaper or otherwise of the conduct and integrity of a judge is ordinarily not a contempt.[11]

"The nature of the abuse which the restrictive statute was intended to correct throws light upon its proper construction. Prior to its enactment, as stated, federal judges had inflicted punishment for contempt based upon improper criticisms of their conduct and decisions, published after the cases had been finally determined. This had been resented, and the judges impeached therefor. The impeachments had failed because under the Judiciary Act the judges were clothed with discretion to decide what constituted contempts of their authority. This was the mischief which Congress intended to remedy by the act restricting contempts to defined classes. Congress was evidently of the opinion that the subjecting of judges to criticism in the press, if it did not obstruct the administration of justice, was of advantage to the judges, and that the citizens should not be punished therefor. The limitation to this was that (1) the criticism should not

9 Ibid; 247 U. S. 602, 423, 424. See Baldwin, J., in *ex parte* Poulson, 15 Haz. Reg. (Pa.) 380, Fed. Cas. 11,350.

10 McLeod v. St. Aubyn, (1899) A. C. 549, 561. See, however, the subsequent English case of Regina v. Gray (1900), 2 Q. B. 36.

11 Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95, 98, 99 (criticism by Josephus Daniels of the appointment of a receiver); U. S. v. Huff, 206 Fed. 700, 704; People ex rel. Barnes v. Albany Court of Sessions, 147 N. Y. 290, 297; State v. Circuit Court, 97 Wisc. 1. *Contra*, State v. Shepherd, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; criticized in Am. Law Review, September-October, 1903; defended in Yale L. J., December, 1903; *Re* Hughes, 8 N. M. 225, 43 Pac. 692. See U. S. ex rel. Guaranty Tr. Co. v. Gehr, 116 Fed. 520; where a man was punished for using abusive language and opprobrious epithets, in public denouncements of the judge, for official action in granting an injunction. This last case was criticised in N. Y. L. J., Nov. 21, 1902.

be administered in the presence of the court, and (2) that its tendency should not be obstructive of the due administration of justice. The judge was deprived by the act of all immunity from outside criticism which affected him only as an individual. The court and the judge, as an arm of it, was still carefully protected by the act from all criticism that interfered with or obstructed the proper administration of justice by it. On the one hand, Congress determined that criticism of a judge that related to no litigation in his court, or such as related only to such litigation as had finally been disposed of, was not so directly obstructive of the administration of justice as to form properly the subject of a charge of contempt. On the other hand, Congress determined that the expression of criticism of the judge or of his decisions in the presence of the court and during its sessions was misbehavior in itself, though in its nature not otherwise directly obstructive of the due administration of justice, since it was in its tendency destructive of the order necessary to enable the court to accomplish its business." [12]

But criticism in a newspaper of the conduct and integrity of the judge may be a contempt when it is intended to influence the jury,[13] or perhaps when it is in the nature of a threat against a judge, intended to influence his action in a case still pending before him,[14] or where it advises or incites disobedience.

It has been held to be a contempt: to accuse a judge of corrupt motives in his action in a litigation which is not terminated.[15] To write abusive letters to a judge because of his rulings in a suit still pending.[16] To make a mis-statement concerning his rulings in an unfinished litigation.[17] To publish evidence which had not been offered and was inadmissible against a defendant,

[12] U. S. v. Huff, 206 Fed. 700, 704. *Per* Grubb, J.

[13] Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95, 99. See Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879; Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280; King v. Tibbits & Windust, (1902) 1 K. B. 77. See Cooper v. People, 13 Colo. 337, 6 L. R. A. 430.

[14] Toledo Newspaper Co. v. U. S., 247 U. S. 402.

[15] U. S. v. Markewich, 261 Fed. 537.

[16] U. S. v. Huff, 206 Fed. 700; *Re* Independent Pub. Co., 228 Fed. 787.

[17] U. S. v. Craig, D. C., S. D. N. Y., March 8, 1920, *per* Mayer, J.

pending his trial for a felony.[18] To publish the names of witnesses that have been called before a grand jury together with a statement of documentary evidence which it is said to be believed that they have produced. It is no defense to such a proceeding that the publication was true.[19] Nor, that the newspaper was not circulated in the court room.[20] Nor, that it was not seen by the judge or jury.[21] Nor, that it did not influence judicial actions.[22] Nor, it has been said, that the suit to which the publication referred was not within the jurisdiction of the court.[23]

A fine was imposed upon the managing editor because he failed in his duty to exercise proper supervision although he did not personally see the article before its publication.[24]

It has been said that a false report of a decision is, "in its essence, a common law contempt of court."[25]

It has been held that it is a contempt to represent by words and by printed circulars, that a sale under an execution is invalid, and that any one who buys will become involved in litigation.[26]

§ 428b. Perjury as a contempt.

All perjury is not a contempt of court, for this would deprive a party charged with the offense of his right to trial by jury.[1] Perjury which is an obstruction to the performance of judicial duty is a contempt and may be punished as such.[2]

What perjury constitutes such an obstruction necessarily de-

18 *Re* Independent Pub. Co., 228 Fed. 787, affirming C. C. A., 240 Fed. 849.

19 U. S. ex rel. Guaranty Tr. Co. v. Gehr, 116 Fed. 520; *Re* Independent Pub. Co., 228 Fed. 787; U. S. v. Providence Tribune Co., 241 Fed. 524.

20 Toledo Newspaper Co. v. U. S., 247 U. S. 402, 421, affirming C. C. A., 237 Fed. 986, affirming 220 Fed. 458.

21 Ibid.

22 Ibid.

23 U. S. v. Toledo Newspaper Co., 220 Fed. 458, 494.

24 *Re* Independent Pub. Co., C. C. A., 240 Fed. 849, affirming 228 Fed. 787.

25 Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879; Gorham Mfg. Co. v. Emery B. T. D. E. Co., 92 Fed. 774, 780. *Contra*, Asbestos Shingle, Slate & Sheathing Co. v. Johns-Manville Co., 189 Fed. 671.

26 *Re* Sowles, 41 Fed. 752.

§ 428b. 1 *Ex parte* Hudgins, 249 U. S. 378.

2 *Ex parte* Hudgins, 249 U. S. 378; *Re* Fellerman, 149 Fed. 244, in which the author was counsel. This case was settled by a remission of the penalty of imprisonment as to one of the respondents and a stipu-

pends upon the circumstances of each case. A persistent denial of recollection regarding recent transactions directly within the knowledge of the witness and facts which he must have known has been treated as a contempt.[3] So have been repeated vague answers concerning alleged transactions which were highly improbable such as losses by gambling[4] and even repeated self contradictions,[5] but not the repeated denial of recollection as to whether a witness had seen a person write.[6]

"If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the question at all."[7]

It has been held that perjury by a bankrupt upon an examination to ascertain the amount and location of his assets,[8] or by

lation of the other not to attack the commitment by an application for a writ of habeas corpus or otherwise. *Ex parte* Bick, 155 Fed. 908; *Re* Gordon, 167 Fed. 32, 39; *Re* Singer, 174 Fed. 208; *Re* Smith, 185 Fed. 983; *Re* Shear, 188 Fed. 677; *Re* Schulman, C. C. A., 177 Fed. 191; U. S. v. Appel, 211 Fed. 495.

3 *Re* Fellerman, 149 Fed. 244, 249; *Re* Schulman, C. C. A., 177 Fed. 191; U. S. v. Appel, 211 Fed. 495, approved; *Ex parte* Hudgins, 249 U. S. 378, 383; Berkson v. People, 154 Ill. 81; 39 N. E. 1079.

4 U. S. v. Appel, 211 Fed. 495, approved *Ex parte* Hudgins, 378, 383.

5 *Re* Fellerman, 149 Fed. 244, 249.

6 *Ex parte* Hudgins, 249 U. S. 378.

7 U. S. v. Appel, 211 Fed. 495, 496, *per* Learned Hand, J.

8 *Re* Fellerman (S. D. N. Y.), 149 Fed. 244. This was subsequently approved in *Ex parte* Bick (C. C. S. D. N. Y.), 155 Fed. 908; *Re* Gordon, 167 Fed. 239; *Re* Singer, 174 Fed. 208; *Re* Smith, 185 Fed.

a witness[9] upon an examination before a referee in bankruptcy, or by an affiant when the affidavit is submitted to the court,[10] otherwise not,[11] should be punished as a contempt of court. So may perjury by a surety on a judicial bond as to his property given upon his justification.[12]

Where the offense charged was perjury before a commissioner or referee, a certificate by the officer indicating that in his opinion the testimony was false must be presented to the court.[13]

983; *Re* Shear, 188 Fed. 677. But see *Re* Bronstein, 182 Fed. 349; *Re* Wiesebrock, 188 Fed. 757.

9 The contempt proceedings can be instituted before the conclusion of the testimony and before the party has been cross-examined. *Re* Schulman, C. C. A., 177 Fed. 191.

10 *Re* Steiner, 195 Fed. 299.

11 Doniphan v. Lehman, 179 Fed. 173.

12 Jones v. U. S., C. C. A., 209 Fed. 585.

13 *Re* Cantor, D. C., S. D. N. Y. 215 Fed. 61, 63, *per* Learned Hand, J.: "There is an especially proper reason for this, because in the case of alleged perjury so much depends upon the witness' bearing. When his words appear in print, it is sometimes possible to see that he is either evasive, or a downright perjurer, but generally it is extremely difficult to tell. This is especially true in the case of men of small education, to whom English is not a native tongue. Again and again such men within two consecutive sentences give the most contradictory answers. It is quite clear that they cannot mean this deliberately, but that they have not understood. In criminal contempts the accused has all the substantive benefits of one indicted (Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. [N. S.] 874), among them that of the degree of proof and without some certificate of the commissioner I certainly cannot say on this record that beyond a reasonable doubt this man was deliberately blocking the course of the proceeding by swearing to what he knew was false. The power undoubtedly exists, but it ought to be used very circumspectly. By that, I do not mean that it ought to be surrounded with absurd technicality which will destroy its value, but I do mean that all reasonable explanations should be made. A judge ought not to commit a man for contempt for perjury except in so plain a case as makes further attempt to examine the witness a farce, so obviously that no observer, who was present, could doubt that the witness was obviously trifling with the proceeding. He ought not to judge upon the balance of proof introduced to contradict the witness and so turn the examination into a trial of perjury, for this trenches on the criminal law itself. And, while the line cannot be abstractly stated with success, it can be so administered, if the judges will remember the purpose which it answers, and loyally accept the limitations which the defendant's right to a jury trial throws upon them." Aff'd C. C. A., 216 Fed. 61.

An attorney was disbarred for perjury in the court irrespective of the immateriality of the false testimony, although he had not been convicted in a criminal prosecution.[14]

§ 428c. Contempts in disobedience to orders by persons not parties. By the Clayton Act an order or injunction "shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same."[1]

A person not a party to the suit who assists a party in violating an injunction may be punished for a contempt.[2]

Incitement, whether directly or by insinuation, to the violation of an injunction is a contempt.[3]

A person not a party to the suit may be punished for a violation of an injunction against a corporation when he is a controlling member thereof and controlled part of the litigation for the defense.[4] Officers of a corporation, who are not parties to the suit, may be punished for contempt in refusing to make the company comply with an order of the court, when they have the power to require such compliance.[5]

It has been said that the directing officers of a labor union whose members have been enjoined from intimidation may be

14 *Re* Ulmer, 208 Fed. 461.

§ 428c. 1 38 St. at L. 738, ch. 323, § 19; Comp. St. § 1243c.

2 *Ex parte* Lennon, 64 Fed. 320; s. c., 166 U. S. 548, 41 L. ed. 1110; Employers' Teaming Co. v. Teamsters' Joint Council, 141 Fed. 679; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, 185.

3 Stewart v. U. S., C. C. A., 236 Fed. 838, see also U. S. v. Weber, C. C. A., 114 Fed. 950; U. S. v. Haggerty, C. C. A., 116 Fed. 510; U. S. v. Gehr, C. C. A., 116 Fed. 520. See also U. S. v. Colo., 216 Fed. 654; Cisco v. Looper, C. C. A., 236 Fed. 336. In Stewart's case, *supra*, "There was evidence that Stewart stated that all of the men who wanted guns could get them; that there would be another Colorado trouble, and that rather than see the mines work open shop he would go out and die himself; that he and his associates did not aim to let the mine be operated with non-union labor; that the union men would prevent it. Upon being reminded that the court had granted an injunction, Stewart said:

"'Damn the injunction! The national government is against us, but the people are with us, and we don't aim to let them dig coal.'"

4 Stahl v. Ertel, 62 Fed. 920; American Const. Co. v. Jacksonville, T. & K. Ry. Co., 52 Fed. 937; Heinze v. Butte & B. Consol. Min. Co., C. C. A., 129 Fed. 274.

5 Heinze v. Butte & B. Consol. Min. Co., C. C. A., 129 Fed. 274.

punished for contempt if they refrain from using so far as good faith would suggest the means they possess for preventing such acts. The court said: "The rational rule prevails that a labor organization, or its officers, or a committee which selects members to act as pickets during a strike may become responsible for the unlawful acts of such pickets or their violation of an injunction, although they were instructed in good faith to observe the injunction and do no unlawful act, where, with knowledge that the instructions have been disobeyed by particular persons, such persons are still kept in service. The directing officers of a union, whose members are on a strike and have been enjoined from intimidation, will themselves be deemed guilty of a violation of the injunction if they do not prevent (if they reasonably can do so) its violation by those under their control, or if they countenance acts of intimidation and refrain from using, so far as good faith would suggest, the means which they possess of preventing such acts." [6]

An officer of a corporation may be punished for contempt because, after the issue of an injunction against his company, he continued the infringement under another name, although he had resigned his office.[7]

An employee of the defendant is not guilty of contempt for committing an act forbidden by a decree or order to the defendant and his employees when he has subsequently severed his connection with the latter and is acting for himself at the time of such commission.[8]

It has been said that, to bind a stranger to the suit, full knowledge of the scope and effect of the injunction must be shown.[9] In one case, where the court had enjoined the defendants to the suit, "and all persons whomsoever," from a wilful trespass upon private property; it was held that a stranger to the suit, who was in no way connected with any of the parties thereto,

6 Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers, 208 Fed. 335, 338, *per* Slater, J.

7 Janney v. Pancoast International Ventilator Co., 124 Fed. 972; Campbell v. Magnet Light Co., 175 Fed. 117. But see E. W. Bliss Co. v. Atlantic Handle Co., 212 Fed. 190.

8 Donaldson v. Roksament Stone Co., 178 Fed. 103.

9 W. B. Conkey Co. v. Russell, 111 Fed. 417, 422.

might be punished for contempt for committing an independent trespass when he had knowledge of the decree.[10]

§ 428d. Notice of a decree before punishment for its violation.

No person can be punished for contempt by a violation of an order or decree, unless he has knowledge or notice thereof.[1] A party who has actual knowledge of the issue of an injunction [2] or of decision, oral or written, granting an injunction [3] may be punished for disobedience thereto, although he has not been served with a copy thereof.

"Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order." [4]

The publication and posting of the injunction is not conclusive evidence of notice to a person not a party to the suit nor a member of nor employed by an association implicated in the acts enjoined when he denies notice under oath.[5]

The misspelling of a defendant's first name in the pleadings, decree and injunction order, will not relieve him from liability for contempt for a violation of the injunction, where he was served with process and appeared, and he could not have been misled as to the person intended.[6]

The equity rules provide that if a decree be for the performance of a specific act, other than the payment of money, it must prescribe the time within which the act shall be done, "of which

10 Chisolm v. Caines, 121 Fed. 397. But see *supra*, § 295. An assault upon a servant of the complainant while he is in the custody of the police after his arrest, is not a violation of an injunction forbidding interference with persons in the conduct of the complainant's business. Garrigan v. U. S., C. C. A., 163 Fed. 16.

§ 428d. 1 Garrigan v. U. S., C. C. A., 163 Fed. 16.

2 *Ex parte* Lennon, 64 Fed. 320; s. c., 166 U. S. 548, 41 L. ed. 1110; *Re* Krinsky, 112 Fed. 972; *Re* Wilk, 155 Fed. 943; *Re* Rice, 181 Fed. 217.

3 Bartholomay Brewery Co. v. Dennis O'Brien, 220 N. Y. 587.

4 Equity Rule 4.

5 Garigan v. U. S., C. C. A., 163 Fed. 16; Stewart v. U. S., C. C. A., 236 Fed. 826, 845.

6 Aaron v. U. S., C. C. A., 155 Fed. 833.

the defendant shall be bound without further service to take notice;"[7] and that, "neither the noting of an order in the Equity Docket nor its entry in the order-book is in itself notice thereof to the parties to the suit.[8]

It is, however, the safer practice to make personal service of a certified copy of a decree or order, disobedience to which it is desired to punish by an attachment.[9] If the party is beyond the district service by registered mail and upon his solicitor or counsel is proper.[10]

§ 429. Courts in which contempt proceedings should be instituted. The contempt proceedings should usually be instituted in the court against which the contempt was committed.[1] The District Courts have the power to punish contempts committed against the former Circuit Courts[2] and those committed in the District Courts before the enactment of the Judicial Code.[3]

It has been held at circuit that a United States commissioner has no power to punish for contempt,[4] but he may, without a previous order of the court, issue a warrant of arrest upon a complaint, which is the foundation of a criminal prosecution for a contempt in the violation of an injunction by a person not a party to the suit.[5]

When the offense is committed before a subordinate judicial officer it will rarely be punished unless he certifies to its commission.[6]

Where the contempt is a violation of a supersedeas, it is punished by the appellate tribunal.[7] Where a mandate from an

7 Eq. Rule 8.

8 Eq. Rule 4.

9 Atlantic G. P. Co. v. Dittman P. Mfg. Co., 9 Fed. 316; Ulman v. Ritter, 72 Fed. 1000; Westinghouse El. & Mfg. Co. v. Sangamon El. Co., 128 Fed. 747.

10 Ulman v. Ritter, 72 Fed. 1000. See *Re* Cary, 10 Fed. 622; *supra*, §§ 165, 255.

§ 429. 1 *Re* Spofford, 62 Fed. 443; Merchants' Stock & Grain Co. v. Board of Trade, C. C. A., 201 Fed. 20, 27.

2 Board of Trade of City of Chicago v. Tucker, 221 Fed. 300.

3 Morehouse v. Giant Powder Co., C. C. A., 206 Fed. 24.

4 *Re* Mason, 43 Fed. 510; *Ex parte* Doll, 7 Phila. 595; *Ex parte* Perkins, 29 Fed. 900; U. S. v. Beavers, 125 Fed. 778.

5 Castner v. Pocahontas Collieries Co., 117 Fed. 184.

6 *Re* Cantor, C. C. A., 215 Fed. 61, quoted; *supra*, § 428b, note 13.

7 U. S. v. Shipp, 203 U. S. 563, 51 L. ed. 319; *Re* McKenzie, 180 U. S. 536, 45 L. ed. 657; *Re* McKenzie, 142 Fed. 383; Tornanses v. Melsing, C. C. A., 106 Fed. 775.

appellate court directing the entry of a decree for an injunction has been filed in the court below, the latter, and not the former, has jurisdiction to punish its violation as a contempt.[8]

The violation of an injunction to restrain the infringement of a copyright,[9] or trade-mark,[10] may be punished as a contempt by any court or judge of the United States having jurisdiction of the defendants. It is the duty of the clerk of the court or the judge that grants the injunction, whenever required so to do by the court hearing an application to enforce the same, to transmit without delay thereto a certified copy of all the papers in the cause that are on file at his office.[11] Disobedience to a subpœna, issued by a court of one district, ordering a witness to appear and testify before a master appointed therein by the court of another district, is punishable by the court which issued the subpœna.[12]

§ 429a. Time when contempt proceedings should be instituted.

By the Clayton Act of October 15, 1914, "No proceeding of contempt shall be instituted against any person unless begun within one year from the date of the act complained of."[1] There may be room for argument as to the application of this section to contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice or to contempts committed in disobedience of a decree entered in any suit in the name of the United States.[2] If not, contempts which are criminal offenses and are committed in suits by or on behalf of the United States are barred by the three year statute of limitations.[3] By analogy the same rule would probably be applied to contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice.[4]

8 Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 736.

9 Act of Mar. 4, 1909, 35 St. at L. 1075, § 36. Pierce Fed. Code Supp. § 1589; *supra*, § 278.

10 Act of Mar. 2, 1907, 34 St. at L. 1251, § 20, Pierce's Fed. Code, § 8826.

11 Act of March 2, 1907, 34 St. at L. 1251, § 20, Pierce's Fed. Code, § 8826; Act of March 4, 1909, 35 St. at L. 1075, § 37, Pierce's Fed. Code Supp. § 1589.

12 *Re* Allis, 44 Fed. 216; *supra*, § 343.

§ 429a. 1 38 St. at L. 740, § 25; Comp. St. § 1245e.

2 Ibid, § 24; Comp. St., § 1245d.

3 U. S. R. S., § 1044; Gompers v. U. S., 233 U. S. 604; *supra*, § 180n.

4 Gompers v. U. S., 233 U. S. 604, 612.

It has been said that no lapse of time since the entry of a decree will prevent contempt proceedings to punish a violation thereof, committed within the statutory period of limitations;[5] but it was then held that an injunction restraining the defendants and all other persons associated or connected with them from interfering with the complainant's business by intimidation of its employees or otherwise which was granted during a strike in 1907 did not justify the punishment of persons not parties to such suit from such action during a strike declared against the same complainant in 1917 although both strikes were instigated by the same trade union for the purpose of unionizing the business.[6]

Pending an appeal accompanied by a supersedeas the trial court is without jurisdiction to entertain contempt proceedings to punish disobedience to the decree from which the appeal was taken.[7]

A court has no jurisdiction to punish for contempt an act not forbidden at the time of its commission; nor can it accomplish such a result by the entry of an order *nunc pro tunc* as of a date prior to the commission of the act,[8] except in a case where the judge has announced orally from the bench a decision that an injunction issue, when the order may be entered as of the date of such decision, and a subsequent act may be punished accordingly, even if committed before the formal entry of the order.[9]

Where a person was under bail to appear and answer indictments in the State courts for the embezzlement of money; it was held that, until such indictments were disposed of, there should be no hearing upon an application to commit him for contempt in failing to obey an order to pay over the same to a trustee in bankruptcy.[10]

§ 430. Distinction between criminal and civil contempts.

Summary proceedings to punish for a contempt of court may

5 Tosh v. West Kentucky Coal Co., C. C. A., 262 Fed. 44, 46, 48.

6 Tosh v. West Kentucky Coal Co., C. C. A., 262 Fed. 44, 50.

7 Smith v. Government of Canal Zone, C. C. A., 249 Fed. 272.

8 *Ex parte* Buskirk, C. C. A., 72 Fed. 14.

9 Ibid.; Kimpton v. Eve, 2 Ves. & B. 349; Anon., 3 Atk. 567; James v. Downs, 18 Ves. 522; Vansandan v. Rose, 2 Jac. & W. 264; Koehler v. Farmers' & D. Nat. Bank, 6 N. Y. Supp. 470.

10 *Re* Hooks Smelting Co., 146 Fed. 336.

be either civil or criminal.[1] The cases in which civil and criminal proceedings may be prosecuted are often classified under the description of civil and criminal contempts.[2] In civil contempt proceedings the punishment is remedial for the benefit of the complainant.[3] In those which are criminal in their nature, the sentence is punitive to vindicate the authority of the court.[4] The line of demarcation between these two classes is not clearly defined. When the offense consists in misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice,[5] it is usually punishable only by criminal contempt proceedings.[6]

In many cases of disobedience to an order the party may be punished either civilly or criminally therefor.[7] "It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."[8]

When the contempt was committed by a person not a party nor in privity with a party to the original suit, the proceedings should ordinarily be criminal in their nature.[9] Such has been said to be disobedience to a subpœna *ad testificandum*.[10] But disobedience to an order for the production of books and pa-

§ 430. 1 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L. R. A. (N. S.) 874. Where the act is one that evinces a deliberate purpose to contemn the authority of the court, it may be punished as a criminal contempt. *Re* Rice, 181 Fed. 217. See Clay v. Waters, C. C. A., 178 Fed. 385, 21 Ann. Cas. 897.

2 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L. R. A. (N. S.) 874.

3 Ibid. 221 U. S. 418, 441, 55 L. ed. 797, 805, 34 L. R. A. (N. S.) 874. But see Puget Sound Traction, Light & Power Co. v. Lawrey, 202 Fed. 263.

4 Ibid.

5 *Supra*, § 428.

6 Bessette v. W. B. Conkey Co., 194 U. S. 324, 330.

7 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L. R. A. (N. S.) 874.

8 Bessette v. W. B. Conkey, 194 U. S. 324, 329, 24 Sup. Ct. 665, 48 L. ed. 997. For an illustration of the distinction, see *Re* Newman, C. C. A., 214 Fed. 69.

9 *Ex parte* Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. ed. 1110; Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997; Garrigan v. U. S., C. C. A., 23 L. R. A. (N. S.) 1295, 163 Fed. 16; Puget Sound Traction, Light & Power Co. v. Lawrey, 202 Fed. 263.

10 Bessette v. W. B. Conkey Co., 194 U. S. 324, 330. But see *Re* Farkas, 204 Fed. 343.

pers [11] or an order directing a witness, who has attended to answer a question [12] in a civil suit, may be treated as a civil contempt. Disobedience to an order to produce papers or to answer questions before a grand jury or in a criminal prosecution, is an offense against the Government and should be punished by criminal contempt proceedings.[13]

When the disobedience to an injunction is an act of violence amounting to a breach of the peace, proceedings to punish its violation should be of a criminal nature.[14] This was also held where the injunction regulated the transaction of business by a railroad company.[15] Otherwise disobedience to an order of the court, which does not direct the payment of money to the Government,[16] is usually punished by civil contempt proceedings.[17]

Proceedings to punish the violation of an injunction against the infringement of a patent, copyright, or trade-mark, are usually civil and remedial.[18] But in patent cases it was formerly the usual custom [19] and it seems is still permissible to consolidate criminal with civil proceedings and to divide the fine between the government and the injured party.[20] This was also

11 Doyle v. London Guaranty & Accident Co., 204 U. S. 509.

12 Hultberg v. Anderson, C. C. A., 214 Fed. 349.

13 Gill v. U. S., C. C. A., 202 Fed. 502.

14 Puget Sound Traction, Light & Power Co. v. Lawry, 202 Fed. 263; Phillips S. & T. Co. v. Amalgamated Ass'n, 208 Fed. 335; U. S. v. Colo., 216 Fed. 654.

15 U. S. ex rel. D. & N. O. Ry. v. Atchison T. & S. F. Ry. Co., 16 Fed. 853.

16 Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072.

17 Bessette v. W. B. Conkey Co., 194 U. S. 324, 329.

18 Hayes v. Fischer, 102 U. S. 121; New Jersey Patent v. Martin, 186 Fed. 513; Searls v. Worden, 13 Fed. 716; *Re* Mullee, 7 Blatchf. 23; Doubleday v. Sherman, 8 Blatchf. 45; Schillinger v. Gunther, 15 Blatchf. 303; *Re* North Bloomfield Gravel Mining Co., 27 Fed. 795; Macaulay v. White Sewing Machine Co. v. Am. Strawboard, 75 Fed. 972; Ready Roofing Co. v. Taylor, 15 Blatchf. 94; Stahl v. Etrel, 62 Fed. 920; Fischer v. Hayes, 7 Fed. 96; Economist Furnace Co. v. Wrought-Iron Range Co., 86 Fed. 1010.

19 Hendryx v. Fitzpatrick, 19 Fed. 810.

20 Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 23 Sup. Ct. 211, 47 L ed. 244; s. c., 108 Fed. 873; Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072; Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774; Sabin v. Fogarty, 70 Fed. 482; Chicago Directory Co. v. U. S. Directory

done where an injunction of another character was violated.[21] "A significant and generally determining feature" of a civil contempt "is that the act is by one party to a suit in disobedience of a special order made in behalf of the other." [22]

Ordinarily an order directing the payment of money is enforced only by civil contempt proceedings.[23]

The bankruptcy law gives to the bankruptcy courts express power to "enforce obedience by bankrupts, officers and other persons to all unlawful orders by fine or imprisonment or fine and imprisonment." [24] This would seem to make a refusal to pay money to a trustee or receiver in bankruptcy punishable in criminal proceedings.[25]

The court, to vindicate its authority may punish as for a criminal contempt a bankrupt who has it in his power to obey but wilfully disobeys its order to pay over money to the receiver or trustee, or who after the institution of proceedings to compel such payment has wilfully disabled himself from compliance.[26] Civil proceedings may also be instituted to compel such a payment.[27]

In determining whether contempt proceedings which have been instituted are civil or criminal in their nature, an examination should be made of the title, the prayer of the party who initiated the proceedings and the punishment if any which has been imposed. If the title is in a suit previously pending,[28] or if the prayer for relief is for the imposition of a fine payable to a

Co., 123 Fed. 194; Continental Gin Co. v. Murray Co., 162 Fed. 873.

21 *Re* Merchants' Stock & Grain Co., 223 U. S. 641, 32 Sup. Ct. 339, 56 L. ed. 584. But see Board of Trade of City of Chicago v. Tucker, C. C. A., 221 Fed. 300.

22 Bessette v. W. B. Conkey Co., 194 U. S. 324, 329.

23 *Re* Nevitt, C. C. A., 117 Fed. 448, 453, approved; Bessette v. W. B. Conkey, 194 U. S. 324, 328, 24 Sup. Ct. 665, 666.

24 Act of July 1, 1898, 30 St. at L. 544, § 2, subd. 13.

25 *Re* Cole, C. C. A., 1st Ct., 163 Fed. 180, 182. But see *Re* Kahn, C. C. A., 204 Fed. 581.

26 Freed v. Central Tr. Co., C. C. A., 7th Ct., 215 Fed. 873, 876; *Re* Stern, D. N. J., 215 Fed. 979, 981.

27 Freed v. Central Tr. Co., C. C. A., 7th Ct., 215 Fed. 873, 876; Stern, D. N. J., 215 Fed. 979, 981.

28 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 446, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. N.S., 874; Mitchell v. Dexter, C. C. A., 244 Fed. 926. But see Phillips S. & T. Co. v. Amalgamated Ass'n, 208 Fed. 335, 343. *Re* Kahn, C. C. A., 204 Fed. 581.

private party in the alternative,[29] or that the respondent be ordered to perform some act for the benefit of such a party or else be punished for contempt,[30] in one case where the petitioner prayed punishment for contempt and that petitioner may have such other and further relief as the nature of its case may require;[31] or if the judgment directs the payment of a fine to a private person,[32] or imprisonment until a specified act for the benefit of such a person is performed;[33] the proceedings will usually be considered civil in their nature. If the title is in the name of the United States,[34] or the prayer is merely for punishment for contempt of court,[35] or a fine is imposed payable wholly or in part to the Government,[36] or an imprisonment for a specified time not terminable upon the performance of an act by the respondent,[37] the proceeding is usually considered to be criminal. Where both kinds of relief are sought or granted, the criminal element dominates the proceeding.[38]

§ 430a. Practice in criminal contempt proceedings.

Criminal proceedings to punish for contempts must be sep-

29 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 449, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. (N. S.) 874.

30 Mitchell v. Dexter, C. C. A., 244 Fed. 926, 930.

31 Ibid.

32 Worden v. Searls, 121 U. S. 14, 25; Cutting v. Van Fleet, C. C. A., 252 Fed. 100.

33 Hultberg v. Anderson, C. C. A., 214 Fed. 349.

34 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. N.S. 874; Stewart v. U. S., C. C. A., 236 Fed. 838.

35 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; Mitchell v. Dexter, C. C. A., 244 Fed. 926, 930.

36 Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072; *Re* Merchants' Stock & Grain Co., 223 U. S. 641, 32 Sup. Ct. 339, 56 L. ed. 584; Creplik v. Couch Patent Co., C. C. A., 190 Fed. 565, 571; Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 341; Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634, 636.

37 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 442, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; Doyle v. London Guarantee & Accident Co., 204 U. S. 599; *Re* Kahn, C. C. A., 204 Fed. 581.

38 Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072; *Re* Merchants' Stock & Grain Co., 223 U. S. 641, 32 Sup. Ct. 339, 56 L. ed. 584; Creplik v. Couch Patent Co., C. C. A., 190 Fed. 565, 571; Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 341.

arate and distinct from the action or suit in which the contempt was committed.[1]

The practice differs in different classes of cases. Criminal proceedings to punish contempt committed in the presence of the court or so near thereto as to obstruct the administration of justice and contempts committed in disobedience of any lawful orders, decrees or commands in a court in a suit or action brought or prosecuted in the name of or on behalf of the United States are punished in conformity to the usages in law and in equity which have formerly prevailed.[2] Contempts which consist of the wilful disobedience to any other lawful order, decree or command of a District Court of the United States and which would otherwise be a criminal offense are punished in accordance with proceedings regulated by the statute described in the following section.[3]

It is the proper practice not to entitle such proceedings in the original suit but with a title of their own appropriate to indicate their character[4] in the name of the United States against the person charged[5] or in the name of the United States in the relation of the complaining party.[6] Or "in re" with the name of the accused following.[7]

It has been held, however, that where it clearly appears that a criminal proceeding has been instituted and an objection to the title is not made before or at the trial it is waived.[8]

Unless the proceedings are instituted by the court of its own motion, it is the better practice to begin by an information filed by the United States Attorney.[9] This is the practice in the Second Circuit.[10] It is the duty of the attorney of the United States for the district to institute the proceedings when requested by the court to vindicate the authority of the court.[11]

§ 430a. 1 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797; S. Anargyros v. Anargyros & Co., 191 Fed. 208.

2 38 St. at L. 739, § 24; Comp. St., § 1245d.

3 Ibid, *infra*, § 430b.

4 Fischer v. Hayes, 6 Fed. 63.

5 Stewart v. U. S., C. C. A., 236 Fed. 838.

6 Fischer v. Hayes, 6 Fed. 63.

7 Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 342.

8 Ibid; see U. S. v. Toledo Newspaper Co., 220 Fed. 458, 493.

9 *Re* Kahn, C. C. A., 204 Fed. 581.

10 Ibid.

11 Durant v. Washington County, 4 Woolworth 297, Fed. Cas. No. 4,191. See 38 St. at L. 739, § 22, Comp. St., 1245b.

Any person, as *amicus curiae,* may bring a criminal contempt to the attention of the court.[12] The court may institute the proceedings of its own motion.[13] It has been said that when the contempt was committed in the presence of a subordinate judicial officer such as a special commissioner in a bankruptcy proceeding the proceedings should be initiated by him.[14]

It has been held, that in the case of a violation of an injunction, the civil and criminal proceedings can be combined;[15] and said, that an indictment and summary criminal proceedings to punish for contempt may be concurrent and that a judgment in one will not bar the other.[16] When the offenses are joint or connected all who commit them may be joined in the same proceeding.[17] Two parties to a proceeding in bankruptcy were punished upon a single application to punish them for contempt in several perjuries therein committed.[18]

The information may be sworn to upon information and belief.[19] An omission to verify the information or other initial paper, if a verification be necessary, is waived by a failure to object thereto before the trial.[20]

The motion papers must clearly specify the acts for which punishment is sought,[21] although the nicety and precision of an indictment are not required.[22] The act which is judged to be an

12 *Re* Star Spring Bed Co., C. C. A., 203 Fed. 640; Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 344; *Re* Cantor, D. C. S. D. N. Y., 215 Fed. 61, 63. See S. C. in C. C. A., Ibid.

13 U. S. v. Toledo Newspaper Co., 220 Fed. 458, aff'd C. C. A., 237 Fed. 986, aff'd 247 U. S. 402.

14 *Re* Cantor, D. C., 215 Fed. 61, 63, see C. C. A., Ibid, per Learned Hand, J.

15 Kreplik v. Couch Patents Co., C. C. A., 190 Fed. 565, citing *Re* Chiles, 22 Wall. 157, 158, 22 L. ed. 819; Hendryx v. Fitzpatrick, 19 Fed. 810.

16 Merchants' S. & G. Co. v. Board of Trade, C. C. A., 201 Fed. 20, 30; United States v. Colo., 216 Fed. 654.

17 *Re* Sobol, C. C. A., 242 Fed. 487.

18 *Re* Fellerman, 149 Fed. 244, in which the writer was counsel.

19 Creekmore v. U. S., C. C. A., 237 Fed. 743.

20 Sona v. Aluminum Castings Co., C. C. A., 214 Fed. 936; Stuart v. Reynolds, C. C. A., 204 Fed. 709.

21 Philips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Steel, Iron & Tin Workers, 208 Fed. 335, 345; *Re* Cantor, D. C., C. C. A., 215 Fed. 61, 63. But see Stuart v. Reynolds, C. C. A., 204 Fed. 709.

22 S. Anargyros v. Anargyros & Co., 191 Fed. 208; Aaron v. U. S., C. C. A., 15 Fed. 833.

offense must be distinctly specified.[23] It is sufficient if the offense is set forth so that the defendant is clearly informed of the charge against him and whether a criminal or civil contempt is alleged.[24] An omission in this respect is jurisdictional and is not waived by proceeding to trial without the objection.[25] There can be no punishment for a contempt, disclosed in the evidence, which was not charged in the information, order to show cause, or affidavits before the hearing.[26] A petition for violation of an injunction against strikers, charged to have been committed by a person not a party to the suit, is insufficient to charge him with knowledge of the injunction when it alleges in the alternative that he knew, or by the exercise of ordinary intelligence might have known, that it had been issued.[27] Allegations that the acts of which complaint is made have interfered with the complainant's exclusive right to the good will of a business, to his irreparable injury, although appropriate to a civil proceeding, are inappropriate in a proceeding to punish for a criminal contempt.[28] A petition or motion for the attachment of a defendant for contempt in violating an injunction, which is entitled as in the original suit, and refers to the order of injunction granted therein by its date, and sets out in detail the alleged acts of violation, is sufficient. It need not set out the order in terms.[29]

[23] *Re* Cantor, D. C., 215 Fed. 61, 63 per Learned Hand, J.: "Every judicial proceeding and every charge to which another must respond justly requires that the respondent should know with reasonable definition what he has to answer. It will not do, as in this case, to throw at a man 120 pages of testimony and say generally that it is generally permeated with perjury. Some specification the most elementary rules of fair play demand, so that he may explain what he is charged with, and so that the judge may know on what the moving party relies. Nor is it any answer to say that the absurd precision of an old indictment at common law is not necessary; which, of course, it is not. The requirement is practical and will be treated practically, but for all that it is none the less real and necessary, and it is a condition, so far as I know, of every kind of judicial proceeding in every free country." Aff'd, C. C. A., Ibid.

[24] Schwartz v. United States, C. C A., 217 Fed. 866.

[25] Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 345.

[26] *Re* Reese, C. C. A., 107 Fed. 942; Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363, 374.

[27] Garrigan v. U. S., C. C. A., 23 L.R.A. (N.S.) 1295, 163 Fed. 16.

[28] S. Anargyros v. Anargyros & Co., 191 Fed. 208.

[29] Aaron v. U. S., C. C. A., 155 Fed. 833.

The petition must contain a prayer that the person charged be punished for contempt of court.[30] An omission of such a prayer is a jurisdictional defect which is not waived by a failure to raise the same before or at the trial.[31] It was so held where the information prayed for no relief except an attachment of the accused, although when served it was accompanied by an order directing them to show cause why they should not be attached and committed for violation of the injunction.[32] "As no relief was sought save their attachment, they were not apprised that their punishment was the object in view. The only purpose an attachment could serve would be to bring the parties into court."[33] The information need not pray any specific punishment either fine or imprisonment.[34]

Objections of a technical character to the information or other proceedings will not be considered upon the writ of error unless they were raised below by assignment of error or otherwise.[35] Such will be waived where the accused appears and goes to trial without appropriate objection.[36] A failure to serve the information or affidavit upon the respondent may be a ground for an adjournment but not for a dismissal of the proceeding.[37]

Although no pleading on behalf of the respondent is necessary, it is the safer practice for him to set forth his defense in an affidavit or formal answer, in such a way that the issues raised may be clearly shown.[38]

When the contempt is a criminal offense, the accused may be reached under criminal process by an order for his removal, made by a judge in any district where he may be found, the proceedings being based upon the writ of attachment, issued by the court of the district where the offense was committed.[39]

30 Gompers v. Bucks Stove & Range Co., 221 Fed. 418, 441, 448, 31 Sup. Ct. 498, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; Phillips v. S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 345.

31 Ibid.

32 Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 345.

33 Ibid.

34 Creekmore v. U. S., C. C. A., 237 Fed. 743, 747.

35 Couts v. U. S., C. C. A., 249 Fed. 595.

36 Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335, 344, citing Foster's Fed. Pr., 4th ed., p. 1095.

37 Sona v. Aluminum Castings Co., C. C. A., 214 Fed. 936.

38 *Re* Goodrich, C. C. A., 184 Fed. 5.

39 *Re* Manning, 44 Fed. 275, where the writer was counsel.

A person arrested in criminal proceedings to punish for a contempt is entitled to an examination before a magistrate, if so entitled by the State practice.[40] When the contempt is committed in the presence of the court, no notice nor trial of any disputed question of fact is necessary.[41] When the offense consists in an insult to the judge he has the power to inflict punishment therefor.[42] Where it consists in publication attacking the judge's conduct or in a letter [43] unless there is an urgency of immediate action, propriety requires that it should be heard by another judge than the one attacked.[44]

"There are frequent cases where, even though mistakenly, a general belief may easily arise that there is a personal controversy between the contender and the judge of the court. Even in cases of this class, if the necessity for summary action or if other reasons make impracticable the substitution of another judge to hear the contempt matter, the duty of the regular judge of the court to proceed with it is clear, no matter how embarrassing this duty may be to him; but, in these cases, if there is no immediate urgency, and if no other reason exists making it specially appropriate that the same judge act, we think it by far the better policy to call in another judge; and the federal system provides special facility for so doing. We can well understand the reluctance with which a District Judge would put himself in a position which seemed to be a shifting to another of this sometimes very burdensome and very delicate duty; but it is of the greatest importance that contempt proceedings be put, as far as possible, beyond the reach of even unjust adverse criticism." [45]

[40] *Re* Acker, 66 Fed. 290.

[41] *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419.

[42] Toledo Newspaper Co. v. U. S., C. C. A., 220 Fed. 458, 492, 498; aff'd 247 U. S. 402.

[43] U. S. v. Huff, 206 Fed. 700.

[44] Ibid. This was the practice pursued by one of the judges for the Southern District of Georgia in U. S. v. Huff, 206 Fed. 700.

[45] Toledo Newspaper Co. v. U. S., 237 Fed. 986, 988, per Dennison, J. See the dissenting opinion of Mr. Justice Holmes, in s. c., 247 U. S. 402, 424, quoted *supra*, § 428a. Notwithstanding these precedents, Mayer, J., in U. S. v. Markewich, 261 Fed. 537, and U. S. v. Craig, N. Y. L. J., 1920, tried two cases for contempt because of attack upon himself for his conduct in connection with the receivership of the New York Street Railroads. According to the newspapers, in U. S. v. Craig, his jurisdiction to do this was expressly challenged.

It would seem that in such a case upon the filing of the proper affidavit the party accused would have an absolute right to trial before another judge although no attorney seems hitherto to have availed himself of this right.[46]

The omission of the name of an accused from an order placing the case upon the criminal docket does not invalidate the proceedings when no objection thereto was taken before the trial.[47]

The old doctrine, that where an attachment had been issued a person charged with contempt might demand that interrogatories be filed concerning the facts which were the basis of the charge and that if he denied them under oath he could not be punished for contempt, the only remedy being an indictment against him for perjury,[48] has been abrogated,[49] except, perhaps, when the decision depends upon the intent of an ambiguous act.[50] It seems that this was never the rule in equity.[51] Where it is a doubtful question of law whether the acts, of which complaint is made, constitute a violation of the injunction, a motion to punish the same for contempt will be denied. The court will not try in such a proceeding a difficult question as to the infringement of a patent.[52]

When, at the argument of the motion for an attachment, the

46 Jud. Code, § 21; 36 St. at L. 1087; *supra*, § 372.

47 Scoric v. U. S., C. C. A., 217 Fed. 871.

48 U. S. v. Dodge, 2 Gall. 313; Hollingsworth v. Duane, Wall. C. C. 77. See U. S. v. Duane, Wall. C. C. 103.

49 Savin, Petitioner, 131 U. S. 267, 33 L. ed. 150; U. S. v. Shipp, 203 U. S. 563, 51 L. ed. 319, 8 Ann. Cas. 265; U. S. v. Carroll, 147 Fed. 947, 951; Swepston v. U. S., C. C. A., 251 Fed. 205; Oates v. U. S., C. C. A., 233 Fed. 201; Kirk v. U. S., C. C. A., 192 Fed. 273; U. S. v. Huff, 206 Fed. 700; U. S. v. Carroll, 147 Fed. 947, 951. See *Ex parte* McCown, 139 N. C. 95; 51 S. E. 957, 2 L.R.A. (N.S.) 603; *Ex parte* Summers, 27 N. C. 169.

50 U. S. v. Shipp, 203 U. S. 563, 574, 51 L. ed. 319, 324, 8 Ann. Cas. 265.

51 U. S. v. Anon., 11 Fed. 701. See U. S. v. Debs, 64 Fed. 724.

52 California Paving Co. v. Molitor, 113 U. S. 609, 618, 28 L. ed. 1106, 1109; Liddle v. Cory, 7 Blatchf. 1; Welling v. Trimming Co., 2 Ban. & A. 1; Buerk v. Imhaeuser, 2 Ban. & A. 465; Fed. Cas. No. 2,108; Onderdonk v. Fanning, 2 Fed. 568; Smith v. Halkyard, 19 Fed. 602; Wirt v. Brown, 30 Fed. 187; Temple Pump Co. v. Gas P. & R. B. Mfg. Co., 31 Fed. 292; Howard v. Mast, 33 Fed. 867; Lilienthal v. Wallach, 37 Fed. 241; Pa. Diamond Co. v. Simpson, 39 Fed. 284; Truax v. Detweiler, 46 Fed. 117, 118; Enterprise Mfg. Co. v. Sargent, 48 Fed. 453; Mack v. Levy, 49 Fed.

party accused of disobedience denies the charge, the practice has been for the court either to determine the disputed questions of fact upon such affidavits as were then presented or to refer them.[53] Whether the Sixth Amendment applies to a proceeding for a criminal contempt and the party must be confronted with the witnesses against him, has not yet been decided by the

857; Accumulator Co. v. Consol. Elect. Storage Co., 53 Fed. 793, 795; Bonsack Mach. Co. v. National Cigarette Co., 64 Fed. 858; International Register Co. v. Recording Fare Register Co., 125 Fed. 790; *infra*, § 431. For a case where the construction put upon the patent by another court was followed, see Accumulator Co. v. Consol. El. Storage Co., 53 Fed. 793.

53 Where affidavits were used, it was held that the facts to authorize a conviction must be clearly established. Garrigan v. U. S., C. C. A., 163 Fed. 16. It has been held, that affidavits containing allegations upon information, without stating the source thereof, and also mere conclusions of law, are insufficient to support a violation of an injunction. Westinghouse Air-Brake Co. v. Christensen Eng. Co., 128 Fed. 749. An objection that a contempt proceeding was based on a rule issued on a complaint made on information and belief supported by an affidavit of the same character was held to be too late, when not raised until after the alleged contemnor had admitted the act charged and had stated in defense, that the act was done in ignorance of the order. *Re* Rice, 181 Fed. 217. Where a party charged with contempt appears and goes to trial without objection by appropriate motion to the sufficiency of the information and affidavits, such objection is waived unless it is jurisdictional. Aaron v. U. S., C. C. A., 155 Fed. 833. It has been said that where the facts appear on the record or by testimony already taken in another proceeding in the suit, to which the respondent was a party, no affidavits are required. Oster v. People, 192 Ill. 473, 56 L.R.A. 462. Where, at the appointed time for the hearing of a motion to punish for contempt, *ex parte* affidavits in support thereof were suppressed on the defendant's motion and the hearing continued for the taking of testimony; it was held that the defendant was not thereby put in jeopardy and that such proceedings did not constitute a bar to a subsequent hearing. New Jersey Patent Co. v. Martin, 186 Fed. 513. A letter written by an attorney to his client, advising him of the terms of an injunction, in a suit in which the attorney is employed, is not a privileged communication, and it is admissible in evidence to prove knowledge of the injunction. Aaron v. U. S., C. C. A., 155 Fed. 833; Fischer v. Hayes, 6 Fed. 63; U. S. v. Debs, 64 Fed. 724. See Woodruff v. North Bl. G. M. Co., 45 Fed. 129. For a collection of authorities on the right to try the question of affidavits, see *Re* Cole, C. C. A., 163 Fed. 180, 185; Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A., 201 Fed. 19, 28.

Supreme Court of the United States.[54] It is the better practice not to try the case upon affidavits, but to take oral testimony before a master or examiner.[55]

The court may take judicial notice of all orders made in the suit out of which the contempt arose,[56] and also it has been held of orders in connected litigation,[57] but if the decision is based upon findings in another case which is subsequently reversed or modified, the order in the second case will be reversed.[58]

Except in the cases specified in the Clayton Act [59] the accused has no right to a trial by jury,[60] nor to have the witnesses examined before the judge.[61] He has no right to a change of venue.[62] He cannot be obliged to testify against himself,[63] nor to answer interrogatories.[64]

In the absence of a denial, machines or articles sold under the same name as those the sale of which was enjoined will be presumed to be of the same character.[65] Upon an application to punish a bankrupt for contempt for disobedience to an order by a referee, the court should receive all material evidence relating to what preceded as well as to what followed the referee's order, although this may show that the order was erroneous.[66]

The erroneous admission of incompetent evidence does not necessitate a new trial when the judgment specifically sets forth such evidence and states that it is rejected.[67] Where the descrip-

54 In Re Cole, C. C. A., 23 L.R.A. (N.S.) 255, 163 Fed. 180, 184, it was held that it did not; but that case might reasonably be considered to be a civil contempt proceeding.

55 Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A., 201 Fed. 9; Sona v. Aluminum Castings Co., C. C. A., 214 Fed. 936.

56 Schwartz v. U. S., C. C. A., 217 Fed. 866; *supra*, § 332a.

57 See Oates v. U. S., C. C. A., 223 Fed. 1013; *supra*, § 332a.

58 Oates v. U. S., C. C. A., 223 Fed. 1013.

59 *Infra*, § 430b, *supra*, § 429a.

60 N. J. Patent Co. v. Martin, 166 Fed. 1010; Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A., 201 Fed. 19, 26; Smith v. Government of Canal Zone, C. C. A., 239 Fed. 133.

61 Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A., 201 Fed. 19, 26; Ibid. 201 Fed. 19, 26.

62 Ibid. 201 Fed. 19, 27.

63 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 444, 55 L. ed. 797, 807, 34 L.R.A. (N.S.) 874. But see Merchants' S. & G. Co. v. Board of Trade, C. C. A., 201 Fed. 19, 27, and citations.

64 Hollingsworth v. Duane, Wall. C. C. 77. See U. S. v. Duane, Wall. C. C. 102.

65 Stahl v. Ertel, 62 Fed. 920.

66 *Re* Goodrich, C. C. A., 184 Fed. 5.

67 Oates v. U. S., C. C. A., 233 Fed. 201.

tion was too general the judgment of conviction was reversed,[68] but the trial judge was allowed to enter a new judgment showing that the improper evidence had been disregarded without a new trial.[69]

The accused is entitled to a fair hearing. A decision by a court which announced that it had prejudged the act and delivered an opinion prepared before the trial was set aside.[70]

The respondent is presumed to be innocent and he must be proved to be guilty beyond a reasonable doubt.[71] "Strong impressions" are not sufficient against a sworn denial.[72] It has been held that a mere preponderance of evidence is insufficient.[73]

The burden of proof is upon a corporation to show that it is

68 Oates v. U. S., C. C. A., 223 Fed. 1013.

69 Oates v. U. S., C. C. A., 233 Fed. 201.

70 *Ex parte* Nelson, Mo., June, 1913, 156 S. W. 795.

71 Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95; *Ex parte* Kearney, 7 Wheat. 38, 5 L. ed. 391; New Orleans v. Steamship Co., 20 Wall. 387, 22 L. ed. 354; King v. Ohio & M. Ry. Co., Fed. Cas. No. 7,800; *Re* Judson, 3 Blatchf. 148 Fed. Cas. No. 7,563; Birdsall v. Hagerstown Agricultural Imp. Co., 1 Ban. & A. 426; *Re* Pitman, 1 Curtis, 186; Allis v. Stowell, 19 Off. Gaz. 727, 728; Fischer v. Hayes, 6 Fed. 63; Woodruff v. North Bloomfield Gravel Mine Co., 18 Fed. 753; *Re* Manning, 44 Fed. 275; Accumulator Co. v. Cons. El. Storage Co., 53 Fed. 796; U. S. v. Jose, 63 Fed. 951; *Re* Aker, 66 Fed. 290; General El. Co. v. McLaren, 140 Fed. 876; U. S. v. Carroll, 147 Fed. 947; Standard Typewriter Co. v. Standard Folding Typewriter Sales Co., 187 Fed. 596; Armstrong v. Belding Bros. & Co., 181 Fed. 173; Victor Talking Mach. Co. v. Sonora Phonograph Co., 191 Fed. 988; Schwartz v. U. S., C. C. A., 217 Fed. 866; Oates v. U. S., C. C. A., 233 Fed. 201; Kelly v. U. S., C. C. A., 250 Fed. 947; *Re* Buckley, 69 Cal. 1; Harris v. Clark, 10 How. Pr. (N. Y.) 415; Potter v. Low, 16 How. Pr. N. S. 549.

72 Cimiotti Unhairing Co. v. Frolloehr, 121 Fed. 561.

73 *Re* Buckley, 69 Cal. 1. The defendant will not, in the absence of evidence, be presumed to have notice of the issue of a mandate from an appellate court, directing a decree for an injunction, when no such decree has been entered. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 736. But, where the contempt charged was the violation of an order to produce books and papers for inspection, which was made after a hearing, at which the defendant failed to deny that the books and papers were not under their control, it was held, in the contempt proceedings, that the burden was upon them to show facts excusing their default; and proof offered by them tending to show that the books and papers had been through accident or mistake lost or destroyed, before the hearing of the application for their inspection, was insufficient to relieve them from punishment. London Guarantee &

not in possession and control of its own books which it has been ordered to produce.[74]

When the contempt charged both conspiracy by the respondents to aid a prisoner committed to his custody to escape and permission and assistance to the prisoner in such escape they were punished for the permission and assistance although the charge of conspiracy was not proved.[75]

The settlement and discontinuance of a suit is no defense to a criminal proceeding for the violation of an order therein previously made.[76] It is no defense to criminal proceedings to punish for contempt for disobedience to an injunction that it was afterwards dissolved,[77] or that the respondent ultimately succeeded in the suit in which the contempt was committed.[78] Where an injunction against the infringement of a patent had been granted and no appeal had been taken from the same, it was held that the validity of the patent for want of invention and anticipation was not open for review on a motion to punish the defendant for contempt in its violation.[79]

Where one or more defendants are found guilty of separate acts of disobedience to an injunction no general sentence should be imposed but the punishment for each offense may be reviewed separately.[80]

Accident Co., Limited v. Doyle & Doak, 134 Fed. 125. See *Re* Iron Clad Mfg. Co., C. C. A., 201 Fed. 66. Where officers of a corporation, in response to a rule upon the condition for the production of books and papers, answered in its name that they had been destroyed, and, upon examination, said that this was alleged upon information received from their subordinates, who had custody of the same, it was held that they were not in contempt of court because they failed to answer of their own personal knowledge. Despeaux v. Pennsylvania R. Co., 149 Fed. 798. On a motion for a commitment for contempt when served with a subpœna, it was held that two witnesses must be produced to prove contemptuous words, but that one was sufficient to prove a battery upon the process-server. Anon., 3 Atkyns, 219.

74 *Re* Ironclad Mfg. Co., C. C. A., 201 Fed. 66.

75 U. S. v. Swepston, C. C. A., 251 Fed. 205.

76 *Re* Steiner, 195 Fed. 299, where the contempt consisted in presenting false affidavits.

77 Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634. See Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 451.

78 Campbell v. Magnet Light Co., 175 Fed. 117; Brougham v. Oceanic Steam Nav. Co., C. C. A., 205 Fed. 857.

79 Westinghouse Air Brake Co. v. Christensen Eng. Co., 128 Fed. 749.

80 Oates v. U. S., C. C. A., 223

Where an injunction order has been reversed or dissolved as improvident, that fact can be taken into consideration when determining the penalty for its violation.[81]

In the assessment of the fine imposed, the court may take into consideration increased costs incurred by the Government because of the contempt,[82] but no compensatory fine can be imposed.[83] A party cannot be punished for contempt when the order which he violated is void for want of jurisdiction;[84] even, it has been held in civil proceedings, when the order is set aside because the plaintiff has an adequate remedy at law.[85] A person is not relieved from punishment for contempt because he acted in good faith under the advice of counsel that he was not infringing the court's order,[86] nor because he disobeyed an order from charitable motives,[87] as in the case of a sheriff who releases a prisoner during working hours in order that the latter might support his family,[88] nor because he has already served the sentence in a criminal prosecution for the same offense.[89]

When disobedience to an order requiring the payment of money is due to inability resulting from bankruptcy, insolvency or other causes not attributable to the fault of the party judged, ordinarily he will not be punished for contempt;[90] but the burden of proof is on the respondent in such cases.[91] A violation of an order may be punished when it was the result of negligence, but not wilful disobedience.[92] The fact that the con-

Fed. 1013; Am. Lighting Co. v. Public Service Corporation, 134 Fed. 129. But see U. S. v. Shipp, 203 U. S. 563, 51 L. ed. 319.

81 S. Anargyros v. Anargyros & Co., 191 Fed. 208; Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634.

82 *Re* Independent Pub. Co., C. C. A., 240 Fed. 849.

83 Searls v. Worden, 13 Fed. 716.

84 Cuyler v. Atl. & N. C. L. R. Co., 131 Fed. 95.

85 Am. Lighting Co. v. Public Service Corporation, 134 Fed. 129.

86 Atlantic G. P. Co. v. Dittman P. Mfg. Co., 9 Fed. 316; Ulman v. Ritter, 72 Fed. 1000; Westinghouse El. & Mfg. Co. v. Sangamo El. Co., 128 Fed. 747; *Re* Munroe, 210 Fed. 326, reversed as another point, C. C. A., 216 Fed. 107; *Re* Fogelman, 204 Fed. 357.

87 *Re* O'Rouree, 251 Fed. 268.

88 Ibid.

89 *Re* Sobol, C. C. A., 242 Fed. 487, see Clayton Act, § 25, 38 St. at L. 740; Comp. St., § 1245e, quoted, *infra*, § 430b.

90 *Re* Sobol, C. C. A., 242 Fed. 487.

91 Ibid.

92 Indianapolis Water Co. v. Am.

tempt was committed under the advice of counsel,[93] or through negligence,[94] or has been purged by obedience to the order and undoing the wrong,[95] or that the act was one not generally understood by the public to be illegal,[96] are mitigating circumstances which will be considered in measuring the punishment.

The extent of the punishment is within the discretion of the court,[97] provided it does not exceed the statutory limits and can not be considered cruel and unusual.[98] When an order was disobeyed after a party, through his counsel, had promised to obey it, it was held that he must be punished by imprisonment.[99] It has been said that a sentence of both fine and imprisonment may be imposed.[100] It seems that the imprisonment imposed must be for a definite period of time.[101]

The imprisonment may be in a county jail.[102] If it exceeds one year it may be in a penitentiary.[103]

In the assessment of a fine the expense to the government caused by the contempt may be taken into consideration.[104]

Where a fine is imposed, that must be made payable to the

Strawboard Co., 75 Fed. 972; Robinson v. S. & B. Lederer Co., 146 Fed. 993. But see Hanley v. Pac. Live Stock Co., C. C. A., 234 Fed. 522.

93 Ullman v. Ritter, 72 Fed. 1000; *Re* Fogelman, 204 Fed. 351. *Contra*, U. S. *ex rel.* D & G. R. R. Co. v. Atchison T. & S. F. R. Co., 16 Fed. 853.

94 Indianapolis Water Co. v. Am. Strawboard Co., 75 Fed. 972; Robinson v. S. & B. Lederer Co., 146 Fed. 993. No punishment was imposed where a party had refused to produce papers under the belief that they would disclose Government secrets. *Re* Grove, C. C. A., 180 Fed. 62; *Re* Farkas, 204 Fed. 343; U. S. v. Colo., 216 Fed. 654.

95 *Re* Wiesebrock, 188 Fed. 757; *Re* Farkas, 204 Fed. 343.

96 *Re* Boyd, 228 Fed. 1003; interferenee with competition at a judicial sale.

97 Creekmore v. U. S., C. C. A., 237 Fed. 743; *Re* Sobol, C. C. A., 242 Fed. 487.

98 Ibid.

99 Missouri, K. & T. Ry. Co. v. McCrary, 182 Fed. 401.

100 U. S. v. Collins, 146 Fed. 553, 555. *Contra, Ex parte* Davis, 112 Fed. 139.

101 Matter of Marsh, McArthur & M. (S. C. D. C.) 32, where it was held that otherwise such an order was void; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 442, 55 L. ed. 797, 806, 34 L.R.A. (N.S.) 874. But see *Re* Nevitt, C. C. A., 117 Fed. 448, 461.

102 Swepston v. United States, C. C. A., 251 Fed. 205.

103 Creekmore v. U. S., C. C. A., 237 Fed. 743.

104 *Re* Independent Pub. Co., 228 Fed. 787; (where the contempt necessitated a new trial of the suit), *Re* Farkas, 204 Fed. 343.

United States;[105] but it has been held, that, a fine may also be imposed payable to the party injured and for the purpose of his indemnification.[106]

This has been often done in patent cases,[107] and sometimes in others.[108]

Costs, if awarded, are paid to the Government.[109] Where the court has found that a party was guilty of several independent contemptuous acts and imposed a single punishment, the judgment must be reversed if it appears that some of those acts were not contemptuous.[110]

It is the better practice for the order committing a person for contempt to recite the offenses charged, although it seems that this is not necessary if it describes the same by reference to other proceedings.[111] It has been said "The record should show that an issue had been made in some way on the question of contempt, and that the person adjudged guilty thereof had had an opportunity to be heard in reference thereto.[112]

It has been said that an order committing a person for contempt cannot be altered at a subsequent term of the court;[113] that the court cannot subsequently discharge the party commit-

105 *Re* Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072; Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997; Gompers v. Bucks Stove & Range Co., 321 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. (N.S.) 874.

106 Kreplik v. Couch Patents Co., C. C. A., 190 Fed. 565, citing *Re* Chiles, 22 Wall. 157, 168, 22 L. ed. 819; Hendryx v. Fitzpatrick, 19 Fed. 810, 813; Merchants Stock & Grain Co. v. Board of Trade, C. C. A., 201 Fed. 20, 30.

107 Ibid; Hendryx v. Fitzpatrick, 19 Fed. 810.

108 Cary Manufacturing Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 23 Sup. Ct. 211, 47 L. ed. 244; s. c., C. C. A., 108 Fed. 873; Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072; Christensen Engineering Co. v. Westinghouse Air Brake Co., C. C. A., 135 Fed. 774; Chicago Directory Co. v. United States Directory Co., 123 Fed. 194; Continental Gin Co. v. Murray Co., C. C. A., 162 Fed. 873; Sabin v. Fogarty, 70 Fed. 482.

109 Durant v. Washington County, 4 Woolw. 297; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 447, 55 L. ed. 797, 808, 34 L.R.A. (N.S.) 874.

110 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 447, 55 L. ed. 797, 808, 34 L.R.A. (N.S.) 874.

111 Fischer v. Hayes, 6 Fed. 63.

112 *Re* Cole, C. C. A., 23 L.R.A. (N.S.) 255, 163 Fed. 180, 183.

113 Fischer v. Hayes, 6 Fed. 63. A term of a court in bankruptcy is never closed. *Re* Henschel, 114 Fed. 968.

ted upon proof of his inability to comply with the order, his remedy being an application to the President for a pardon;[114] and that such an order is void if it does not express or limit the term of imprisonment.[115]

When the contempt consisted in disobedience to a subpœna to appear and produce documents before a grand jury, and an order directed that the delinquent be imprisoned "until he shall be willing to obey the command of said subpœna and of this order," it was held: that, upon the discharge of the grand jury, the term of imprisonment thus imposed expired; but that he was not purged of his contempt, and a new term of imprisonment was consequently imposed upon him.[116]

A prisoner summarily committed for a contempt of court is not entitled to any credit for good behavior.[117]

It has been said that the President has no power, by pardon, to relieve a person from punishment for a civil, as distinguished from a criminal, contempt.[118] The court refused to stay proceedings under a commitment, until the persons committed for contempt could apply to the President for pardon.[119]

Criminal proceedings to punish contempts are to a certain extent, like other criminal proceedings, assimilated by statute to those under the State practice.[120]

It has been said that such an offense is not a felony, but more in the nature of a misdemeanor.[121]

Otherwise, the practice in criminal and civil proceedings to punish for contempt is substantially the same.

§ 430b. Contempt proceedings under the Clayton Act to punish acts which constitute criminal offenses.

Complaints of abuses by the Federal courts in depriving of

114 *Re* Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911. *Contra, Re* Nevitt, C. C. A., 117 Fed. 448, 461.

115 Matter of Marsh, MacA. & M. (D. C.) 32. *Contra, Re* Nevitt, C. C. A., 117 Fed. 448, 461.

116 U. S. v. Collins, 146 Fed. 553.

117 *Re* Terry, 37 Fed. 649.

118 *Re* Nevitt, C. C. A., 117 Fed. 448, 456. *Contra, Re* Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911. Attorney General Gilpin expressed the opinion: that the president might relieve a person of a fine imposed upon him for an affray in the presence of the court, 3 Op. Atty. G. 622; and Attorney General Mason: that he might relieve defaulting jurors from the payment of fines, 4 Op. Atty. G. 458.

119 *Re* Nevitt, C. C. A., 117 Fed. 448, 453.

120 *Re* Acker, 66 Fed. 290, 293. See U. S. v. Block, 4 Sawyer 211, Fed. Cas. No. 14,609.

121 *Re* Acker, 66 Fed. 290.

their constitutional right to trial by jury laborers charged with acts of violence resulted in the enactment of the Clayton Law of October 15, 1914.

"Any person who shall wilfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided."[1]

"Nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usage at law and in equity now prevailing."[2]

"Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein."[3]

"If upon or by such return, in the judgment of the court,

§ 430b. [1] 38 St. at L. 738, § 21, Comp. St., § 1245a.

[2] 38 St. at L. 739, § 24, Comp. St., § 1245d.

[3] 38 St. at L. 738, § 22, Comp. St., § 1245b.

the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: Provided, however, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer."[4]

"In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."[5]

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: Provided, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof

[4] 38 St. at L. 738, § 22, Comp. St., § 1245b.

[5] 38 St. at L. 738, § 22, Comp. St., § 1245b.

without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance."[6]

"The evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia."[7]

"No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act."[8]

This statute is constitutional although it discriminates between persons guilty of different classes of contempts of the court.[9] It does not apply to an attempt to tamper with a juror.[10]

§ 430c. Contempt proceedings under Prohibition Law.

Special statutory regulations have been enacted to regulate contempt proceedings to punish violations of injunctions under the Federal Prohibition Law.

"In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath

6 38 St. at L. 738, § 22, Comp. St., § 1245b.

7 38 St. at L. 739, § 23, Comp. St., § 1245c.

8 38 St. at L. 740, § 25, Comp. St. § 1245e.

9 Couts v. U. S., C. C. A., 249 Fed. 595.

10 Ibid.

setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment." [1]

"No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying." [2]

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title." [3]

§ 431. Civil contempt proceedings.

There is no settled practice in civil contempt proceedings.[1]

Proceedings to punish a contempt otherwise than as a criminal offense [2] are instituted for the protection of the person injured.[3] This is the usual remedy for the violation of an injunction granted for the protection of that party when the infringement is not a criminal act.[4] The proceedings must clearly apprise the

§ 430c. 1 Act of Oct. 28, 1919, § 24, 41 St. at L. 305. *Cf. supra*, § 274a.

2 Ibid, § 30. See *supra*, §§ 339a, 339b.

3 Ibid, § 33.

§ 431. 1 U. S. v. Sweeney, 95 Fed. 434, 446; Morehouse v. Giant Powder Co., C. C. A., 206 Fed. 24.

2 *Supra*, §§ 430-430c.

3 Board of Trade v. Tucher, 221 Fed. 300.

4 Bradstreet Co. v. Bradstreet's Collection Bureau, C. C. A., 249 Fed. 958.

defendant of the nature of the charge.[5] With the exceptions hereinafter described they follow in general the proceedings to punish a contempt criminally in cases not covered by the Clayton Act.[6]

The proceedings should be entitled with the name of the suit in which the offense was committed.[7] They are usually instituted by an order to show cause supported by an affidavit.[8]

In case of disobedience to a decree for the performance of a specific act, other than the payment of money, the rules direct the issue of an attachment *ex parte* by the clerk, upon the filing of an affidavit that the act has not been performed within the required time.[9] It is, however, the usual practice to give notice to the delinquent, of an application for an attachment, either by an order to show cause or otherwise.[10] An attachment may be issued at the request of a person not a party to the cause, in whose favor an order has been made, or against a person not a party to the cause, against whom obedience to an order can be enforced.[11] Notice of the application, when required, should be served personally upon the person thereby affected.[12] If a party conceals himself to avoid personal service of the notice, perhaps notice may be served upon an attorney who has appeared for him in the proceeding in which the contempt was committed.[13] In the case of a foreign corporation, it is sufficient to serve notice upon the person, whom it advertises as its manager for the State and upon its solicitor, or perhaps upon its counsel in the orig-

5 Ibid.

6 *Supra,* § 430.

7 Gompers v. Buck Stove & Range Co., 221 U. S. 418, 55 L. ed. 797.

8 Bradstreet Co. v. Bradstreet's Collection Bureau, C. C. A., 249 Fed. 956.

9 Eq. Rule 8. See In re Steiner, 195 Fed. 299.

10 Worcester v. Truman, 1 McLean, 483; Fischer v. Hayes, 6 Fed. 63. Six days' notice has been held to be reasonable. American Const. Co. v. Jacksonville, T. & K. Ry. Co., 52 Fed. 937. Where the notice named a defendant corporation "and its officers" as the objects of the contempt proceedings, without specifying the individual officers, it was held that any officer served with the notice might be attached. American Const. Co. v. Jacksonville, T. & K. Ry. Co., 52 Fed. 937.

11 Equity Rule 10. See King v. McLean Asylum of M. G. Hospital, C. C. A., 64 Fed. 325. *Supra,* § 428.

12 Gray v. Chicago, I. & N. R. Co., 1 Woolw. 63; Hollingsworth v. Duane, Wall. C. C. 141.

13 Eureka L. & Y. C. Co. v. Superior Ct. of Yuba County, 116 U. S. 410, 418, 29 L. ed. 671; *supra,* § 165.

inal suit.[14] It is the safer practice to serve notice upon the person, whom it has authorized to accept service of process against it within the State.[15]

Several proceedings may be issued to compel obedience to the same order.[16]

The proceeding may be instituted by a person not a party to the cause in whose favor an order has been made.[17]

In the English Court of Chancery a party in contempt could not move for any other purpose than to discharge the contempt proceedings or to expunge scandal from the record;[18] and in such cases he could only apply by petition.[19] The usual rule in the Federal courts is that he is only debarred from applications which are not of strict right but are matters of favor in the discretion of the court,[20] such as an application to open a default.[21] and that his answer cannot be stricken from the record, nor can he be denied a hearing.[22] The Court of Appeals of the District of Columbia has held that a party whom the record shows to be apparently in contempt of the court, although he has not been so adjudicated, will not be permitted to argue an appeal.[23]

Where proceedings are civil in their nature the respondent can not be arrested nor removed from another district to that in which the proceedings were instituted.[24] Where the defendant had been extradited upon a criminal charge, it was held that he could not be attached in civil proceedings for contempt.[25]

It has been held that the respondent may be compelled to testi-

14 Westinghouse Air Brake Co. v. Christensen Eng. Co., 130 Fed. 735.

15 See §§ 164c, 213 *supra*.

16 Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487; Bradstreet Co. v. Bradstreet's Collection Bureau, C. C. A., 249 Fed. 958.

17 U. S. Envelope Co. v. Transo Paper Co., 221 Fed. 79; Del. Lac. & W. R. R. Co. v. Franks, C. C. A., 230 Fed. 988.

18 Everett v. Pyrthergch, 12 Sim. 363.

19 Loed Eldon v. Nicholson v. Squire, 16 Ves. 259, 260.

20 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215.

21 Ellingwood v. Stevenson, 4 Sandf. Ch. (N. Y.) 366.

22 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215; Sibley v. Sibley, 76 App. Div. (N. Y.) 132, 136. *Contra*, Walker v. Walker, 82 N. Y. 260; Pickett v. Ferguson, 45 Ark. 177, 191. See Bennett v. Bennett, 208 U. S. 505, 52 L. ed. 590.

23 Early v. Early, D. C. Ct. App. 261 Fed. 1003.

24 Mitchell v. Dexter, C. C. A., 244 Fed. 926.

25 Smith v. Government of Canal Zone, C. C. A., 249 Fed. 272.

fy against himself [26] although not to acts which are in themselves criminal.[27] The investigation will not be limited because of a contention that relevant evidence will disclose confidential relations between the respondents and their customers and enable the petitioners to take business away from them.[28]

It is the better practice not to try the case upon affidavits but to take oral testimony before a master or examiner.[29]

The complainant is entitled to contradict the testimony of the defendant's employees although he called and examined them.[30]

Witnesses may be examined before a special examiner appointed to take testimony within and without the district where the proceeding is instituted.[31] Where the examination is improperly conducted the application for relief should be made to the court in the jurisdiction where the examination is being conducted and not to that which ordered the taking of the testimony.[32]

Where the contempt consists in disobedience to an order directing the payment of money, the burden is upon the respondent to prove his inability.[33] In the absence of a denial, machines or articles sold under the same name as those the sale of which was enjoined, will be presumed to be of the same character.[34] The court cannot punish a contempt by striking out an answer or by refusing a hearing upon the merits.[35]

A State statute regulating the practice in contempt proceedings does not affect the practice in the Federal courts, far as civil proceedings are concerned.[36]

26 Merchants' Stock & Grain Co. v. Board of Trade, C. C. A., 201 Fed. 20, 28; State v. Sieber, 49 Oregon, 1; 88 Pac. 313; Patterson v. Wyoming Valley District Council, 31 Pa. Superior Ct. 112 (appeal dismissed by Supreme Court).

27 State v. Sieber, 49 Oregon, 1; 88 Pac. 313; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797; 34 L.R.A. (N.S.) 74.

28 Board of Trade v. Tucker, 202 Fed. 288, see *supra*, § 343.

29 Merchant's S. & G. Co. v. Board of Trade, C. C. A., 201 Fed. 920.

30 Board of Trade v. Tucker, 202 Fed. 288.

31 Ibid.

32 Ibid.

33 Cutting v. Van Fleet, C. C. A., 252 Fed. 100.

34 Stahl v. Ertel, 62 Fed. 920; Stebbins v. Duncan, 108 U. S. 32, 48, 27 L. ed. 641, 647; Brown v. Metz, 33 Ill. 339, 85 Am. Dec. 277.

35 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, *supra*, § 251.

36 Searles v. Worden, 13 Fed. 716.

Where it is a doubtful question of law whether the acts, of which complaint is made, constitute a violation of the injunction, a motion to punish the same for contempt will be denied. The court will not try in such a proceeding a difficult question as to the infringement of a patent.[37] When the contempt charged consists in the use of a machine which has been substantially altered so as to differ from that put in evidence in the suit,[38] or in the use of a new device[39] the application will usually be denied and the patentee must seek his remedy by a supplemental bill[40] or by a new suit.[41] When the alleged infringer relies upon a new patent not considered before the decree was entered, the motion will usually be denied until there has been an adjudication as to the effect thereof.[42] When, however, the change is merely colorable proceedings to punish for contempt because of its use may be sustained.[43] Although the court even then in its discretion may compel the complainant to apply for a new injunction by a supplemental bill.[44]

37 California Paving Co. v. Molitor, 113 U. S. 609, 618, 28 L. ed. 1106, 1109; Liddle v. Cory, 7 Blatchf. 1; Welling v. Trimming Co., 2 Ban. & A. 1; Buerk v. Imhaeuser, 2 Bann. & A. 465; Fed. Cas. No. 2,108; Onderdonk v. Fanning, 2 Fed. 568; Smith v. Halkyard, 19 Fed. 602; Wirt v. Brown, 30 Fed. 187; Temple Pump Co. v. Mfg. Co., 31 Fed. 292; Howard v. Mast, 33 Fed. 867; Lilienthal v. Wallach, 37 Fed. 241; Pa. Diamond Co. v. Simpson, 39 Fed. 284; Truax v. Detweiler, 46 Fed. 117, 118; Enterprise Mfg. Co. v. Sargent, 48 Fed. 453; Mack v. Levy, 49 Fed. 857; Accumulator Co. v. Consol. Elect. Storage Co., 53 Fed. 793, 795; Bonsack Mach. Co. v. National Cigarette Co., 64 Fed. 858; International Register Co. v. Recording Fare Register Co., 125 Fed. 790. For a case where the construction put upon the patent by another court was followed, see Accumulator Co. v. Consol. El. Storage Co., 53 Fed. 793.

38 Rajah Auto Supply Co. v. Grossman, C. C. A., 207 Fed. 84; Crown Cork & Seal Co. v. American Cork Specialty Co., C. C. A., 211 Fed. 650; Frank F. Smith Metal Window Hardware Co. v. Yates, C. C. A., 244 Fed. 793.

39 Individual Drinking Cup Co. v. Public Service Cup Co., 234 Fed. 653; Charles Green Co. v. Henry P. Adams Co., C. C. A., 247 Fed. 485.

40 *Supra*, §§ 231, 389a.

41 *Supra*, § 389a.

42 Charles Green Co. v. Henry P. Adams Co., C. C. A., 247 Fed. 485, 486. But see Gordon v. Turco-Halvah Co., 233 Fed. 430, aff'd C. C. A., 247 Fed. 487.

43 Frank F. Smith Metal Window Hardware v. Yates, C. C. A., 244 Fed. 793; Gordon v. Turco-Halvah Co., 233 Fed. 430, aff'd C. C. A., 247 Fed. 487.

44 Nat. Metal Molding Co. v.

When the defendant appears in reply to an order to show cause why he should not be punished for violation of an injunction, the court is not limited in granting the relief to that specified in the prayer of the applicant.[45]

The usual relief afforded by the court is a fine or imprisonment until compliance is made with the order violated.[46] The only proper punishment is a fine measured by the pecuniary injuries sustained[47] and imprisonment until that fine is paid.[48] Imprisonment for a specified term cannot be imposed.[49] The court may make a preliminary order directing a fine, determining the principles with regard to which its amount should be estimated, and directing either a reference to a master to determine the amount or a submission of affidavits upon that point to the court.[50] In a civil proceeding, the court orders the fine to be paid to the party injured,[51] and may direct the offender "to stand committed till paid."[52]

When an application is made to compel the payment of money it is the safer practice, not to enter an order directing the payment and that in default thereof, the party should be committed, but to make the order specify the time in which the payment should be made and in case of default to enter an order upon notice imposing a punishment for the contempt.[53]

An order declaring that the defendant is in contempt of an injunction forbidding the use of his name and directing that unless the name is removed from his door and from the telephone directory within ten days thereafter, further application may be

Tubular Woven Fabric Co., C. C. A., 239 Fed. 907; Charles Green Co. v. Harry P. Adams Co., C. C. A., 247 Fed. 485; Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487, affirming 233 Fed. 430.

45 Bradstreet Co. v. Bradstreet's Collection Bureau, C. C. A., 249 Fed. 958.

46 Ibid.

47 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874.

48 Ibid. Fischer v. Hayes, 6 Fed. 63; New Jersey Patent Co. v. Martin, 186 Fed. 513.

49 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 787, 34 L.R.A. (N.S.) 874.

50 Fischer v. Hayes, 6 Fed. 63.

51 Searles v. Worden, 13 Fed. 716; s. c., as Worden v. Searles, 121 U. S. 14, 30 L. ed. 853; *Re* Mullee, 7 Blatchf. 23; Doubleday v. Sherman, 8 Blatchf. 45; Bridges v. Sheldon, 7 Fed. 747.

52 Fischer v. Hayes, 6 Fed. 63; U. S. R. S., § 725.

53 *Re* Cole, C. C. A., 163 Fed. 180, 183.

made to the court, was held to be a decree upon contempt appealable, enforceable by an immediate attachment, and not by a supplementary decree.[54]

When an injunction against the infringement of a patent has been violated, the fine may include the profits made by the defendant through his contemptuous acts.[55]

The burden of proof is upon the defendant to show that he is entitled to a credit for depreciation.[56] He is ordinarily entitled to a credit for the expenses of advertising the infringing article and for an apportionment of his general expenses for his taxes and insurance.[57] Where no profits or damages are shown, the amount of the fine is usually limited to the counsel fees and the disbursements of the defendant in the contempt proceedings.[58] A reasonable counsel fee for the civil contempt proceedings is almost always included in the fine imposed.[59]

The reasonable expenses of the proceedings are also included and the court may allow the expense of copies of stenographers' minutes which are not taxable;[60] but where the record was unnecessarily voluminous and the expenses so large that a fine commensurate therewith would have been inordinate, complete reimbursement to the plaintiff was not granted.[61]

54 Bradstreet Co. v. Bradstreet's Collection Bureau, C. C. A., 249 Fed. 950, 959.

55 Ibid. But where, after the institution of contempt proceedings for violation of a preliminary injunction, a decree was entered by consent in favor of the complainants upon their waiver of all damages and costs; it was held that the counsel fees and disbursements included in the fine should not exceed those necessitated by the contempt proceedings. New Jersey Patent Co. v. Martin, 186 Fed. 513, 517; Board of Trade of City of Chicago v. Tucker, 221 Fed. 305.

56 Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487, see *supra*, §§ 389b, 389e.

57 Ibid.

58 Cheatham Electric Switching Device Co. v. Transit Development Co., 197 Fed. 563; Union Tool Co. v. U. S., C. C. A., 262 Fed. 431. But see Victor Talking Mach. Co. v. Senora Phonograph Co., 191 Fed. 988. Where, in such a case, no punishment was imposed and the contempt consisted in the institution of a suit; the fine should include the expenses of the defense of such suit, including reasonable counsel fees to be paid to the party against whom the suit was brought. Bridges v. Sheldon, 7 Fed. 17.

59 Stahl v. Ertel, 62 Fed. 920; *Re* DeForest Wireless Tel. Co., 154 Fed. 81.

60 Gordon v. Turco-Halvah Co., C. C. A., 247 Fed. 487, 492.

61 Board of Trade v. Tucker, 221 Fed. 300, 304, aff'd C. C. A., 221 Fed. 305, 306; where a fine of

The complainant is also entitled to the costs of the proceedings.[62] These, unless included in the fine, cannot be collected by attachment but only upon execution.[63] Where the proceeding is instituted by creditors for the benefit of the estate of a bankrupt or insolvent the court may direct that part of the fine be paid to them as partial reimbursement for their expenses.[64]

The expense of watching the defendant to ascertain whether he was violating the injunction and of securing evidence of the contempt may be included in the fine.[65]

Upon the hearing of an application to punish a defendant for contempt in violating an injunction against infringement, the court ordered the marshal to take the infringing machines into his possession and retain them until the final determination of the suit.[66] When the contempt consisted in building a railroad, in violation of an injunction, the marshal was ordered to take up the railroad at the expense of the guilty party.[67]

The settlement and discontinuance of a suit in which an injunction has been granted is a defense to civil proceedings to punish for contempt a violation of an injunction therein granted.[68] It seems, that after the reversal of the order that has been violated, civil proceedings for contempt cannot be maintained,[69] but where there has been no appeal, the validity of the patent for want of invention and for anticipation cannot be considered in the contempt proceedings.[70]

§ 432. Writ of attachment against the person. An attachment against the person is a writ directed to the marshal of the court, sealed and bearing *teste* in the same manner as a writ of

$1800 was imposed, although there was evidence that the contempt proceedings cost the complainants over $14,000.

62 Ibid.

63 Board of Trade of City of Chicago v. Tucker, C. C. A., 221 Fed. 305.

64 Morehouse v. Giant Powder Co., C. C. A., 206 Fed. 24.

65 Delaware L. & W. R. Co. v. Frank, C. C. A., 230 Fed. 988; Cheatham Electric S. D. Co. v. Transit Development Co., 261 Fed. 792, 796.

66 Underwood Typewriter Co. v. Elliott-Fischer Co., 156 Fed. 588.

67 Indianapolis & N. W. Traction Co. v. Consolidated Traction Co., 125 Fed. 247, 250.

68 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874. But see N. J. Patent Co. v. Martin, 186 Fed. 513.

69 S. Anargyros v. Anargyros & Co., 191 Fed. 208.

70 Campbell v. Magnet Light Co., 175 Fed. 117.

subpœna,[1] directing him to attach the body of the person named therein, and to safely keep the same, so that he can produce the person or persons thus attached in court at a certain day termed the return day of the writ, or until the further order of the court.[2] The writ must be indorsed with the special reason for which it is issued, and also with the name and address of the solicitor of the party issuing it.[3]

The writ may be issued either in vacation or in term; and may be returnable immediately; provided, at least, that the party against whom it is issued then dwells or is within twenty miles of the place of holding the court. Otherwise, if the English practice is followed, a period of fifteen days between the *teste* and the return might be required.[4]

The writ of attachment cannot be addressed to any marshal beyond the territorial jurisdiction of the court or in another district in a different State,[5] unless it directs the arrest of a witness who lives within one hundred miles of the place of trial and has disobeyed a subpœna. In the latter case it should be directed to the marshal of the district where the witness resides.[6]

§ 433. Execution of writ of attachment. The first thing to be done after the writ has been issued is to deliver it to the marshal to whom it is directed, or to one of his deputies authorized by him to receive such writs.[1] Although the writ is always directed to the marshal of the judicial district within which it is to be executed,[2] it is usually executed by one of his deputies.

The marshal and his deputy can only execute the writ within the district for which he has been appointed;[3] and not then against a person who has been brought there by force or fraud, or under such circumstances as would make it improper to serve a subpœna upon him;[4] and probably not upon

§ 432. 1 See U. S. R. S., § 911.

2 Braithwaite's Pr. 159-161.

3 Braithwaite's Pr. 159.

4 Acts of 11 Geo. IV and 1 Wm. IV., ch. 36, § 15, subd. 3.

5 *Re* Manning, 44 Fed. 275, in which the author was counsel; U. S. v. Jacobi, 4 Am. Law. T. R., 148, 151.

6 Voss v. Luke, 1 Cranch, C. C. 331; Sommerville v. French, 1 Cranch, C. C. A., 474.

§ 433. 1 U. S. R. S., § 787.

2 U. S. R. S., § 787.

3 U. S. R. S., § 787; In the Matter of Allen, 13 Blatchf. 271; Voss v. Luke, 1 Cranch, C. C. 331; Sommerville v. French, 1 Cranch, C. C. 474.

4 In the Matter of Allen, 13

Sunday,[5] nor usually in the court-room,[6] except for an offense committed in the presence of the court.[7] In the case of a recalcitrant witness who resides out of the district but within one hundred miles of the place of trial, it was held that he might be arrested under a writ issued by the trial court addressed to the marshal of the district of the residence of the witness.[8] It has been held: that in other cases this cannot be done;[9] but that, on presentation of a certified copy of the contempt proceedings and of the writ of attachment, the district attorney of the district where the delinquent is, may obtain from a commissioner of that district a warrant for the arrest of the party in contempt, who is then entitled to an examination, pending which he may be discharged on bail; and that if the commissioner decides to hold the accused the judge of that district may issue a warrant for his removal as in other criminal cases.[10]

If the delinquent be already in custody, either upon criminal sentence or civil process, no further arrest is necessary; but the marshal should give notice of the attachment, which notice is called a detainer, to the keeper or jailer in whose custody he is.[11]

If a return day be appointed in a writ, and it be issued to enforce obedience to an interlocutory order, the marshal may, but is not obliged to, allow the delinquent to go at large with or without security for his surrender to him upon the return day.[12] If the delinquent do not then surrender himself to the marshal's custody, the latter and his bondsmen are responsible for all damages which the court shall determine have resulted therefrom to the party at whose instance the writ was issued.[13] It seems, however, that this cannot be done when the writ is issued for a refusal to perform a specific act in obedience to a decree.[14]

Blatchf. 271. And see authorities cited under § 167, *supra*. *Cf.* Wroe v. Clayton, 16 Simons, 183.

5 29 Car. II, ch. 12, § 6. And see authorities cited under § 163.

6 U. S. v. Scholfield, 1 Cranch, C. C. 130; Davis v. Sheron, 1 Cranch, C. C. 287.

7 Ibid. *Cf.* § 428, *supra*.

8 Voss v. Luke, 1 Cranch, C. C. 331. But see Henry v. Ricketts, 1 Cranch, C. C. 580.

9 *Ex parte* Graham, 3 Wash. C. C. 456, 462; *Re* Manning, 44 Fed. 275.

10 U. S. v. Jacobi, 4 Am. L. T. R. 148, 151, 152; *Re* Manning, 44 Fed. 275.

11 Trotter v. Trotter, Jacob, 533.

12 Morris v. Hayward, 6 Taunt. 569; Studd v. Action, 1 H. Blackstone, 468.

13 Moore v. Moore, 25 Beav. 8; U. S. R. S., §§ 783-786.

14 Rule 8; Cowdry v. Cross, 24 Beav. 445.

According to an old writer, when the marshal "has taken up the body he has paid obedience to the writ, though he does not actually bring him up to the court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county gaol."[15] If, however, he be specially ordered to bring the contemnor before the court, he must obey.

Upon the return day of the writ the marshal should make a return thereto. He cannot detain the party named in the writ after the return day, unless by the court's orders.[16]

There are three ordinary returns upon a writ of attachment: *First* if the delinquent cannot be arrested, the marshal returns, "The within-named John Stiles is not found in my bailiwick." This is termed a *non est inventus*, and upon it further process of contempt is grounded. *Second*, if the delinquent has been arrested, but the marshal has either accepted bail for his appearance or keeps him in his own custody, the return is, "I have attached the within-named John Stiles, as within I am commanded, whose body I have ready." This is called *accepi corpus*. *Third*, if the marshal has arrested the delinquent and lodged him in jail, or, finding him there, has lodged a detainer against him, the marshal returns, "I have attached the within-named John Stiles, whose body remains in [naming the jail or prison] in my custody."[17]

Although the return is regularly made by the marshal, no matter by whom the writ has been executed, it will not be void if made by his deputy.[18] If the marshal refuse to make any return he may be compelled to do so, by means of an order to show cause followed by an attachment against him.[19]

When the marshal or his deputy is a party to a cause, or probably when a writ of attachment is issued against either of them, the writs and precepts therein must be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.[20] In such a case the person serving the process should make affidavit thereof.[21]

15 Gilbert's Ch. 83.

16 *Ex parte* Burford, 1 Cranch, C. C. 456.

17 Braithwaite's Pr. 272, 281.

18 Spafford v. Goodell, 3 McLean, 97.

19 U. S. v. Scroggins, 3 Woods, 529; Daniell's Ch. Pr. 470.

20 U. S. R. S., § 923; Eq. Rule 15.

21 Eq. Rule 15.

§ 434. Review of commitments for contempt. In general. A commitment for contempt may be reviewed by *habeas corpus,* which is usually accompanied by the writ of *certiorari;*[1] in an extraordinary case, by the writ of *certiorari* alone;[2] by writ of error[3] or appeal;[4] and, in bankruptcy, possibly by a petition of review.[5] The validity or propriety of any part of the order cannot be reviewed upon a mandamus to compel the Circuit Court of Appeals to review the same.[6] A Circuit Court of Appeals has refused to issue a writ of prohibition to stay contempt proceedings in a Circuit Court, in a case where its appellate jurisdiction had not been invoked by appeal or writ of error.[7]

§ 435. Review by habeas corpus of commitment for contempt. If a commitment for contempt is void, the prisoner may be discharged by the writ of *habeas corpus;*[1] but not for irregularities,[2] nor for the erroneous construction of a statute,[3] when the court had jurisdiction to grant the order.

The writ will also issue in extraordinary cases[4] such as the improper commitment of a witness for perjury.[5]

An editor was discharged, upon a writ of *habeas corpus,* from a commitment, because of a criticism of a court in a newspaper, since that offense was not included in the statute.[6] When the

§ 434. 1 *Infra,* §§ 435, 461.

2 *Re* Chetwood, 165 U. S. 443, 41 L. ed. 782. There the Supreme Court allowed a writ of *certiorari* unaccompanied by the writ of *habeas corpus,* to bring up the record, so that an order might be revised and annulled, which adjudged a party to a suit and his attorney guilty of contempt, and directed them to dismiss one writ of error and to refrain from prosecuting another. See *infra,* § 460.

3 *Infra,* § 436.

4 *Infra,* § 437.

5 *Re* Cole, C. C. A., 163 Fed. 180, 183, 90 C. C. A. 50, 53, 23 L.R.A. (N.S.) 255; *Re* Goodrich, C. C. A., 184 Fed. 5, 7; *infra,* § 438.

6 *Re* Merchants' Stock & Grain Co., 223 U. S. 639, 56 L. ed. 584.

7 *Re* Paquet, C. C. A., 114 Fed. 437.

§ 435. 1 *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117; *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405. See §§ 461-467, *infra.*

2 Savin, Petitioner, 131 U. S. 267, 279, 33 L. ed. 150, 154; Stevens v. Fuller, 136 U. S. 468, 478, 34 L. ed. 461, 463; U. S. v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 636; *Ex parte* Davis, 112 Fed. 139; *Ex parte* O'Neal, 125 Fed. 967. See § 461, *infra.*

3 *Re* Tyler, 149 U. S. 164, 37 L. ed. 689; *Ex parte* O'Neal, 125 Fed. 967.

4 *Ex parte* Hudgins, 249 U. S. 378, 384, *infra,* § 461.

5 Ibid.

6 Cuyler v. Atl. & N. C. R. Co., 131 Fed. 95.

court has no jurisdiction of the subject-matter of the suit, in which the decree or order violated was made, a commitment for violation of an injunction therein is void, and the prisoner will be discharged upon a writ of *habeas corpus*.[7] It was so held where the order of the court was an unjustifiable interference with the administration of a decedent's estate.[8] A party was discharged from a commitment for disobedience to an order for his examination before trial which was authorized by the State but not by a Federal statute.[9]

This cannot be done, however, on the ground that the court had no jurisdiction of the suit, because there was no difference of citizenship nor Federal question involved;[10] nor because process upon the original bill has not been served;[11] nor, in case of disobedience to a subpœna because of the immateriality of the evidence sought to be elicited or the insufficiency of the pleadings.[12] Where the disobedience occurred after an acquiescence for over two years in the order attacked, the punishment was a small fine, with imprisonment only until the fine was paid, and it was admitted at the argument that the proceeding was adopted in order to obtain a summary disposition of the cause by the Supreme Court; it was held that the writ of *habeas corpus* should not be allowed.[13] Where the court erroneously imposed both fine and imprisonment it was held that there could be no discharge by *habeas corpus*, until either the fine had been paid or the term of imprisonment had been served.[14]

The petition for the writ may allege, and the petitioner may prove, any facts not in contradiction of the record, which show that, on the facts, no case of contempt was made out.[15] It was

7 *Ex parte* Robinson, C. C. A., 144 Fed. 835.

8 *Ex parte* Robinson, C. C. A., 144 Fed. 835. The previous proceedings are reported as Carrau v. O'Calligan, C. C. A., 125 Fed. 657, 60 C. C. A., 347; Farrell v. O'Brien, 199 U. S. 89; 25 Sup. Ct. 727, 50 L. ed. 101.

9 *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117.

10 In re Lennon, 166 U. S. 548, 41 L. ed. 1110; Conkey Co. v. Russell, 111 Fed. 417; *Ex parte* Richards, 117 Fed. 658.

11 *Ex parte* Richards, 117 Fed. 658.

12 Fairchild v. U. S., C. C. A., 146 Fed. 508. But see *supra*, §§ 343, 352, 354.

13 *Ex parte* Simon, 208 U. S. 144, 52 L. ed. 429.

14 *Ex parte* Davis, 112 Fed. 139.

15 Cuddy, Petitioner, 131 U. S. 280, 33 L. ed. 154; *Ex parte* Mayfield, 141 U. S. 107, 116, 35 L. ed. 635, 638.

held Judge will not, upon the return of the writ of *habeas corpus,* discharge a person committed by another Circuit Judge;[16] but he will thus review a commitment by a District Judge.[17]

The facts upon which a commitment is based can be brought before an appellant tribunal for review by *habeas corpus,* accompanied by a writ of *certiorari.*[18]

§ 436. Review by writ of error of commitment for contempt.

A writ of error is the proper method of reviewing an order punishing for contempt a person not a party to the suit.[1]

A writ of error is the proper method of reviewing an order of punishment in criminal contempt proceedings.[2] This is so whenever any part of the fine is payable to the United States;[3] so far, at least, as that portion is concerned.[4]

Where a writ of error has been issued in a case where an appeal was the proper remedy, the writ will be treated as if it were an appeal.[5]

Where a constitutional question[6] or a jurisdictional question is at issue,[7] the question can be reviewed immediately by the Supreme Court of the United States.

16 *Re* Hale, 139 Fed. 496.

17 Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95.

18 *Re* Watts & Sachs, 190 U. S. 1, 47 L. ed. 933; *infra,* § 466.

§ 436. 1 Bessette v. W. B. Conkey Co., 194 U. S. 324; Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634.

2 Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; *Re* Merchants' Stock & Grain Co., 223 U. S. 639, 56 L. ed. 584, setting aside Merchants' Stock & Grain Co. v. Board of Trade, C. C. A., 187 Fed. 398; Sessions v. Gould, 63 Fed. 1001; Board of Councilmen v. Deposit Bank, C. C. A., 127 Fed. 812; Garrigan v. U. S., C. C. A., 163 Fed. 16; Swepston v. U. S., C. C. A., 201 Fed. 205.

3 Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; *Re* Merchants' Stock & Grain Co., 223 U. S. 639, 56 L. ed. 584, setting aside Merchants' Stock & Grain Co. v. Board of Trade, C. C. A., 187 Fed. 398.

4 Ibid. See Worden v. Searls, 121 U. S. 14, 26, 30 L. ed. 853, 857.

5 Act of Sept. 6, 1916, ch. 448, § 4, 39 St. at L. 727, Comp. St. 1916, § 1649a; Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634.

6 Nelson v. U. S., 201 U. S. 92, 50 L. ed. 673, where a witness was committed for refusing to incriminate himself.

7 Jud. Code, § 250, 36 St. at L. 1087. See chapter xxxvi on "Writs of Error and Appeals," *infra.*

Otherwise, even in the case of summary proceedings, not begun by information, the writ of error is returnable to the Circuit Court of Appeals.[8]

No writ of error lies to an order punishing a party for contempt when the proceeding was purely remedial as between the parties to the suit and not criminal in its nature.[9]

No constitutional question is involved in an order committing a district attorney for contempt in refusing to comply with a prior order for the return of books and papers which were held to have been seized by him in violation of the constitutional rights of the owner.[10] Where the party in contempt consented to the order which he disobeyed, the point, that if resisted it would have been a violation of his constitutional rights, cannot be raised upon writ of error.[11] Where the objection to the commitment for the commission of an assault on an officer of a court for the purpose of preventing the discharge of his duties, was that, on the facts, no case of contempt was made out; it was held that the contention was addressed to the merits of the case, not to the jurisdiction of the court, and that a writ of error immediately from the Supreme Court to the District Court of the United States would not lie.[12]

When the order was entered in a criminal proceeding it may be thus reviewed although the suit in which the alleged contempt was committed has not terminated.[13]

An order denying a motion to vacate an order of commitment for contempt cannot.[14]

When the writ of error is returnable to the Supreme Court of the United States it must be issued within three months after the entry of the order.[15] When returned to the Circuit Court of Ap-

8 Toledo Newspaper Company v. U. S., 247 U. S. 402.

9 Hultberg v. Anderson, C. C. A., 214 Fed. 349; *supra*, § 430.

10 Wise v. Mills, 220 U. S. 549, 55 L. ed. 579.

11 Brown v. U. S., C. C. A., 196 Fed. 351; Couts v. U. S., C. C. A., 249 Fed. 595.

12 O'Neal v. U. S., 190 U. S. 36, 47 L. ed. 945; International Paper Co. v. Chaloux, C. C. A., 165 Fed. 436.

13 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874; Hultberg v. Anderson, C. C. A., 214 Fed. 349.

14 Gill v. U. S., C. C. A., 202 Fed. 502; Shuler v. Ratan Waterworks Co., C. C. A., 247 Fed. 634.

15 *Infra*, § 698.

peals it must be issued within six months.[16] A judgment adjudging two persons, who are jointly charged and tried, guilty of contempt for violating an injunction, although their acts were separate, may be reviewed as to both on a single writ of error.[17]

When an appeal is taken from an order in a case which properly could only be reviewed by a writ of error, the proceeding will be treated as if a writ of error had been duly issued.[18]

Upon a writ of error only questions of law can be considered,[19] and those only which are presented upon an assignment of error.[20] A finding of fact supported by competent evidence can not be reviewed [21] even though it is contended that it does not show the guilt of the party beyond a reasonable doubt.[22] The evidence can not be considered unless a bill of exceptions is filed and allowed.[23] It has been said that the admission of immaterial or prejudicial facts is error; [24] but the better rule is otherwise.[25] It has been held that an error in the admission of evidence is not cured by a recital in the charge that the findings are based only on legal evidence, rejecting the irrelevant and improper parts thereof, when what evidence was disregarded and rejected is not indicated.[26] When the judgment recited that the court took judicial notice of the facts found in a similar case, some of which findings were subsequently reversed upon appeal, it was sent back for new findings of fact in view of the opinion in the former case.[27] Where the punishment is based upon several charges,

16 Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634.

17 Tosh v. West Kentucky Coal Co., C. C. A., 252 Fed. 44.

18 39 St. at L. 727; Shuler v. Raton Waterworks Co., 247 Fed. 639; *infra*, § 687.

19 *Re* Grove, C. C. A., 180 Fed. 62; Swepston v. U. S., C. C. A., 201 Fed. 205.

20 Ibid. Assignments that the court erred in entering the order below and erred in refusing to deny the same, were held to be sufficient to justify the inspection of the record by the court of review to ascertain whether there was any apparent error. Ibid.

21 Fairfield v. U. S., C. C. A., 146 Fed. 508; Toledo Newspaper Co. v. U. S., C. C. A., 237 Fed. 986, aff'd 247 U. S. 402; *Re* Independent Pub. Co., C. C. A., 240 Fed. 849; Tjosevig v. U. S., C. C. A., 255 Fed. 5.

22 Schwartz v. U. S., C. C. A., 217 Fed. 866.

23 Brown v. Detroit Tr. Co., C. C. A., 193 Fed. 622.

24 Swepston v. United States, C. C. A., 251 Fed. 205.

25 Oates v. U. S., C. C. A., 223 Fed. 1013.

26 Ibid.

27 Ibid.

some of which were not sufficiently proved, there should be a reversal.[28]

The propriety of an order granting an injunction from which no appeal has been taken can not be considered upon the review of a judgment for contempt in violating such injunction when the first order was within the jurisdiction of the court.[29]

All matters which the opinion of the District Court assumed and which might be naturally inferred will be considered as found when no specific findings were made or requested.[30]

The payment of a fine imposed in criminal contempt proceedings does not deprive the defendant of the right to review the legality of his conviction.[31] The Supreme Court of the United States has refused to review by writ of error the judgment of a State court denying an application to punish a party for contempt, where it was claimed that the obligation of a contract was impaired by such denial.[32]

§ 437. Review by appeal of commitment for contempt. A commitment in civil contempt proceedings can only be reviewed by an appeal.[1] This is the case whenever the punishment is a fine wholly payable to a party to the suit; even if accompanied by imprisonment, not for a fixed term, but until the fine is paid.[2]

When a writ of error is taken to review an order which properly could have been reviewed only by an appeal the writ of error will be treated as if it were an appeal.[3] It was formerly held, that where part of the fine was payable to the United States and the remainder to a party to the suit, so much of the proceedings as imposed the latter might be reviewed by appeal.[4] It has been

28 Toledo Newspaper Co. v. United States, 247 U. S. 402; but see *infra*, § 536.

29 Scoric v. United States, C. C. A., 217 Fed. 871.

30 Toledo Newspaper Co. v. U. S., 247 U. S. 402.

31 Fairfield v. U. S., C. C. A., 146 Fed. 508.

32 Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259.

§ 437. 1 Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; Doyle v. London Guarantee & Accident Co., 204 U. S. 599, 51 L. ed. 641; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; Hanley v. Pacific Live Stock Co., C. C. A., 234 Fed. 522; Cutting v. Van Fleet, C. C. A., 252 Fed. 100.

2 Clay v. Waters, C. C. A., 178 Fed. 385, 21 Ann. Cas. 897.

3 Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634.

4 Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; Doyle v. London Guarantee & Accident Co., 204 U. S. 599, 51 L. ed. 641; Worden v. Searls, 121 U. S.

said that an order punishing a party for a civil contempt, committed after the final decree, is reviewable by appeal.[5] It cannot be reviewed by writ of error.[6]

An interlocutory order punishing a party for contempt in civil proceedings cannot be reviewed by an appeal,[7] but when it punishes persons not parties to the suit it seems that they can immediately sue out a writ of error.[8]

No appeal can be taken from an order in an action at law punishing a party for contempt.[9]

The Circuit Court of Appeals for the Eighth Circuit has taken jurisdiction of an appeal from an order, discharging a rule to show cause why a party should not be punished for contempt of a final decree of injunction against the infringement of a trade-mark.[10]

The Circuit Court of Appeals for the Seventh Circuit dismissed an appeal from an order dismissing a rule to show cause why a witness should not be punished for contempt in refusing to answer a question before an examination in a suit where no final decree had been entered.[11]

An order will not be reversed upon the facts when the evidence is not contained in the transcript and the findings made by a judge or master below are sufficient to sustain the commitment.[12]

§ 438. Review by revisory petitions of commitments for contempt in bankruptcy proceedings. Although the point is doubtful, in two cases in the First Circuit commitments in contempt proceedings were reviewed by revisory petitions,[1] but when part

14, 26, 30 L. ed. 853, 857; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 5 L. ed. 797, 34 L.R.A. (N.S.) 874.

5 Worden v. Searls, 121 U. S. 14, 26, 30 L. ed. 853, 857; Wilson v. Calangraph Co., C. C. A., 153 Fed. 961, 963; Clay v. Waters, C. C. A., 178 Fed. 385, 21 Ann. Cas. 897.

6 Ibid.

7 Hultberg v. Anderson, C. C. A., 214 Fed. 349.

8 Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634.

9 International Paper Co. v. Chaloux, C. C. A., 165 Fed. 436.

10 Enoch Morgan's Sons Co. v. Gibson, C. C. A., 122 Fed. 420.

11 Hultberg v. Anderson, C. C. A., 214 Fed. 349.

12 Frank v. Bernard, C. C. A., 185 Fed. 812; McKee Glass Co. v. H. C. Fry Glass Co., C. C. A., 248 Fed. 125.

§ 438. 1 *Re* Goodrich, C. C. A., 184 Fed. 5, 7; *Re* Cole, C. C. A., 163 Fed. 180, 183, 90 C. C. A. 50, 53, 23 L.R.A. (N.S.) 255. Where an order directed that a trustee in bankruptcy be committed to jail unless he filed an account on or before a certain date, a petition for a

of the punishment is a fine, payable to the United States, a writ of error is the proper remedy.[2]

§ 439. Sequestration. The process of sequestration is a writ or commission issuing under the seal of the court, directed either to the marshal or to certain persons of the plaintiff's nomination empowering him or them to enter upon and sequester the real and personal estate of a defendant (or some particular parcel of his lands), and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the court shall in its discretion appoint, until such defendant shall have performed some matter, previously ordered by the court, in the process specifically mentioned, for not doing whereof he is in contempt.[1] This is one of the oldest writs of the court of chancery, and has been the cause of many conflicts between the English Chancellors and the courts of common law.[2] Much curious history and learning upon the subject invite the attention of the antiquarian; but, as the writ is now rarely used, little space will be devoted to it in this work.

By the Equity Rules, whenever the marshal has returned *non est inventus* under a writ of attachment, a writ of sequestration may issue to compel obedience to a decree or order of the court.[3] The writ, when not issued to the marshal, appoints two or more sequestrators.[4] The usual number is four.[5] The sequestrators are officers of the court, and as such are subject to new directions during the discharge of their functions,[6] may be attached for disobedience or misconduct,[7] and, if resistance be made to them, may be aided by the court with the exercise of its process of contempt,[8] or by a writ of assistance.[9] Sequestrators must from

revision of the order which was permitted to be filed prior to the expiration of the time was dismissed as premature. O'Conor v. Sunseri, C. C. A., 184 Fed. 712.

2 Brown v. Detroit Tr. Co., C. C. A., 193 Fed. 622.

§ 439. 1 Hinde's Ch. Pr. 127; Hoffman's Ch. Pr., ch. iii, § 10; Daniell's Ch. Pr., ch. xxv, § 7.

2 Gilbert's Forum Romanum, 78; Daniell's Ch. Pr., ch. xxv, § 7.

3 Rules 7 and 8. See Shainwald v. Lewis, 6 Fed. 766, 777.

4 Hoffman's Ch. Pr., ch. iii, § 10.

5 Daniell's Ch. Pr., ch. xxv, § 5.

6 Hinde's Ch. Pr. 138; Daniell's Ch. Pr., ch. xxv, § 7; Hoffman's Ch. Pr., ch. iii, § 10.

7 Lord Pelham v. Lord Harley, 3 Swanst. 291, n.

8 Angel v. Smith, 9 Ves. 335; Lord Pelham v. Duchess of Newcastle, 3 Swanst. 293, n.; Rule 9.

time to time account for what comes into their hands, and pay into court such money as they receive.[10]

§ 440. Writ of assistance and writ of possession. The Equity Rules provide that "when any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court."[1] This is a writ commanding the marshal to eject the defendant from the land and put the plaintiff in possession; and is executed in the same manner as a writ of *habere facias possessionem* is executed in favor of a successful plaintiff in the action of ejectment;[2] "in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or a ring of a door in the name of seisin, is sufficient execution of the writ."[3] This writ is often used to put into possession receivers[4] and sequestrators.[5] It is not issued without an order for that purpose.[6]

An application may be made by a bill to carry the decree into execution[7] or by a petition.[8] It cannot issue against any but a party to the suit, or his representative, or one who came into possession under him since the suit was begun.[9]

The grantee of the purchaser at a foreclosure sale where the court has ordered the receiver to put him in possession of the purchased property, if the court has retained jurisdiction of the suit, may obtain a writ of possession.[10]

9 Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Rule 9.

10 Howell v. Lord Coningsby, 1 Fowl. Ex. Pr. 161; Deshrow v. Grommie, Bunb. 272.

§ 440. 1 Rule 9.

2 Hunter's Suit in Equity (6th ed.), 168.

3 Bl. Com. 412.

4 Sharp v. Carter, 3 Wms. 375, 379, n.; Seton on Decrees (4th ed.), 441, 1563.

5 Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Seton on Decrees (4th ed.), 1562.

6 Seton on Decrees (4th ed.), 1562.

7 Root v. Woolworth, 150 U. S. 401; 14 Sup. Ct. 136.

8 Lee v. Thornton, N. C., Oct., 1918, 97 S. E. 23.

9 Terrell v. Allison, 21 Wall. 289, 22 L. ed. 634; Howard v. Railway Co., 101 U. S. 837, 849, 25 L. ed. 1081, 1084; Thompson v. Smith, 1 Dill. 458.

10 Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. 653, 658. But see Van Hook v. Throckmorton, 8 Paige (N. Y.), 33; People

It may be issued to enforce the decree in a suit to set aside a deed for fraud and undue influence[11] or to cancel a cloud upon the complainant's title,[12] and in any suit brought for the purpose of determining the rights of the litigants to the title or possession of real estate,[13] although a single case limits the exercise of the jurisdiction to the enforcement of decrees which pass the title.[14]

The writ cannot be issued to put a party in possession of land beyond the territorial jurisdiction of the court, and all acts of the marshal beyond such jurisdiction are unauthorized notwithstanding the command of the writ.[15]

After a party has been put in possession under a judgment in ejectment, the court has no power at a subsequent term to direct a restitution of the property to the persons from whom possession was taken, unless the judgment is reversed by the proper court of review.[16] It has been held that a marshal or other officer charged with the execution of a writ of possession, under judgment in ejectment, cannot appeal to the court for instructions because of protests made, or notices served upon him, by persons not parties to the action, who claim independent rights in the land.[17]

§ 441. Action by the Court itself. The Equity Rules now provide: "If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as

v. Grant, 45 Cal. 97; Stanley v. Sullivan, 71 Wis. 585, 5 Am. St. Rep. 245; Harding v. Harker, 17 Idaho, 341, 105 Pac. 788; Jones v. Hooper, 50 Miss. 513.

11 Reed v. Exum, 84 N. C. 430; Schenck v. Conover, 13 N. J. Eq., 223; Knight v. Houghtalling, 94 N. C., 408; Stanley v. Sullivan, 71 Wis. 585; see also Yates v. Hamby, 2 Atk. 362; Adamson v. Adamson, 12 Ont. Pr., 21 (Ann. Cas., 1913D, 1121, note).

12 Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136.

13 Clarke v. Aldridge, 162 N. C. 328, 78 S. E. 216; Lee v. Thornton, 97 S. E. 23.

14 Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, also reported and approved in 93 Am. State Rep. 143, 156, disapproved in Lee v. Thornton, N. C., Oct., 1918, 97 S. E. 23.

15 *Re* Anderson, 94 Fed. 487, 497.

16 Dickinson v. Huntington, C. C. A., 185 Fed. 703.

17 Huntington's Devisees v. Taylor, 156 Fed. 700, aff'd Dickinson v. Huntington, C. C. A., 185 Fed. 703.

practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."[1] It had previ-

§ 441. [1] Eq. Rule 8. In the year 1830, an act was passed in England, at the instance of Sir Edward Sugden, the author of Sugden on Powers, afterwards Lord St. Leonards, providing: "That when any person shall have been directed by any decree or order to execute any deed or other instrument, or make a surrender or transfer, or to levy a fine or suffer a recovery, and shall have refused or neglected to execute, make or transfer, or levy or suffer the same, and shall have been committed to prison under process for such contempt, or, being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in such prison, the court may, upon motion or petition, and upon affidavit that such person has after the expiration of two calendar months from the time of his being committed under or charged with, or detained under such process, again refused to execute such deed or instrument or make such surrender or transfer, or levy or suffer such fine or recovery, order or appoint one of the masters in ordinary, or if the act is to be done out of London, then, if necessary, one of the masters extraordinary, to execute such deed or other instrument or to make such surrender or transfer, for and in the name of such person, and to levy such fine or suffer such recovery, in his name, and to do all acts necessary to give validity and operation to such fine and recovery, and to lead or declare the uses thereof; and the execution of said deed or other instrument, and the surrender or transfer made by the said master, and the fine or recovery levied or suffered by him, shall in all respects have the same force and validity as if the same had been executed or made, levied or suffered, by the party himself; and within ten days after the execution or making of any such deed or other instrument or surrender or transfer, or levying or suffering such fine or recovery, notice thereof shall be given by the adverse solicitor to the party in whose name the same is executed or made; and such party, as soon as the deed or other instrument or surrender, transfer, fine or recovery shall be executed, made, levied, or suffered, shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged therefrom, under any of the provisions of this act applicable to his case; and the court shall make such order as shall be just, touching the payment of the costs of or attending any such deed, surrender, instrument, transfer, fine, or recovery." "That where a person shall be committed for a contempt in not delivering to any person or persons or depositing in court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, any sequestrator or sequestrators appointed under any commission of sequestration shall have the same power to seize and take such books, papers, writings, or other articles or things, be-

ously been held that the Supreme Court of the District of Columbia [2] and a Circuit Court of the United States [3] had power to appoint a trustee to execute an assignment of a patent right,[4] or to have the same made by a master.[5] A Court of Equity has power to appoint a trustee to protect the rights of the beneficiaries of a trust.[6] A District Court of the United States has power to direct its marshal to remove buildings from land over which a complainant has a right of way.[7]

When permanent injunctions are issued to restrain the infringement of copyrights [8] or trade marks,[9] the court may order the destruction by the marshal of the infringing articles. In contempt proceedings the court may also direct the destruction of a railroad or other building built in violation of an order of the court.[10]

§ 442. Bills to carry decrees into execution. A bill to carry a decree into execution is proper where, after a decree has been pronounced, it has happened that owing to some neglect of the parties to proceed upon the decree, their rights have become so

ing in the custody or power of the person against whom the sequestration issues, as they would over his own property; and thereupon such articles or things so seized and taken shall be dealt with by the court as shall be just; and after such seizure it shall be lawful for the court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of this act, to make such order for the discharge of the prisoner, upon such terms, and, if it shall see fit, making any costs to the cause, as to the court shall seem proper.''

2 Acts of 1 Wm. IV, ch. 36, § 15, R. 15; Shepherd v. Com'rs of Ross County, 7 Ohio, 271; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640; Sayle v. Scott Paper Mfg. Co., 55 Fed. 553, 557; Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993; York County Sav. Bank v. Abbot, 139 Fed. 988, 993; Wilson v. Martin, etc., Co., 151 Mass. 515, 8 L.R.A. 309; *supra*, §§ 64, 398.

3 Underfeed Stoker Co. v. Am. Ship. Windlass Co., 165 Fed. 65.

4 Ager v. Murray, 105 U. S. 126, 132, 26 L. ed. 942, 944.

5 Underfeed Stoker Co. v. Am. Ship Windlass Co., 165 Fed. 65, when the defendant refused so to do after a sale of the patent right in a suit of which the court had jurisdiction.

6 Drennen v. Heard, 198 Fed. 414.

7 Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909.

8 35 St. at L. 1081; 37 St. at L. 489, 38 St. at L. 113; Comp. St., § 9546, 9526.

9 33 St. at L. 729; Comp. St., § 9505.

10 Indianapolis & N. W. Traction Co. v. Consolidated Traction Co., 125 Fed. 247, 250.

embarrassed by subsequent events that no ordinary process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them;[1] or where a person who was not a party nor claims under a party to the original decree, claims, in a similar interest, or is unable to obtain the determination of his own right until the decree has been carried into execution;[2] or by or against a person claiming as assignee of a party to the original decree,[3] or otherwise, in privity with such a party, for example, a stockholder or perhaps a creditor of a corporation;[4] or to carry into execution the judgment of an inferior court of equity.[5]

A bill of this description is generally partly an original bill, though not strictly original; and sometimes it is likewise a bill of revivor or a supplemental bill, or both; and the frame of the bill, and the course of proceedings upon it, vary accordingly.[6] Such a bill is treated as ancillary to the principal suit, and the Federal court in which the original decree was entered will take jurisdiction of the same irrespective of the citizenship of the parties.[7]

Upon a bill to carry a decree into execution the court is at liberty to examine into the grounds of the original decree, and if such decree appears to have been erroneous, to refuse to enforce it, even when the same was entered by consent.[8] Where a

§ 442. [1] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1689; Johnson v. Northley, Prec. in Ch. 134; s. c., 2 Vern. 407.

[2] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1689, 1690; Rylands v. Latouche, 2 Bligh, 566; Oldham v. Eboral, Cooper Sel. Cases, *temp.* Brougham, 27.

[3] Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552, 34 L. ed. 1005; Pacific Live Stock Co. v. Hanley, C. C. A., 200 Fed. 468; Organ v. Gardiner, 1 Ch. Cas. 231; Lord Carteret v. Paschal, 3 Peere Wms. 197; Binks v. Binks, 2 Bligh, P. C. 593; Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123; Daniell's Ch. Pr. (1st Am. ed.) 1691.

[4] Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24.

[5] Morgan v. ———, 1 Atk. 408; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691.

[6] Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1693.

[7] Railroad Co. v. Chamerlain, 6 Wall. 748, 18 L. ed. 859; Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123; Central Tr. Co. v. Western R. Co., 89 Fed. 24.

[8] Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552, 562, 34 L. ed. 1005, 1009; Lewers & Cooke v. Atcherly, 222 U. S. 285, 56 L. ed. 202; Gay v. Parprat, 106 U. S. 679, 27 L. ed. 256; Lawrence v. Berney, 2 Rep. in Ch. 127; Johnson

decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, till it is reversed the court is bound to assist it with the utmost process the course of the court will bear; but where the common process of the court will not serve and things come to be in such a state and condition after a decree made, that it requires a new bill and a second decree upon that before the first decree can be executed, if the first decree is unjust, the court desires to be excused in making it its own, and to build upon such foundations, and charging its conscience with promoting an apparent injustice; and this obliges the court to examine the grounds of the first decree before it makes the same decree again.[9]

v. Northey, Prec. in Ch. 134; s. c., 2 Vern. 407; Atty. Gen. v. Day, 1 Vesey, 218; Wert v. Skip, 1 Vesey, 218; Hamilton v. Houghton, 2 Bligh, P. C. 169; Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691, 1692. *Cf.* Deposit Bank v. Frankfort, 191 U. S. 499, 525, 48 L. ed. 276, 286.

[9] Lawrence v. Berney, 2 Ch. R. 127; Lawrence Mfg. Co. v. Janesville C. Mills, 138 U. S. 552, 562, 34 L. ed. 1005, 1009; Mitford's Pl., ch. i, § 3; Daniell's Ch. Pr. (1st Am. ed.) 1691, 1692.

CHAPTER XXIX.

CORRECTION OF DECREES OTHERWISE THAN BY APPEAL.

§ 443. Correction of decrees. In general. When a party to a suit in equity, or his representative feels himself aggrieved by a final decree of the court, there are eight ways in which he can apply to have such decree reversed, set aside, or varied: by petition for a mere clerical or accidental error,[1] by a petition for a rehearing,[2] by a bill of review,[3] by a bill in the nature of a bill of review,[4] by a supplemental bill in the nature of a bill of review,[5] by a bill to set aside a decree on account of fraud, mistake, accident, or surprise,[6] by a bill to suspend or avoid the operation of a decree,[7] and by an appeal.[8]

An interlocutory decree can be corrected before[9] or at the

§ 443. [1] § 444.
[2] § 445.
[3] §§ 447–449.
[4] § 450.
[5] § 446.
[6] § 451.
[7] § 452.
[8] Ch. XXXVI.

[9] Iowa v. Illinois, 151 U. S. 238, 38 L. ed. 145; *supra*, § 397. See, however, Gunn v. Black, 60 Fed. 151.

A decree for an accounting, even one making absolute an order that a bill be taken *pro confesso*, Webster v. Oliver Ditson Co., 171 Fed. 895, is interlocutory and may be modified at any time, Weston El. Instrument Co. v. Empire El. Instrument Co., 166 Fed. 867. See Comly v. Buchanan, 81 Fed. 58, where a decree for an injunction and an accounting, entered December 9, 1895, was modified on petition January 22, 1897. A decree in a partition suit adjudging the property susceptible of partition, and appointing petitioners to make the same, is interlocutory and may be set aside or modified at any time before final decree. Dangerfield v. Caldwell, C. C. A., 151 Fed. 554.

A court refused to modify an interlocutory decree for an injunction, so as to more clearly advise the defendant what he could, and what he could not do without infringing same. Thomas & Sons Co. v. El. Porcelain Co., 114 Fed. 407.

An interlocutory decree can be opened to admit new evidence, only on the same terms as a final decree. Deitch v. Staub, C. C. A., 115 Fed. 309, 317. It has been said that this will not be done, when the party seeking to modify the interlocutory decree has acquiesced in the same. Dewey v. Stratton, C. C. A., 114 Fed. 179.

Cushman & Denison Mfg. Co. v. Grammes, 225 Fed. 883, 885, *per*

entry of the final decree.[10] A rule of the State court permitting decrees or a default to be opened at the term after they have become absolute will not be followed by the Federal courts.[11] A motion to set aside an interlocutory decree will ordinarily be denied, if based only upon grounds considered at the hearing.[12]

§ 444. Amendment of decree without a rehearing. The rules provide that "clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition without the form or expense of a rehearing."[1] Decretal orders may be corrected in the same manner.[2] In this way, corrections have been permitted of errors in the title of a decree or order;[3] of an omission from a decree for specific performance of

Dickinson, J.: "The decree, it is true, is interlocutory; but as long as it stands it disposes of everything involved in it. We entertain no doubt of the power of control which the court has over such decrees. This is implied in their very nature. If authority for the existence of such power is required, it may, be found in Perkins v. Fourinquet, 47 U. S. 206, 12 L. ed. 406. This is, however, far from the being all. The exercise of power, merely because it is possessed, the height of unwisdom. The doctrine of *stare decisis*, where the decision has been made in the very case under consideration, has a value far beyond that of the presumption of correctness. The ruling is much more than merely persuasive, even when the reasoning of the judges by whom it was rendered is such as to bring instant convincement of mind. It is a decision of the questions involved which should not be disturbed by any other than a tribunal having appellate duties. We have the authority of one of the greatest of jurists and statement for the truth that bad laws may be borne but the '*jus aut vadum aut incertum*' presents a situation which is intolerable."

10 Henry v. Travelers' Ins. Co., 34 Fed. 258; Clark v. Blair, 14 Fed. 812; Rogers v. Pitt, 129 Fed. 932; King v. West Virginia, 216 U. S. 92, 100, 54 L. ed. 396, 401; Lewers & Cooks v. Atcherly, 222 U. S. 285, 295, 56 L. ed. 202, 205. For motions at the foot of a decree, see *supra*, § 405; Kapiolani Estate, Limited v. Atcherley, 238 U. S. 179; Pease v. Rathbun-Jones Engineering Co., 228 Fed. 275.

11 Austin v. Riley, 55 Fed. 833. See Rogers v. Pitt, 129 Fed. 932, 937. But see *infra*, § 481.

12 A. B. Dick Co. v. Wickelman, 77 Fed. 853; Rogers v. Pitt, 129 Fed. 932, 937.

§ 444. 1 Eq. Rule 72. See Witters v. Sowles, 32 Fed. 130; Hop B. Mfg. Co. v. Warner, 28 Fed. 577.

2 Union S. Ref. v. Mathiesson, 3 Cliff. 146.

3 Spearing v. Lynn, 2 Vern. 376.

a direction to settle the conveyance,[4] or of a reference as to title;[5] of an omission in a decree in a creditor's suit of a direction to take the accounts of the personal estate;[6] of an allowance of interest from a different date from that determined in a master's report which the court had confirmed;[7] to change the place at which a sale of real estate was directed in order to conform with the statute;[8] to correct the numbers of certain letters patent, an interest in which was decreed to a party, when there was no issue concerning the identity of the same,[9] and of other minor defects or redundances in respect to which a decree did not conform to the directions or the written opinion of the court.[10] It has been held that such a correction cannot be made in an appealable case after the term at which the decree was entered,[11] except by consent, and it has been held that when thus corrected the corrected decree cannot be modified,[12] except under extraordinary circumstances.[13]

An order or decree entered by consent cannot be varied or modified in a material part without the assent of all the parties to the same; but the court, it seems, may give such further directions as are necessary to carry it "into effect, according to its spirit and intent,"[14] and under extraordinary circumstances it might be set aside.[15]

4 Trevelyan v. Charter, 9 Beav. 140.

5 Hughes v. Jones, 26 Beav. 24.

6 Pickard v. Mattheson, 7 Ves. 293.

7 Fidelity Trust & Safe Deposit Co. v. Roanoke Iron Co., 84 Fed. 744.

8 Fulton Inv. Co. v. Dorsey, 220 Fed. 298.

9 Maginn v. Standard Equipment Co., C. C. A., 150 Fed. 139.

10 Gage v. Kellogg, 26 Fed. 242; Rogers v. Riessner, 34 Fed. R. 270; Tufts v. Tufts, 3 W. & M. 429; Pfanschmidt v. Kelly M. Co., 32 Fed. 667; Witters v. Sowles, 32 Fed. 765; Burdsall v. Curran, 31 Fed. 918; Albany v. Steam T. Co., 26 Fed. 318; Dorsheimer v. Rorback, 9 C. E. Green (N. J.) 33; Sprague v. Jones, 9 Paige (N. Y.) 395; Jarmon v. Wiswall, 9 C. E. Green (N. J.) 68. But see Ry. Reg. Mfg. Co. v. North Hudson Co. R. Co., 26 Fed. 411.

11 Doe v. Waterloo Min. Co., 60 Fed. 643; Hicklin v. Marco, 64 Fed. 609; Born v. Schneider, 128 Fed. 179. *Re* Metropolitan Tr. Co., 218 U. S. 312, 54 L. ed. 1051. *Contra*, Taylor v. Easton, C. C. A., 180 Fed. 363, 368, where the petition was treated as a bill of review; Ommen v. Talcott, 180 Fed. 925, a mistake as to the date of the entry of a decree made pending an appeal.

12 Ibid.

13 U. S. v. Discher, 255 Fed. 719.

14 In Leitch v. Cumpston, 4 Paige

The former English practice occasionally though rarely allowed similar corrections in what were manifestly mere clerical errors after a decree had been enrolled;[16] and in the Federal courts it has been said that an error in calculating the amount ordered by the decree to be paid may be corrected after enrolment, upon motion or petition, by entering a credit as for its payment.[17]

A decree cannot be set aside after the expiration of the term when it was entered because the remedy was at common law and not in equity.[18] A decree may be set aside in whole or in part at a subsequent term because it is beyond the jurisdiction.[19] This was done where it did not conform to the pleadings or findings and injuriously affected persons not parties to the suit.[20] Judgments have been set aside after the terms at which they were rendered where appearances had been made by attorneys without authority.[21] It has been held that the Federal courts can set aside, after the term at which it was rendered, a final judgment or decree entered by a mistake of the judge without an examination of the pleadings and evidence;[22] one which the judge was induced to make by false representations as to its nature[23] or as to the value of property thereby affected,[24] when the necessity for

(N. Y.) 476; Gage v. Kellogg, 26 Fed. 242; Rogers v. Riessner, 34 Fed. 270.

15 City of Des Moines v. Des Moines Water Co., 218 Fed. 939; Cushman & Denison Mfg. Co. v. Grammes et al., 234 Fed. 952; Chancellor Walworth in Leitch v. Cumpston, 4 Paige (N. Y.) 473.

16 Weston v. Haggerston, G. Cooper, 134; Yow v. Townsend, 1 Dick. 59; Atty. Gen. v. Greenhill, 34 Beav. 174; Beekman v. Peck, 3 J. Ch. (N. Y.) 415; Clark v. Hall, 7 Paige (N. Y.) 382; Thompson v. Goulding, 5 Allen (Mass.) 81. For enrollment of decrees, see *supra*, § 406.

17 Massie v. Graham, 3 McLean, 41.

18 Brown v. Allebach, 182 Fed. 264.

19 Clark v. Arizona Mut. Savings & Loan Ass'n, 217 Fed. 640. Aff'd as Farmers' & Merchants' Bank of Phoenix, Ariz. v. Arizona Mut. Savings & Loan Ass'n, C. C. A., 220 Fed. 1. *Re* Dennett, C. C. A., 221 Fed. 350.

20 Ibid.

21 After three years, in McGeorge v. Bigstone G. I. Co., 88 Fed. 599. After eleven years, in Maury's Trustees v. Fitzwater, 88 Fed. 768.

22 U. S. v. Williams, 67 Fed. 384. Such an application should be addressed to the judge who made the error. If he is dead or has left the bench, another judge will rarely, if ever, grant it. Hicklin v. Marco, 64 Fed. 609.

23 Fisher v. Simon, 67 Fed. 387.

24 Winslow v. Staab, C. C. A., 242 Fed. 426.

the correction and the matter from which it is to be made appear upon the face of the record;[25] when, according to the judge's recollection, it does not conform to his decision;[26] in which last two cases no notice of the application for the correction is required;[27] and whenever it can be shown, by evidence adduced *aliunde,* that the judgment does not represent the decision of the court,[28] and the whole or any part of a decree which is beyond its jurisdiction.[29]

A decree may be modified by the consent of the parties at any time.[30] But it has been held that the Federal courts, after the term at which they were rendered and the time allowed by the rules for an application for a rehearing has expired, have not the power to set aside decrees or judgments for errors of law.[31]

A decree entered upon a mandate of the Supreme Court which fails in any respect to comply therewith is not final, and may be modified at a subsequent term.[32]

It has been held that, after the term at which a decree has been entered, it may be modified as to the time or the manner of its enforcement.[33]

A Federal court may vacate or correct its judgments or decrees on its own motion during the same term for any cause.[34]

Where the judge, after he had signed a decree, but before it was entered on the journal, suspended its entry, and thereafter proceeded to reform the pleadings and hear the cause anew with the acquiescence of the parties, it was held that the decree had no validity, although it was by mistake filed by the clerk.[35]

25 Odell v. Reynolds, C. C. A., 70 Fed. 656.

26 Ibid.

27 Ibid.

28 In such a case the application must be upon notice. Ibid.

29 *Re* Dennett, C. C. A., 221 Fed. 350, 357.

30 U. S. v. Trogler, C. C. A., 237 Fed. 181.

31 Klever v. Seawall, C. C. A., 65 Fed. 373; McGregor v. Vt. L. & Tr. Co., C. C. A., 104 Fed 709.

32 Moran v. Hagerman, C. C. A., 64 Fed. 499.

33 Mootry v. Grayson, C. C. A., 104 Fed. 613, 618; Farmers' L. & Tr. Co. v. Oregon Pac. R. Co., 28 Oreg. 44; s. c., 40 Pac. 1089; Monkhouse v. Corporation of Bedford, 17 Ves. 380.

34 Aetna L. Ins. Co. v. Board of Co. Com'rs, C. C. A., 79 Fed. 575; Miocene Ditch Co. v. Moore, Judge of the United States District Court, C. C. A., 150 Fed. 483; United States ex rel. Animarium Co. v. Circuit Court of United States, Southern Dist. of Iowa, C. C. A., 129 Fed. 897.

35 Mahler v. Animarium Co., 129 Fed. 897.

A decree should not be modified without notice to all the parties thereby affected,[36] unless one of them can not be served within the jurisdiction. The omission of notice does not make the order of amendment void for want of jurisdiction.[37]

Where a decree was modified, at a term subsequent to its entry, it was presumed that it was not final where the record did not affirmatively show the contrary.[38] Where evidence omitted by oversight was offered to the court upon appeal, the case was reversed, with the direction for a rehearing, upon the payment of costs of the original court and the court of review.[39]

§ 445. Petition for a rehearing. A petition for a rehearing is the proper method of correcting before enrolment errors in a decree which are not evidently clerical or accidental. A petition for a rehearing could formerly in England have only been made to a judge before whom the cause was heard, or to the Lord Chancellor.[1] In the Federal courts a petition for a rehearing will usually be entertained only by the judge or justice before whom the cause was heard.[2]

The rules provide that "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."[3] A petition filed within the time prescribed by the rules may be heard and granted subsequently.[4]

When the respondent to a petition for a rehearing, at the hear-

[36] Livingston v. Livingston, Indiana, D. C. 1918, 121 N. E. 119.

[37] U. S. v. Midland Oil Co., 232 Fed. 619; Kalehua v. Clark, C. C. A., 250 Fed. 612.

[38] Maginn v. Standard Equipment Co., C. C. A., 150 Fed. 139.

[39] St. Claire Foundry Co. v. Union Jack Co., C. C. A., 184 Fed. 989.

§ 445. [1] Daniell's Ch. Pr. (5th Am. ed.) 1471.

[2] Giant P. Co. v. California V. P. Co., 5 Fed. 197, 202.

[3] Eq. Rule 69. See McMicken v. Perrin, 18 How. 507, 15 L. ed. 504; Bank of Lewisburg v. Sheffey, 140 U. S. 445, 35 L. ed. 493; First Nat. Bank v. Woodrum, 86 Fed. 1004.

[4] Aspen M. & S. Co. v. Billings, 150 U. S. 31, 36, 37 L. ed. 986, 988; Goodard v. Ordway, 101 U. S. 745, 25 L. ed. 1040; New Orleans v. Fisher, C. C. A., 91 Fed. 574, 585; Giant P. Co. v. California V. P. Co., 6 Fed. 197, 202. *Contra,* Glenn v. Noonan, 43 Fed. R. 403; s. c., 43 Fed. 550; U. S. v. Midway Northern Oil Co., 232 Fed. 619.

ing on the petition, does not dispute the fact that the suit could not be appealed, he cannot, after a rehearing has been granted, offer new proof that an appeal might lie, and on that ground seek to reverse a decree rendered after a rehearing.[5] Where a decree for an injunction against the infringement of a patent had been reversed, the mandate ordering, together with the reversal, "that such execution and further proceedings be had in said case, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding;" an application for a writ of *certiorari* had been denied; and the complainant, before the entry of a decree upon the mandate, filed a disclaimer in the Patent Office, seeking to restrict the claims in controversy, so as to avoid the effect of anticipating devices, to which reference was made in the opinion of the Circuit Court of Appeals: he was allowed a rehearing.[6] Otherwise, without leave of the appellate court, no rehearing for newly discovered evidence can be granted, when a case has been decided upon an appeal.[7]

A rehearing in England was formerly allowed almost as of course, upon the filing of a petition signed by two counsel of whom one at least must have been concerned in the original hearing; the rule having been stated by Lord Hardwicke, that "such credit is given by the court to their opinion that the cause ought to be reheard, that it will, in general, order the cause to be set down" for that purpose, as a matter of course.[8] This rule, however, has not been adopted in the courts of the United States, where a rehearing is discretionary with the judge to whom the application is made.[9] Unless the judge acts of his own motion, a rehearing will be granted only for errors of law apparent upon the record and arising upon questions which were not argued at the original hearing, or upon newly discovered evidence of such a character that it would have authorized a new trial in an action at law.[10]

[5] Moelle v. Sherwood, 148 U. S. 21, 26, 37 L. ed. 350, 352.

[6] Sample v. Am. Soda Fountain Co., 134 Fed. 402.

[7] *Re* Potts, 166 U. S. 263, 41 L. ed. 994.

[8] Cunyngham v. Cunynham, Amb. 89. See Atty. Gen. v. Brooke, 18 Ves. 319, 325; East India Co. v. Boddam, 13 Ves. 421.

[9] Mr. Justice Filed in Giant P. Co. v. California V. P. Co., 5 Fed. 197.

[10] Daniel v. Mitchell, 1 Story, 198; Jenkins v. Eldredge, 3 Story, 299; Emerson v. Davies, 1 W. & M.

A rehearing should not be granted for newly discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing,[11] nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result.[12] When the new evidence was discovered after the hearing and before the decision a motion should be made to stay proceedings for the purpose of introducing it.[13] Unless such motion is made a petition for rehearing will be denied.[14] After the affirmance of a decree in a suit to restrain the infringement of a patent the appellate court will not grant a rehearing to permit the defeated party to exhibit before it articles not in evidence so that the result would be not a review of the decision below but a new trial on new evidence.[15]

21; Tufts v. Tufts, 3 W. & M. 426; Giant P. Co. v. California V. P. Co., 5 Fed. 197; Swann v. Austell, 257 Fed. 870.

11 Allis v. Stowell, 85 Fed. 481; McLeod v. New Albany, C. C. A., 66 Fed. 378; *Re* Gamewell F. A. Tel. Co., C. C. A., 74 Fed. 908; Bennett v. Schooley, 7. Fed. 352. A rehearing was denied where the defendant claimed to have discovered that another patent anticipated the one in suit, when such patent was referred to in the defendant's brief and record upon the original hearing. Combustion Utilities Corporation v. Worcester Gaslight Co., 190 Fed. 155. And because of the discovery of a mortgage on the patent, which was shown by the file wrapper then put in evidence, Money-Weight Scale Co. v. Toledo Computing Scale Co., C. C. A., 199 Fed. 905. It has been said that surprise as a ground for the granting of a rehearing in equity must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate, and which ordinary prudence and foresight could not guard against. Anderson Land & Stock Co. v. McConnell, 171 Fed. 475; Daniel Green Felt Shoe Co. v. Dolgeville Felt S. Co., 208 Fed. 289; American Sulphite Pulp Co. v. Hinckley Fibre Co., 241 Fed. 590.

12 Giant P. Co. v. California V. P. Co., 5 Fed. 197, 201; Jenkins v. Eldredge, 3 Story, 299; Tufts v. Tufts, 3 W. & M. 426; Hicks v. Otto, 22 Blatchf. 122; Page v. Holmes B. A. Tel. Co., 2 Fed. 330; Collins Co. v. Coes, 8 Fed. 517; Witters v. Sowles, 31 Fed. 5; Pfansehmidt v. Kelly M. Co., 32 Fed. 667, and cases cited in the opinions in these cases. But see Webster Loom Co. v. Higgins, 43 Fed. 673. It has been said that a motion to open a decree in order to introduce new evidence differs from a motion for a rehearing, technically so called, and is not to be governed by the same stringent rules. "It is rather a motion addressed to the discretion of the court with reference to the order of trial." Campbell Pr. & Mfg. Co. v. Marden, 70 Fed. 339, 340.

13 American Hoist & Derrick Co. v. Nancy Hanks Hay Press & Foundry Co., 224 Fed. 524.

14 Ibid.

15 Barber v. Otis Motor Sales Co., C. C. A., 240 Fed. 723.

"A new hearing should not be had simply to allow a rehash of old arguments."[16] "If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear, that suits would become immortal, and the decision be postponed indefinitely."[17]

A rehearing can only take place for the purpose of altering a decree upon grounds which existed at the time when the decree was pronounced, and one will not be allowed to remedy a grievance consequent upon a decree, resulting entirely from circumstances that have occurred subsequent to its entry.[18]

The application may be made by petition where it is founded upon newly discovered evidence as well as when it is made for other reasons.[19] The rules provide that "every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person."[20]

The petition for a rehearing should state fully the facts which show the nature of the new evidence, the facts which show that it could not have been found by the exercise of reasonable diligence before the hearing, that it was not known then and that a diligent search was previously made for the evidence. Mere general averments of reasonable diligence and previous ignorance are insufficient.[21]

When the application is founded upon a discovery of new evidence, the allegations must be full, precise, and certain. It seems that they will be insufficient if sworn to merely upon information and belief.[22]

16 Field, J., in Giant P. Co. v. California V. P. Co., 5 Fed. 197, 201.

17 Story, J., in Jenkins v. Eldredge, 3 Story, 299, 305.

18 Bowyer v. Bright, 13 Price, 316; Hurlburd v. Freelove, 3 Wis. 537.

19 Sheeler v. Alexander, 214 Fed. 544.

20 Equity Rule 69; U. S. v. The Dago, C. C. A., 63 Fed. 182. The petition and affidavits should not be verified before a notary who is one of the petitioner's counsel. Allis v. Stowell, 85 Fed. 481.

21 Allis v. Stowell, 85 Fed. 481; Hicks v. Otto, 85 Fed. 728; McLeod v. New Albany, C. C. A., 66 Fed. 378; Corrugated Paper Patents Co. v. Paper Working M. Co., 237 Fed. 380, 381.

22 Page v. Holmes B. A. Tel. Co., 2 Fed. 330.

It is the better practice to accompany the petition by affidavits fully setting out the new evidence that has been discovered.[23]

It has been held that when evidence of new facts not already in issue is to be given, the petition should be accompanied by a supplemental bill in the nature of a bill of review, pleading these facts; in which case, if the petition be granted, the hearing upon that bill will take place at the same time as the rehearing of the original suit.[24]

The usual proceedings to obtain a rehearing are for the party desiring it to file his petition in the clerk's office, and then to procure an order directing his opponent to show cause why his prayer should not be granted.[25] The adverse party may then answer, controverting or setting up new matter in avoidance of allegations in the petition; or he may show cause against granting the rehearing on the return-day of the order by an affidavit.[26] He may submit affidavits in opposition to the petition.[27]

If there be any irregularity in the petition, it may be taken off the file at the respondent's motion.[28] Upon the return-day of the order to show cause, if no adjournment be had, the matter is argued before the judge, by whose direction the decree or order complained of was made, unless he be absent, when the papers and the briefs of counsel should be filed with the clerk, who will mail them to him.[29]

When a rehearing is sought pending an appeal the proper proceeding is for the petitioner to file a petition duly verified praying for leave to file in the court below a supplemental bill in the nature of a review.[30]

The petition will not be granted without notice to the adverse parties, and an opportunity for their presence afforded them.[31]

23 Sheeler v. Alexander, 211 Fed. 544.

24 Baker v. Whiting, 1 Story, 218; Perry v. Phelps, 17 Ves. 173, 178; Head v. Godlee, Johns, 536, 579; Jopp v. Wood, 2 De G., J. & S. 323.

25 Giant P. Co. v. California V. P. Co., 5 Fed. 197; Sheeler v. Alexander, 211 Fed. 544.

26 Giant P. Co. v. California V. P. Co., 5 Fed. 197.

27 Sheeler v. Alexander, 211 Fed. 544, 546.

28 Wood v. Griffith, 1 Meriv. 35.

29 Giant P. Co. v. California V. P. Co., 5 Fed. 195.

30 Sheeler v. Alexander, 211 Fed. 544, 547.

31 Giant P. Co. v. California V. P. Co., 5 Fed. 195, 197.

Upon a rehearing the cause or matter is proceeded in as if it were heard for the first time.

It has been said that when a rehearing is granted because of newly discovered evidence the petitioner should file a supplemental bill or answer as the case may be.[32]

All depositions taken before the original hearing, though not then used, may be read,[33] and the plaintiff may withdraw from evidence any portion of the answer read before.[34] No new evidence can be used in support of the original issues, unless a supplemental bill has been filed;[35] but exhibits not previously used may be produced;[36] and if a witness has since the former hearing been convicted of perjury,[37] or admitted receiving a bribe to influence his testimony,[38] that may be proved to the court. Evidence taken upon an accounting cannot be offered against a person not a party to such accounting unless it is equivalent to an admission upon his part.[39]

After one rehearing, a petition for another can only be filed by special leave of the court, and may be taken off the file if presented without such leave.[40]

It has been held that an order granting a rehearing after the time prescribed by the rules has expired is void, not merely voidable; and that a party does not, by taking a subsequent step in the cause, waive his right to move to vacate the same.[41]

The grant or refusal, absolute or conditional, of an application for a rehearing, which has been made in due time, rests in the discretion of the court where the cause is first heard, and is not a subject of appeal.[42] Affidavits presented in support of a motion

32 Sheeler v. Alexander, 211 Fed. 544, 547.

33 Cunyngham v. Cunyngham, Amb. 89, 90.

34 Allfrey v. Allfrey, 1 Macn. & G. 87; Ogle v. Morgan, 1 De G., M. & G. 359.

35 Jenkins v. Eldredge, 3 Story, 299; *infra*, § 194.

36 Herring v. Clobery, Cr. & Ph. 251.

37 Needham v. Smith, 2 Vern. 463.

38 Ibid.

39 Weston El. Instrument Co. v. Empire El. Instrument Co., 166 Fed. 867.

40 Moss v. Baldock, 1 Phila. 118.

41 Glenn v. Lucas, 43 Fed. 550.

42 Roemer v. Bernheim, 132 U. S. 103, 106, 33 L. ed. 277, 279; Buffington v. Harvey, 95 U. S. 99, 100, 24 L. ed. 381, 382; Steines v. Franklin County, 14 Wall. 15, 22, 20 L. ed. 846, 848; Railway Co. v. Heck, 102 U. S. 120, 26 L. ed. 58; Kennon v. Gilmer, 131 U. S. 22, 24, 33 L. ed. 110, 111; Boesch v. Graff, 133 U. S. 697, 699, 33 L. ed. 787, 788. So

for a rehearing which was denied, cannot be considered on an appeal from the final decree.[43]

§ 446. Supplemental bills in the nature of bills of review. A supplemental bill in the nature of a bill of review is a bill that brings to the attention of the court new matter, which has arisen or been discovered since, and could not by the exercise of due diligence have been discovered before, the time for taking testimony in a cause expired, and which the party filing the bill alleges as a reason why a decree made and passed therein, but not signed and enrolled, should be reversed or modified.[1] Such a bill cannot be filed after a decree has been signed and enrolled.[2] The proper remedy in a similar case then is a bill of review.[3]

A supplemental bill in the nature of a bill of review cannot be used to obtain a reversal or modification of a decree for errors in law apparent upon its face.[4]

That, before enrollment, can only be done by means of a petition for a rehearing.[5] A bill setting up newly discovered evidence, tending to show the invalidity of a patent, was described as a supplemental bill in the nature of a bill of review, in the permission granted to file it.[6]

Matter of revivor and supplement may be incorporated in such a supplemental bill.[7]

An English chancery order made on the 17th of October, 1841, and which should probably be followed here, the clerk taking the place of the registrar and five dollars being reckoned as a pound sterling, provides: "That no supplemental bill, or bill in the nature of a review, grounded upon new matter discovered, or pretended to be discovered, since the pronouncing of any decree of this court, in order to the reversing or varying of such decree shall be exhibited without the special leave of the court first obtained for that purpose, and unless the party ex-

held of an application to set aside an adjudication of bankruptcy. *Re* Columbia Real Estate Co., C. C. A., 112 Fed. 643, 646.

43 Giles v. Heysinger, 150 U. S. 627, 631, 37 L. ed. 1204, 1205.

§ 446. 1 Perry v. Phelps, 17 Ves. 173; Mitford's Pl., ch. 1, § 2; Moore v. Moore, 2 Ves. Sen. 596; Story's Eq. Pl. §§ 422, 423.

2 Beames' Orders, 1.

3 See §§ 447, 449.

4 Perry v. Phelps, 17 Ves. 173.

5 See § 445.

6 Kelley v. Diamond Drill & Machine Co., C. C. A., 136 Fed. 855.

7 Perry v. Phelps, 17 Ves. 176 178.

hibiting the same do first deposit with the registrar of this court so much money as together with the deposit by the rules of this court required to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced will make up the sum of 50*l.*, as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill." [8]

A supplemental bill in the nature of a bill of review should state the facts which it is desired to prove, and, if they had then occurred, the reason why they were not discovered and given in evidence before publication, and it seems should state positively that the decree has not been enrolled, and not in the alternative, praying one sort of relief as upon a bill of review, if the decree has been enrolled, and if not enrolled, then to have the benefit of it as upon a supplemental bill in the nature of a bill of review.[9] Such a bill should conclude with a prayer that the cause be reheard. It should be signed by counsel, and in other respects conform to the requirements of a bill of review upon newly discovered facts.[10] Like that, it can only be filed by leave of the court, which is obtained in the same way, and upon the same grounds as leave to file such a bill of review;[11] and the proceedings upon the two kinds of bills are also substantially the same.[12] But according to Lord Redesdale, "Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill." [13]

Laches may be a ground for refusing leave to file a supplemental bill in the nature of a bill of review, unless such laches is extenuated by laches on the part of the defendant to it.[14]

Such a bill cannot be heard unless accompanied by a petition for a rehearing, when the rehearing of the original and the hear-

8 Order of 17th October, 1741; Beames' Orders, 368.

9 Story's Eq. Pl., § 425. See the language of Lord Eldon in Perry v. Phelips, 17 Ves. 173–178.

10 Story's Eq. Pl., §§ 422, 425; Bennett v. Schooley, 77 Fed. 352. See *infra*, § 448.

11 Story's Eq. Pl., § 422.

12 Story's Eq. Pl., §§ 422–425.

13 Mitford's Pl., ch. 1, § 3, pt. 3.

14 Story's Eq. Pl., § 423; Sheffield Canal Co. v. Sheffield & R. Ry. Co., 1 Phillips, 484.

ing of the supplemental cause will be set down together.[15] Such a bill cannot be filed to set aside or to reopen an interlocutory order or decree.[16]

§ 447. Bills of review. A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled for error in law apparent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which could not by the exercise of due diligence have been discovered or used before the decree was made.[1] A bill of review can only be filed to impeach a final, not to impeach an interlocutory decree.[2] For an interlocutory decree can always be modified or reversed by the court without any bill for that purpose.[3] But the expression "final decree" is here used with the meaning given it when speaking of appeals.[4]

It has been held that such a bill of review is in the nature of a writ of error, and must be governed practically by the same rules that control the appellate court, when considering writs of error.[5] A bill to review can not be filed in the appellate court.[6] A bill of review treats of matters as they exist at the time it is filed.[7]

§ 447a. Bills of review for errors of law. The errors of law for which a decree may be reversed or modified must be clearly apparent upon the record, that is, "only such as arose upon the pleadings, proceedings, and decree, without reference to the evidence in the cause;"[1] as, for example, the disregard of a statute,[2]

15 Moore v. Moore, 2 Ves. Sen. 596, 598; Perry v. Phelips, 17 Ves. 173.

16 C. & A. Potts Co. v. Creager, 71 Fed. 574.

§ 447. 1 Mitford's Pl., ch. 1, § 3, pt. 3; Story's Eq. Pl., §§ 403–420; Irwin v. Meyrose, 7 Fed. 533; Nickle v. Stuart, 111 U. S. 776; 28 L. ed. 599; Scotten v. Littlefield, 235 U. S. 487; Freeman v. Clay, C. C. A., 52 Fed. 1.

2 Jenkins v. Eldredge, 3 Story, 299; Story's Eq. Pl., § 408a.

3 Story's Eq. Pl., § 408a. See *supra*, § 255.

4 Story's Eq. Pl., § 408a; Whiting v. Bank of U. S., 13 Pet. 6, 15, 10 L. ed. 33, 37; Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Jenkins v. Eldredge, 3 Story, 299. *Supra*, § 397.

5 Acord v. Western Pocahontas Corporation, 156 Fed. 989.

6 Omaha El. Light & Power Co. v. City of Omaha, C. C. A., 216 Fed. 848.

7 Thomas v. South Butte Min. Co., C. C. A., 230 Fed. 968.

§ 447a. 1 Bradley, J., in Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381. See also Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Putnam v. Day, 22 Wall. 60, 22 L. ed. 764; Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481.

2 Story's Eq. Pl., § 405; Gregor v. Molesworth, 2 Ves. Sen. 109.

or want of jurisdiction,[3] or the finding of a fact contrary to an allegation in a defendant's answer when no evidence was taken;[4] not errors in drawing conclusions from evidence,[5] nor errors in casting accounts,[6] nor it seems in matters of abatement,[7] nor in the exercise of discretion,[8] nor matters of form,[9]—among which however, the omission of a clause giving an infant defendant a day in which to show cause against a decree is not included, and on that ground a bill of review may be sustained.[10] It has been held to be no sufficient ground for a bill of review that since the decree a State court has given to the constitution of the State a construction different from that put upon it by the Federal court in its decree;[11] nor that since the decree the Supreme Court has changed its ruling upon a question of law or fact.[12]

In England, where the mandatory part of a decree was usually preceded by a statement of the facts upon which it was founded, only the decree itself could be examined for such errors;[13] but in the Federal courts where this custom does not exist, the whole record may be thus examined,[14] but not the evidence at large.[15]

It is improper for a bill of review on account of errors of law

3 Ketchum v. Farmers' L. & T. Co., 4 McLean, 1; Miller v. Clark, 47 Fed. 850; s. c., 52 Fed. 900.

4 Clark v. Killian, 103 U. S. 766, 26 L. ed. 607.

5 Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Dexter v. Arnold, 5 Mason, 303; Putnam v. Day, 22 Wall. 60, 22 L. ed. 764; Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; Kimberley v. Arms, 40 Fed. 548; s. c., 136 U. S. 629, 34 L. ed. 557; Jourolman v. Ewing, 85 Fed. 103.

6 Massie v. Graham, 3 McLean, 41; Beames' Ord. 1; Story's Eq. Pl., § 405.

7 Story's Eq. Pl., § 411; Hartwell v. Townsend, 6 Bro. Parl. 107; Slingsby v. Hale, 1 Ch. Cas. 122.

8 Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; Irwin v. Meyrose, 7 Fed. 533.

9 Story's Eq. Pl., § 411.

10 Story's Eq. Pl., § 407; Perry v. Phelips, 17 Ves. 173; Gregor v. Molesworth, 2 Ves. Sen. 109. See *supra*, 401.

11 King v. Dundee M. & Tr. I. Co., 28 Fed. 33; Hoffman v. Knox, 50 Fed. 484.

12 Tilghman v. Werk, 39 Fed. 680; Scotten v. Littlefield, 235 U. S. 407; Hopkins v. Hebard, 235 U. S. 287.

13 Story's Eq. Pl., § 407.

14 Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; Clark v. Killian, 103 U. S. 766, 26 L. ed. 607.

15 Ibid. Quinton v. Neville, C. C. A., 152 Fed. 879; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

to contain a statement of the evidence in the original cause.[16] The plaintiff was not allowed to put his case in the alternative, as a bill of review, or, if the court should think it not good as such, then as a bill of revivor and supplement.[17] A bill of review, which sought relief because the original decree was erroneous for errors of law appearing on its face, and because of the discovery of new facts, and because of fraud, has been held multifarious.[18]

Facts, which are inconsistent with the pleadings and decrees in the original cause, when alleged in a bill of review, not founded upon newly discovered evidence, cannot be considered.[19] Bills of review for errors apparent upon the record may be filed after the term at which the decree sought to be corrected was entered,[20] but not after the expiration of the time limited for an appeal,[21] except under extraordinary circumstances.

Where, however, such a bill was presented for filing within the time and the court delayed passing upon the application until subsequently, it was treated as filed upon the day when it was presented.[22]

A decree directing a sale is final and not subject to a bill of review filed after the expiration of the time allowed for an appeal although it reserves the questions concerning the distribution of the proceeds of the sale.[23]

Where the Circuit Court of Appeals had inadvertently directed a complete reversal of the decree below together with a dismissal of the bill with costs, the Circuit Court had entered a decree of dismissal with costs, in accordance with such mandate, and the Supreme Court had denied a petition for a *certiorari*, the case not being appealable thereto; after payment of the costs

16 Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

17 Perry v. Phelips, 17 Ves. 173.

18 Kimberly v. Arms, 40 Fed. 548, 559; s. c., 136 U. S. 629, 34 L. ed. 557.

19 Fraenkl v. Cereedo, 216 U. S. 295, 54 L. ed. 486.

20 Lewis v. Holmes, C. C. A., 224 Fed. 410.

21 Quinton v. Neville, C. C. A., 152 Fed. 879.

22 Home St. L. Co. v. City of Lincoln, C. C. A., 162 Fed. 133.

23 Thomas v. Harvie's Heirs, 10 Wheat. 146, 6 L. ed. 287; Kennedy v. Georgia State Bank, 8 How. 586, 12 L. ed. 1209; Clark v. Killian, 103 U. S. 766, 26 L. ed. 607; Story's Eq. Pl., § 410; Cocke v. Copenhaver, C. C. A., 126 Fed. 145. See also Massie v. Graham, 3 McLean, 41; McDonald v. Whitney, 39 Fed. 466; Rector v. Fitzgerald, C. C. A., 59 Fed. 808; Home St. Ry. Co. v. City of Lincoln, C. C. A., 162 Fed. 133.

by the complainant, the Circuit Court of Appeals granted him leave to file a bill of review in the Circuit Court to modify its decree upon the mandate, so as to provide that the bill of complaint be not wholly dismissed and part of the injunctive relief granted.[24] The time within which the control of the District Court over the case is suspended by an appeal subsequently dismissed, is not included in the computation of time;[25] but the period between the entry of a void order vacating the order sought to be reviewed and the vacation of such void order is included.[26] Laches for a shorter period of time might be a ground for dismissing a bill of review.[27]

It has been held that a bill of review for want of jurisdiction cannot be filed after the term of the decree, unless the decree states that the objection was duly raised, or a certificate that the question of jurisdiction was raised has been made during the term.[28]

After a decree has been affirmed [29] or reversed [30] by the appellate court, it cannot be reviewed for any reason without leave of that tribunal; even if the affirmance was by a divided court.[31] But it was held that a Circuit Court might, without leave of the Supreme Court, entertain a bill to enjoin the enforcement of a judgment against the complainant upon a mandate of the Supreme Court on the ground that the complainant was not in fact a party to such judgment nor bound thereby.[32]

Leave to make such an application to the court below should be inserted in the mandate of the appellate court.[33] Leave will

24 Faber-Castell v. Faber, C. C. A., 145 Fed. 626.

25 Ensminger v. Powers, 108 U. S. 292, 27 L. ed. 732. See *Re* Brown, 213 Fed. 701.

26 Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97.

27 Farmers' Loan & Trust Co. v. Green Bay & M. R. Co., 16 Fed. 100, 113; Duncan v. Atlantic M. & O. R. Co., 88 Fed. 840; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

28 Chamberlin v. Peoria, D. & E. Ry. Co., C. C. A., 118 Fed. 32.

29 Southard v. Russell, 16 How. 547, 14 L. ed. 1052; Kingsbury v. Buckner, 134 U. S. 654, 33 L. ed. 1050; Kimberly v. Arms, 40 Fed. 548; s. c., 136 U. S. 629, 34 L. ed. 557; Watson v. Stevens, C. C. A., 53 Fed. 31; Franklin Savings Bank v. Taylor, C. C. A., 53 Fed. 854; Suhor v. Gooch, C. C. A., 248 Fed. 870; *infra*, § 448.

30 Suhor v. Gooch, 248 Fed. 870.

31 Leslie v. Town of Urbana, C. C. A., 56 Fed. 762.

32 Brown v. Walker, 84 Fed. 532.

33 Watson v. Stevens, C. C. A., 53 Fed. 31, 35. See also Society of

rarely, if ever, be granted then to file a bill of review for errors in law.[33a] Leave of court is not needed to enable a party to file a bill of review for errors apparent upon the face of the record.[34]

A bill of review cannot be filed in the appellate court.[35]

A bill of review must show specifically the errors in the record of which the complaint is made.[36] An allegation that defendant's attorney "wrongfully" entered the judgment complained of is merely a conclusion of law which will be disregarded.[37]

An aspect of the claim cannot be held back when the case is first presented to the court and later made the subject of a bill of review.[38] Where the assignments of error upon a former appeal were sufficient to set forth a question not then presented or argued, such question cannot ordinarily be made the basis of a subsequent bill of review.[39]

The bill will not lie unless the complainant is aggrieved by the decree,[40] although he might have insisted on the error at the original hearing or upon appeal.[41] But it has been held that this bill of review will not be dismissed because it does not appear that the complainant thereto would be benefited or the defendant prejudiced by continuing the litigation.[42]

Under the former practice, the usual defense to a bill of review for errors apparent upon the face of the decree was a demurrer;[43] to which was usually joined a plea setting forth in full the original decree, although there seems to have been no necessity for this practice.[44] If the demurrer was overruled, the decree

Shakers v. Watson, C. C. A., 77 Fed. 512.

33a Southard v. Russell, 16 How. 547, 14 L. ed. 1052; Kingsbury v. Buckner, 134 U. S. 650, 671; Story's Eq. Pl., § 408.

34 Ross v. Prentiss, 4 McLean, 106; Lewis v. Holmes, C. C. A., 194 Fed. 842; *Re* Brown, 213 Fed. 701; Farmers' & Merchants' Bank v. Arizona M. S. & L. Ass'n, C. C. A., 220 Fed. 1.

35 Omaha Electric Light & Power Co. v. City of Omaha, C. C. A., 216 Fed. 848.

36 Scotten v. Rosenblum, 231 Fed. 357.

37 Ibid.

38 Scotten v. Littlefield, 235 U. S. 407.

39 *Re* Brown, 213 Fed. 701.

40 U. S. v. Salomon, 231 Fed. 461, 464.

41 Whiting v. U. S. Bank, 13 Peters 6, 10 L. ed. 33; Burleigh v. Flint, 105 U. S. 247, 26 L. ed. 986; U. S. v. Salomon, 231 Fed. 461, 464.

42 Lewis v. Holmes, C. C. A., 194 Fed. 842.

43 Mitford's Pl., ch. 2, § 2, pt. I, 5. Accord v. Western Pocahontas Corporation, 156 Fed. 989.

44 Ibid.

was reversed or modified and the errors allowed, and no further answer or hearing was necessary.[45] If the demurrer was sustained, that had all the effect of confirming the decree, and put an end to the suit.[46] The rule was in such a case only to vary the decree upon such errors as were complained of, except as to consequential directions, which were altered to conform to the changes made.[47] It was held that such a bill of review could not be dismissed upon motion because of the pendency of a prior bill to review the same proceedings.[48] If a bill of review for apparent error contained a statement of the evidence taken in the original cause, that might have been stricken out of the bill as surplusage on motion;[49] or it might have been a ground of demurrer, if specially assigned;[50] but the bill, if otherwise good, could be dismissed for that reason upon a general demurrer,[51] although such evidence or an allegation of an error of fact could on a general demurrer be used in support of the bill.[52]

§ 448. Provisions peculiar to bills of review for matters of fact newly discovered. Bills of review upon matters of fact newly discovered can be filed only by express leave of the court.[1] Such a bill can be filed at a term subsequent to the entry of the decree,[2] even if the original decree was entered by default[3] or recites that it was entered on consent, which the bill of review charges not to have been given.[4]

It has been said that a bill of review for matters of fact, can be allowed, although the original decree was entered by default.[5] It has been held that an objection that a collusive transfer of the

45 Cook v. Bamfield, 3 Swanst. 607.

46 Webb v. Pell, 3 Paige (N. Y.), 368.

47 Moore v. Moore, 2 Ves. Sen. 596, 598.

48 Lewis v. Holmes, C. C. A., 194 Fed. 842.

49 Bradley, J., in Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

50 Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

51 Ibid.

52 Shelton v. Van Kleeck, 106 U. S. 532, 27 L. ed. 269.

§ 448. 1 Anon., 2 P. Wms. 283, Perry v. Phelips, 17 Ves. 173; Ross v. Prentiss, 4 McLean, 106; Story's Eq. Pl., § 412.

2 Taylor v. Easton, C. C. A., 180 Fed. 363, 368; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

3 Acord v. Western Pocahontas Corporation, 156 Fed. 989.

4 Kaw Valley Drainage Dist. v. Union Pac. R. Co., C. C. A., 163 Fed. 836.

5 Acord v. Western Pocahontas Corporation, 156 Fed. 989.

subject-matter of the suit was made, for the purpose of conferring Federal jurisdiction, cannot be taken for the first time after final decree has been entered and the term ended.[6]

Leave should be obtained by a petition praying for leave to file the bill, and supported by an affidavit showing that the new matter, which it is desired to prove, was not known to the petitioner, and could not have been discovered by him, with the exercise of due diligence, in time to prove it before the entry of the decree sought to be reviewed.[7] It seems that the affidavit must be positive, and not merely upon information and belief.[8]

Previous knowledge of it by the petitioner's attorney or other agent while acting in that capacity, is equivalent to knowledge by the petitioner, and will be a reason for refusing to allow him to file the bill.[9] If the newly discovered facts are proved by documents that were under the control of the petitioner, very good reasons for his not discovering and producing them before must be shown in order to entitle him to file a bill of review founded upon them.[10] Leave was denied when the newly discovered evidence consisted chiefly of public records, and the only excuse was the poverty and ignorance of the plaintiffs and the default of their counsel, there being no charge of fraud or collusion.[11] Also when the complainant was a speculative purchaser and the defendants had bought the land affected in good faith for a valuable consideration subsequent to the decree sought to be reviewed.[12]

The affidavit should also state the nature of the new matter,

6 Anon., 342 P. Wms. 283; Perry v. Phelps, 17 Vesey, 773; Ross v. Prentice, 4 McLean, 106.

7 Wortley v. Birkhead, 2 Ves. Sen. 571; Young v. Keighly, 16 Ves. 348; Purcell v. Miner, 4 Wall. 519, 18 L. ed. 459; Dexter v. Arnold, 5 Mason, 303; Massie v. Graham, 3 McLean, 41; Ross v. Prentiss, 4 McLean, 106; Thomas v. South Butte Mining Co., C. C. A., 230 Fed. 968; Scotter v. Rosenblum, 231 Fed. 357; Story's Eq. Pl., §§ 412, 413.

8 Page v. Holmes B. A. Tel. Co., 2 Fed. 330.

9 Norris v. Le Neve, 3 Atk. 26; Greenlee v. McDowell, 4 Ired. Eq. (N. C.) 481; Story's Eq. Pl., §§ 413, 414.

10 Forum Romanum, 187.

11 Acord v. Western Pocahontas Corporation, 156 Fed. 989. See Jorgenson v. Young, C. C. A., 136 Fed. 378.

12 Hopkins v. Hebard, 235 U. S. 287.

and the evidence desired to be given in its support, in order that the court may judge of its relevancy and materiality.[13]

The bill will not be sustained in a case where if it were at common law a motion for a new trial because of newly discovered evidence would be denied.[14]

The evidence must be not only new, but material,[15] relevant, and not merely hearsay,[16] nor incompetent,[17] such as, if not answered in point of fact, would clearly entitle the plaintiff to a decree and show that the decree, of which complaint is made, has deprived him of some substantial equity,[18] or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause.[19] The new matter may be concerning a point not in issue in the original cause,[20] provided that it be connected with the subject-matter of the bill.[21]

A bill of review will not lie on the ground of newly discovered evidence which is merely cumulative,[22] or goes to impeach the character of witnesses[23] or shows a defense that is purely technical.[24]

Where the error shown by the new evidence would be offset by an error committed in favor of the complainant to the bill of review leave to file the bill will be denied.[25]

It has been held that a bill of review will not lie on the ground

13 U. S. v. Sampeyreac, Hempst. 118; Dexter v. Arnold, 5 Mason, 303; Massie v. Graham, 3 McLean, 41; Story's Eq. Pl., § 412.

14 Suhor v. Gooch, C. C. A., 248 Fed. 870.

15 Ord v. Noel, 6 Madd. 127; Jorgensen v. Young, C. C. A., 136 Fed. 378; Ward v. Ward, C. C. A., 149 Fed. 204; Richardson v. Lowe, C. C. A., 149 Fed. 625.

16 Ward v. Ward, C. C. A., 149 Fed. 204.

17 Ward v. Ward, C. C. A., 149 Fed. 204; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

18 Keith v. Alger, C. C. A., 124 Fed. 32; Nowell v. International Trust Co., C. C. A., 203 Fed. 95; McClintock v. City of Pawtucket, C. C. A., 209 Fed. 361; Scotten v. Rosenblum, 231 Fed. 357; Suhor v. Gooch, C. C. A., 248 Fed. 870.

19 Ibid.; Ord v. Noel, 6 Madd. 127.

20 Partridge v. Osborne, 6 Russ. 195.

21 U. S. v. Sampeyreac, Hempst. 118.

22 Southard v. Russell, 16 How. Pr. 547; Richardson v. Lowe, C. C. A., 149 Fed. 625; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

23 Southard v. Russell, 16 How. 547, 14 L. ed. 1052; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

24 Keith v. Alger, C. C. A., 124 Fed. 32; Lincoln Gas & El. Light Co. v. City of Lincoln, 250 U. S. 256.

25 Ibid.

that a decree offered in evidence in the original suit and there held to be *res adjudicata* has since been set aside for want of jurisdiction, unless it is shown that the defect in the jurisdiction could not have been known or discovered by the exercise of reasonable diligence when the decree was offered in evidence.[26]

It has been said that the matter upon the discovery of which a bill of review is based, if previously known to the other party, must be of such a nature that he was not in conscience obliged to have discovered it to the court: for if it was known to him and such as in conscience he ought to have discovered, he obtained the decree by fraud, and it ought to be set aside by an original bill.[27]

A bill of review deals with the state of things existing at the time it is filed.[28]

Permission to file a bill of review is always in the discretion of the court;[29] subject to review upon appeal,[30] and lapse of time since the discovery of the new matter will always have great weight in inducing the court to look with disfavor upon an application for leave to file such a bill of review.[31]

A refusal of witnesses to state what their testimony would be is no ground for granting permission to file such a bill of review when the complainant thereto knew that they had some knowledge concerning the matter in controversy.[32]

Ordinarily, permission will be refused, after the time to appeal has expired, without an appeal.[33] When to reopen the decree would be productive of mischief to innocent parties, leave may be denied.[34] It has been said, that the question of diligence

26 Vetterlein v. Barker, 45 Fed. 74.

27 Manaton v. Molesworth, 1 Eden, 18, 25. But see U. S. v. Sampeyreac, Hempst. 118; s. c., as Sampeyreac v. U. S., 7 Pet. 222, 8 L. ed. 665; Bennett v. Schooley, 77 Fed. 352; Municipal S. Co. v. Gamewell F. A. Tel. Co., 77 Fed. 452.

28 Thomas v. South Butte Mining Co., C. C. A., 230 Fed. 968.

29 Beames' Orders, 1; Hopkins v. Hebard, 235 U. S. 287; Massie v. Graham, 3 McLean, 41; Story's Eq. Pl., §§ 404, 417.

30 Hopkins v. Hebard, C. C. A., 194 Fed. 301.

31 Blandy v. Griffith, 6 Fish. Pat. Cas. 434; Thomas v. Harvie, 10 Wheat. 146, 151, 6 L. ed. 287, 289; Tilghman v. Werk, 39 Fed. 680; Hopkins v. Hebard, C. C. A., 194 Fed. 301; Story's Eq. Pl., § 419.

32 Novelty Tufting Mach. Co. v. Buser, C. C. A., 158 Fed. 83.

33 Jorgenson v. Young, C. C. A., 136 Fed. 378.

34 Acord v. Western Pocahontas Corporation, 156 Fed. 989.

is preliminary, and having been once disposed of by permission to file the bill, it will not again be considered on the final hearing;[35] but such a bill has been dismissed because leave to file the same was improvidently granted.[36] It has been said that if the decree impeached has been affirmed by an appellate court, such a bill of review can only be filed by leave of that court;[37] but that in the absence of special circumstances leave to make the application to the court below will be granted by the court of review, as of course.[38] Such leave was refused where the newly discovered evidence had it been in the original record, clearly could not have changed the decision.[39] A bill of review for newly discovered matter, if filed without leave, may upon motion be dismissed or taken off the file.[40]

§ 449. Provisions common to all bills of review. "To entitle a person to bring a bill of review, it is necessary that he should have obeyed or performed the decree; as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguishes the party's right at the common law, as making of assurance or release, acknowledging satisfaction, canceling bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court."[1] If, however, the plaintiff to the bill of review be insolvent,[2] or for any other reason it be

35 Kelley Bros. & Spielman v. Diamond Drill & Machine Co., 142 Fed. 868.

36 Acord v. Western Pocahontas Corporation, 156 Fed. 989; Hopkins v. Hebard, C. C. A., 194 Fed. 301.

37 Southard v. Russell, 16 How. 547, 14 L. ed. 1052.

38 Seymour v. White County, C. C. A., 92 Fed. 115; *supra*, § 448. But see Keith v. Alger, C. C. A., 124 Fed. 32.

39 Lafferty Mfg. Co. v. Acme Ry. Signal & Mfg. Co., C. C. A., 143 Fed. 321. See Keith v. Alger, C. C. A., 124 Fed. 32.

40 Carroll v. Parran, 1 Bland (Md.), 125, note.

§ 449. 1 Daniell's Ch. Pr. (3d Am. ed.) 1634, 1635. See also Beames' Orders, 4; Massie v. Graham, 3 McLean, 41; Hoffman v. Knox, 50 Fed. 484. This rule applies even when it appears on the face of the former decree that the court had not jurisdiction of the subject-matter. Miller v. Clark, 47 Fed. 850.

2 Davis v. Speiden, 104 U. S. 83, 26 L. ed. 660.

impossible for him to obey the original decree;[3] or if he were directed to perform an act after the performance of another act by the other party, and that other has omitted to perform his part thereof;[4] or if the direction were to another defendant to the original decree and not to the party who files the bill of review;[5] or perhaps, if he have given security for its performance,[6]—his disobedience is no objection.

By an English order in Chancery, made on March 12, 1700, it was ordered that for the future no bill of review should be allowed or admitted unless the party who preferred it first deposited the sum of £50 with the registrar of the court, as a pledge to answer such costs and damages as the court should award to the adverse party, in case it should think fit to dismiss the bill of review.[7] This order should usually be followed here, five dollars being reckoned as the equivalent as a pound sterling, and the money being deposited with the clerk of the court.[8] The court may, however, dispense with this requirement.[9]

A decree entered by consent cannot be impeached by a bill of review.[10] A decree entered by consent can be set aside only by an original bill alleging fraud or surprise.[11]

It is no objection to a bill of review that the party filing it has entered and procurred the enrolment of the decree: "because," said Lord Nottingham, "he can have no error till it be enrolled, and perhaps the defendant will never enroll it;"[12] and a party may file a bill of review to a decree entirely in his favor, claiming that it is less beneficial to him than it should have been.[13]

If upon a bill of review a former decree has been reversed,

3 Story's Eq. Pl., § 406; Wiser v. Blachly, 2 J. Ch. (N. Y.) 488; Davis v. Speiden, 104 U. S. 83, 26 L. ed. 660.

4 Partridge v. Osborne, 5 Russ. 195, 251; Story's Eq. Pl., § 406.

5 Hobbs v. State Tr. Co., C. C. A., 68 Fed. 618.

6 Stallings v. Goodloe, 3 Murph. 159; Taylor v. Person, 2 Hawks (N. C.), 298.

7 Beames' Orders, 313; Anon., 2 P. Wms. 283.

8 Davis v. Speiden, 104 U. S. 83, 26 L. ed. 660.

9 Ibid.

10 Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481.

11 Gilbert v. Endean, 9 Ch. D. 259, 266. See *infra*, § 355.

12 Cook v. Bamfield, 3 Swanst. 607.

13 Cook v. Bamfield, 3 Swanst. 607; Dexter v. Arnold, 5 Mason, 303.

another bill of review may be brought to reverse the decree of reversal;[14] but after a bill of review has been dismissed upon demurrer or otherwise without leave to amend, no second bill of review will be allowed to be filed.[15] It has been held that a bill of review cannot be filed pending an appeal, although the plaintiff alleges that he does not intend to perfect his appeal.[16]

A bill defective as a bill of review may be sustained as a cross bill.[17] A petition to set aside a decree[18] or a petition of intervention[19] may be sustained as a bill of review when a defendant thereto raises no objections to the formal defects therein.[20]

A Federal court will not entertain a bill to review a decree of a State court.[21]

No person can file a bill of review except a party who has been aggrieved by the decree complained of,[22] or the assignee by operation of law of such a party.[23] A bill of review cannot be filed to set aside a decree in favor of a corporation that has been dissolved; and a former officer thereof, upon whom notice has been served, may resist the application.[24] "If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by a bill of review."[25] All the parties to the original decree should be joined either as plaintiffs or as defendants to

14 Mitford's Pl., ch. 1, § 3; Stafford v. Bryan, 2 Paige (N. Y.), 45.

15 Pitt v. Earl of Arglass, 1 Vern. 441; Dunn v. Filmore, 1 Vern. 135.

16 Kimberly v. Arms, 40 Fed. 545, 550; s. c., 136 U. S. 629, 34 L. ed. 557; Willian v. Willian, 16 Ves. 72, 87.

17 Houghton v. West, 2 Bro. Parl. Rep. by Tomlins, 88; Story's Eq. Pl., § 401, n. 5.

18 Taylor v. Easton, C. C. A., 180 Fed. 363, 368; Kaw Valley Drainage Dist. v. Union Pac. R. Co., C. C. A., 163 Fed. 836.

19 Farmers' & Merchants' Bank v. Arizona M. S. & L. Ass'n, C. C. A., 220 Fed. 1.

20 Taylor v. Easton, C. C. A., 180 Fed. 363, 368.

21 Bradley, J., in Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; Craver v. Faurot, 64 Fed. 241.

22 Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481. But see King v. Dundee M. & Tr. I. Co., 28 Fed. 33.

23 Story's Eq. Pl., § 409; Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481.

24 Board of Councilmen of Frankfort v. Deposit Bank, 120 Fed. 165.

25 Waite, C. J., in Shaw v. Railroad Co., 100 U. S. 605, 611, 25 L. ed. 757, 758.

the bill of review.[26] The personal representative of one of the members of a firm, who were defendants to the original bill, is not, when beyond the jurisdiction of the court, an indispensable party to a bill of review, filed after such partner's death.[27] It is doubtful whether a purchaser from the successful party to the decree can be made a defendant to a bill of review.[28]

Lord Redesdale gives the following rules for the framing of a bill of review: "In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it and the fact of the discovery, though it may be doubted whether after leave given to file the bill that fact is traversable.[29] The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event has happened which requires it; and particularly if any person not a party in the original suit becomes interested in the subject he must be made a party to the bill of review by way of supplement."[30]

A bill of review may set forth both errors in law upon the face of the former decree, and facts newly discovered.[31] Such

26 Bank of U. S. v. White, 8 Pet. 262, 8 L. ed. 938.

27 Perkins v. Hendryx, 127 Fed. 448.

28 Rector v. Fitzgerald, 59 Fed. 808.

29 But see U. S. v. Sampeyreac, Hempst. 118; Dexter v. Arnold, 5 Mason, 303; Story's Eq. Pl., 420, note 7.

30 Mitford's Pl., ch. 1, § 3, pt. 3. See also Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33.

31 Accord v. Western Pocahontas Corporation, 156 Fed. 989.

a bill is not multifarious, except under extraordinary circumstances.[32]

A bill of review is not considered as a continuance of the former bill, but as in the nature of an original bill.[33] It does not affect with notice of *lis pendens* a purchaser in good faith after a final decree and before the bill of review was filed or notice to the purchaser of an intention to file the same;[34] a decree upon such a bill of review, to which he is not a party, will not affect his rights.[35]

A bill of review should be signed by counsel, and otherwise conform in general to the requirements of an original bill.[36] If the court had jurisdiction of the original suit, it can take jurisdiction of the bill of review, even though it would have none were the latter regarded as the beginning of a new suit.[37] The issue of process and the service and the appearance of a defendant to a bill of review is made and enforced in the same manner as to an original bill.[38] But if the defendant be beyond the jurisdiction of the court, service of a subpœna upon his solicitor in the former suit may be allowed by the court.[39] If there is no service or appearance, a decree upon a bill of review is void.[40] According to Lord Redesdale: "When any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like."[41] "A bill of review upon the discovery of new matter and a supplemental bill of the same nature being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance

32 Acord v. Western Pocahontas Corporation, 156 Fed. 989.

33 Home St. Ry. Co. v. City of Lincoln, C. C. A., 162 Fed. 133; Rector v. Fitzgerald, 59 Fed. 808, 811; Ludlow v. Kidd, 3 Ohio, 541.

34 Rector v. Fitzgerald, 59 Fed. 808, 811; Ludlow v. Kidd, 3 Ohio, 541. See also Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160. *Contra*, Earle v. Couch, 3 Met. (Ky.) 450; Clarey v. Marshall's Heirs, 4 Dana (Ky.), 95, 96.

35 Ohio River R. Co. v. Fisher, C. C. A., 115 Fed. 929.

36 Mitford's Pl., ch. 1, § 2, pt. 3.

37 Oglesby v. Attrill, 12 Fed. 227. See § 21.

38 Home St. Ry. Co. v. City of Lincoln, C. C. A., 162 Fed. 133.

39 See *supra*, § 165.

40 Home St. Ry. Co. v. City of Lincoln, C. C. A., 162 Fed. 133.

41 Mitford's Pl., ch. 2, § 2, pt. 2.

it can rarely be liable to a demurrer. But if brought upon new matter and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill."[42] If a demurrer to such a bill of review or supplemental bill were overruled, it did not dispose of the cause; and the defendant had to answer, because fact was at issue.[43] If the demurrer is allowed, however, the suit is at an end.[44] The defendant may, it seems, traverse, and attempt to disprove, the allegations concerning the discovery of the new facts.[45] Upon the argument of the demurrer, nothing could be read except the bill of review and the decree,[46] and, in the Federal courts, the record[47] in the original suit; but, after the demurrer had been overruled, the plaintiff was at liberty to read any evidence that was submitted therein, as at a hearing, the cause being then equally open.[48] Filing a bill of review does not prevent the execution of the decree impeached.[49] The court has power, when sustaining such a bill, to set aside a conveyance made in pursuance of the decree.[50] Where an appeal from the original decree has been taken and dismissed with costs, the cause will not be erased from the docket by a decree sustaining a bill of review for want of jurisdiction; and in such a case the court will not usually order a restitution of the costs of the original cause in the district and appellate courts paid by the plaintiff to the bill of review.[51] Where a decree for an injunction was set aside upon a bill of review, and the original bill dismissed, it was held that the court had no power to continue the injunction in force pending an appeal.[52] After a decision

42 Mitford's Pl., ch. 2, § 2, pt. 2.

43 Cook v. Bamfield, 3 Swanst. 607.

44 Mitford's Pl., ch. 2, § 2, pt. 2.

45 Dexter v. Arnold, 5 Mason, 303; U. S. v. Sampeyreac, Hempst. 118; Story's Eq. Pl., § 420, n. 7.

46 Catterall v. Purchase, 1 Atk. 290.

47 Whiting v. Bank of U. S., 13 Pet. 13, 10 L. ed. 33; Story's Eq. Pl., § 407.

48 Catterall v. Purchase, 1 Atk. 290.

49 Williams v. Mellish, 1 Vern. 117, n.

50 Bank of U. S. v. Ritchie, 8 Pet. 128, 144, 8 L. ed. 890, 897.

51 Miller v. Clark, 52 Fed. 900. See Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658. Such costs were, however, allowed by U. S. C. C., S. D. N. Y., after the decision of the Circuit Court of Appeals, in Von Faber-Castell v. Faber, C. C. A., 145 Fed. 626.

52 Kelley Bros. & Spielman v. Dia-

upon an appeal, permission to apply for leave to file a bill of review must be obtained from the appellate court before it can be presented to that of original jurisdiction,[53] and will only be granted where the former court has a strong impression that the decree ought to be reviewed.[54] Where the principal relief sought was denied, but upon a bill of review the decree was modified so as to grant minor relief, to which there had been no objection, it was held that the court of first instance had no right to compel the defendant to repay the costs received under the original decree.[55]

An appeal from an order dismissing a bill of review cannot be conditioned upon the filing of a bond for more than sufficient to secure payment of costs.[56]

§ 450. Bills in the nature of bills of review. As has been said above,[1] only parties to the decree impeached or their privies by operation of law, as heirs, executors, or administrators, are entitled to file a bill of review; but other persons in interest and in privity of estate, who are aggrieved by the decree, can have the same relief by means of a bill in the nature of a bill of review.[2] Such are assignees, devisees, and remaindermen of the original unsuccessful parties.[3] Property owners were permitted to file such a bill after a decree foreclosing a street railroad mortgage, to which they were not parties, in order to compel compliance with a contract made pending the litigation between the receiver and the new complainants for the permanent abandonment of the portion of the railroad covered by the mortgage.[4]

Lord Redesdale says concerning such a bill: "If a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the

mond Drill & Machine Co., 142 Fed. 868.

53 Novelty Tufting Mach. Co. v. Buser, C. C. A., 158 Fed. 83; McClintock v. City of Pawtucket, 180 Fed. 320.

54 Novelty Tufting Mach. Co. v. Buser, C. C. A., 158 Fed. 83.

55 Castell v. Faber, C. C. A., 166 Fed. 281, reversing C. C. A., 145 Fed. 626.

56 Lewis v. Holmes, C. C. A., 194 Fed. 842.

§ 450. 1 See § 449, *supra*.

2 Story's Eq. Pl., § 409.

3 Story's Eq. Pl., § 409; Whiting v. Bank of U. S., 13 Pet. 6, 10 L.

4 Thompson v. Schenectady Ry. Co., 119 Fed. 634.

same or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill for review. Thus, if a decree is made against a tenant for life only, a remainderman, in tail or in fee, cannot defeat the proceedings against the tenant for life, but by a bill, showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accrual of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court."[5] It has been said, however, that leave of the court is required before such a bill can be filed.[6] Otherwise, the frame of, and proceedings under, bills in the nature of bills of review are substantially the same as those relating to bills of review.

§ 451. Bills to impeach decrees on account of fraud, accident or mistake. If a decree has been obtained by fraud,[1] accident[2] or mistake,[3] it may be impeached by an original bill without the leave of the court.[4] The fraud used in obtaining the decree is the principal point in issue, and it is necessary to establish the same by proof before the propriety of the decree can be investigated;[5] and where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be.[6] Such a bill has been called an original bill in the nature of a bill of review.[7] It may be filed by a privy

5 Mitford's Pl., ch. 1, § 2, pt. 3.

6 Thompson v. Schenectady Ry. Co., 119 Fed. 634.

§ 451. 1 Mitford's Pl., ch. 1, § 2, pt. 3. See also Story's Eq. Pl., § 426; Richmond v. Tayleur, 1 P. Wms. 734; Barnesle v. Powell, 1 Ves. Sen. 120; Evans v. Bacon, 90 Mass. 213; Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498.

2 Hendryx v. Perkins, C. C. A., 114 Fed. 801; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., C. C. A., 116 Fed. 1.

3 Mitford's Pl., ch. 1, § 2, pt. 3; and authorities cited in two previous notes.

4 Ibid.

5 Ibid.

6 Ibid.

7 Mussel v. Morgan, 3 Bro. Ch. R. 74, 79; Story's Eq. Pl., § 426. For the distinction between such a decree and a bill of review, see Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524.

to one of the parties to the suit, although he did not obtain his interest until after the former case was pending.[8]

There are dicta stating that a decree obtained by fraud may be set aside upon petition;[9] but it was finally settled that after enrolment a decree could only be impeached for this account by an original bill.[10] This is the only manner in which a decree entered by consent can be impeached.[11] Decrees entered by collusion,[12] and, under extraordinary circumstances, decrees entered by surprise,[13] or mistake,[14] may also be rectified in this manner.

Certain other cases, although if logical arrangement solely were considered they should be considered under heads, yet as they are usually spoken of in this connection by the books, may be here referred to. Lord Redesdale uses the following language, which has been copied by all subsequent text-writers: "Besides cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the *cestui que trust* not being before the court and the trust not discovered; or against a person who has made some conveyance or incumbrance not discovered; or when a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit; the concealment of the trust or subsequent conveyance or incumbrance, or will, in these several cases, ought to be treated as a fraud. It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill."[15]

8 Northern Pac. Ry. Co. v. Boyd, C. C. A., 177 Fed. 804.

9 Sheldon v. Fortesque Aland, 3 P. Wms. 104, 111; Story's Eq. Pl., § 426.

10 Mussel v. Morgan, 3 Bro. Ch. R. 74, 79; Bennett v. Hamill, 2 Sch. & Lefr. 566, 576; Story's Eq. Pl., § 426.

11 Buck v. Fawcett, P. Wms. 242; Davenport v. Stafford, 8 Beav. 503; Gilbert v. Endean, L. R. 9 Ch. D. 259; Seton on Decrees (4th ed.) 1536.

12 Buck v. Fawcett, 3 P. Wms. 242; Northern Pac. Ry. Co. v. Boyd, C. C. A., 177 Fed. 804, collusion against a creditor. Story's Eq. Pl., §§ 426, 428.

13 Stevens v. Guppy, 1 Turn. & Rus. 178.

14 Hendryx v. Perkins, C. C. A., 114 Fed. 801.

15 Mitford's Pl., ch. 1, § 2, pt. 3. Upon a bill to set aside a judgment for mistake stronger proof of freedom from negligence is required than upon a motion for a new trial.

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.[16] The bill was demurrable if it failed to allege that the complainant thereto was misled to his prejudice by a fraudulent representation or suppression of which he complains.[17] All the parties to the original suit or their representatives should be joined as parties to it.[18] Such a bill may be filed in the court of first instance to enjoin the enforcement of a judgment pending an appeal,[19] and after a mandate of affirmance has been remitted to it by a court of review,[20] and to enjoin an officer of the appellate court from enforcing a decree of reversal and sale when such decree was procured from the court of review by fraud.[21]

A bill to set aside a decree for fraud, accident or mistake, may be filed after the expiration of the time for a bill of review;[22] but laches may be a good defense to such a bill.[23]

A bill to set aside a judgment or decree of a State court on account of fraud may be filed in a Federal court,[24] and if originally filed in a State court, may be removed to a Federal court, when the requisite difference of citizenship exists.[25] A bill to set aside the decree of a Federal court on account of fraud may be filed in a Federal court irrespective of the citizenship of the

Village of Cellina v. Eastport Sav. Bank Co., C. C. A., 68 Fed. 401. It has been said that when a motion for a new trial and a petition for a rehearing have been denied, equity will not entertain a bill to set aside a judgment on the same ground as that alleged in such motion and petition. Hendrickson v. Bradley, C. C. A., 85 Fed. 508.

16 Mitford's Pl., ch. 2, § 1, pt. 3; Story's Eq. Pl., § 476.

17 Massachusetts Ben. L. Ass'n v. Lohmiler, C. C. A., 74 Fed. 23.

18 Harwood v. Railroad Co., 17 Wall. 78, 21 L. ed. 558.

19 Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524.

20 Nelson v. First Nat. Bank, 70 Fed. 526.

21 Carver v. Jarvis Conklin M. Tr. Co., 73 Fed. 9.

22 Dewey v. Stratton, C. C. A., 114 Fed. 179.

23 Hendryx v. Perkins, C. C. A., 114 Fed. 801.

24 Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547; Arrowsmith v. Gleason, 129 U. S. 86, 101, 32 L. ed. 630, 635. But see Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026; Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 177, 30 L. ed. 196, 204.

25 Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870. See *supra*, § 51.

parties.[26] Although such a bill is ancillary to the former suit in the same court, upon demurrer thereto judicial notice will not be taken of any matters in the former suit not set forth in the new bill, unless, perhaps, when it is filed by a party to the former suit.[27] A judgment of a Federal court entered after personal service upon the defendant cannot, after the time to file a bill of review has expired be set aside by an original bill because the record does not show the jurisdictional difference of citizenship.[28]

A bill defective as a bill to set aside a decree for fraud might perhaps be sustained as a bill of review for matters apparent upon the record, but not unless filed within the time allowed for an appeal.[29]

Upon an application for leave to file a bill of review for matters of fact newly discovered which were insufficient to support the bill, the court refused to separate from such allegations other allegations of fraud in obtaining the original decree, and to permit the bill to be filed as a bill to set aside the decree for fraud.[30]

A bill to set aside a decree for fraud must show a valid and meritorious defense to the original decree.[31]

A decree sustaining such a bill may be reversed upon appeal.[32]

§ 452. Bills to suspend or avoid the operation of decrees or judgments. Lord Redesdale speaks as follows concerning bills to suspend the operation of decrees: "The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of nonpayment of principal, interest, and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the

26 Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498; *supra*, § 51.

27 Richardson v. Loree, 94 Fed. 375. But see *supra*, § 329.

28 Donham v. Springfield H. Co., 62 Fed. 110.

29 Dunlevy v. Dunlevy, 38 Fed. 462. See *supra*, § 447.

30 Kimberly v. Arms, 40 Fed. 548, 558; s. c., 136 U. S. 629, 34 L. ed. 557.

31 Kimberly v. Arms, 40 Fed. 548; s. c., 136 U. S. 629, 34 L. ed. 557.

32 Hendryx v. Perkins, C. C. A., 114 Fed. 801.

royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court upon a new bill enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree."[1] "The embarrassment, occasioned by the civil war in the reign of Charles I., and the state of affairs after his death, before the restoration of Charles II., occasioned many extraordinary applications to the court of Chancery for relief, and perhaps induced the court to go far in extending relief; but there were many cases of extreme hardship, in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution."[2]

No instance is known of the maintenance of such a bill in a Federal court. In a few cases the Federal courts have sustained bills to suspend the operation and enjoin the enforcement of judgments at law for matters subsequent.[3]

§ 452. 1 Mitford's Pl., ch. 1, § 2, pt. 3; Cocker v. Bevis, 1 Ch. Cas. 61; and also referring to Venables v. Foyle, 1 Ch. Cas. 2; Whorewood v. Whorewood, 1 Ch. Cas. 250; Wakelin v. Walthal, 2 Ch. Cas. 8.

2 Mitford's Pl., ch. 1, § 2, pt. 3.

3 Johnson v. St. Louis, I. M. & S. Ry. Co., 141 U. S. 602, 610, 35 L. ed. 875, 876; Parker v. The Judges, 12 Wheat. 561, 6 L. ed. 729. See Ballnace v. Forsyth, 24 How. 183, 16 L. ed. 733.

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